ANNOTATIONS

TO THE

Revised Statutes of Ontario

1914

BY

FLETCHER CAMERON SNIDER, D.C.L.

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PREFACE

In the preparation of this work, which has involved a great deal of very exacting labour, a checking system was adopted to eliminate mistakes as far as possible, but it proved impossible in putting the work through the press to re-check the citations in the proof, and doubtless a number of errors have crept in. I shall be very glad to have these called to my attention so that they may be corrected later. Arrangements are contemplated to follow up in supplements judicial decisions and the annual changes in the statutes, and these supplements would afford opportunity to correct mistakes in the present work. Owing to a printer's error, which had gone too far to be completely corrected, in the citation of English cases the calendar year is, in many cases, not within brackets as it should be. I do not think any difficulty will arise from this.

The abbreviations used are the usual ones. The present rules of the Supreme Court of Ontario are cited as "1913 Rules." The former rules as "C. R." or "Con. Rule." The edition of Holmested and Langton, so frequently cited, is the present current 3rd edition.

It is to be hoped that the short bibliographies prefixed to certain chapters may be of assistance in bringing other annotations of the chapters in question in touch with the present work. The references to text books may also help. I desire to express my obligations to the late W. George Eakins, Librarian of Osgoode Hall, for assistance at the inception of this work, and to Mr. Shirley Denison, K.C., for permission to make use of notes, bearing chiefly on the Real Property Statutes.

Toronto, April, 1913.

F. C. SNIDER.

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DATE OF COMMENCEMENT OF REIGN OF RECENT SOVEREIGNS.

Sovereign.	Date of Com. of Reign.
William IV.	June 26, 1830.
Victoria	June 20, 1837.
Edward VII.	January 22, 1901.
George V.	May 6, 1910.

TABLE

of Calendar years and the corresponding years of the reign of recent Sovereigns.

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1832	2 & 3 "
1833	3 & 4 "
1834	4 & 5 "
1835	5 & 6 "
1836	6 & 7 "
1837	7 Wm. IV. & 1 Vict.
1838	1 & 2 Vict.
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1840	3 & 4 "
1841	4 & 5 "
1842	5 & 6 "
1843	6 & 7 "
1844	7 & 8 "
1845	8 & 9 "
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1847	10 & 11 "
1848	11 & 12 "
1849	12 & 13 "
1850	13 & 14 "
1851	14 & 15 "
1852	15 & 16 "
1853	16 & 17 "
1854	17 & 18 "
1855	18 & 19 "
1856	19 & 20 "
1857	20 & 21 "
1858	21 & 22 "
1859	22 & 23 "
1860	23 & 24 "
1861	24 & 25 "
1862	25 & 26 "
1863	26 & 27 "
1864	27 & 28 "
1865	28 & 29 "
1866	29 & 30 "
1867	30 & 31 "
1868	32 & 33 "
1870	33 & 34 "
1871	34 & 35 "
1872	35 & 36 "
1873	36 & 37 "
1874	37 & 38 Vict.
1875	38 & 39 "
1876	39 & 40 "
1877	40 & 41 "
1878	41 & 42 "
1879	42 & 43 "
1880	43 & 44 "
1881	44 & 45 "
1882	45 & 46 "
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1887	50 & 51 "
1888	51 & 52 "
1889	52 & 53 "
1890	53 & 54 "
1891	54 & 55 "
1892	55 & 56 "
1893	56 & 57 "
1894	57 & 58 "
1895	58 & 59 "
1896	59 & 60 "
1897	60 & 61 "
1898	61 & 62 "
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1901	1 Edw. VII.
1902	2 "
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1864	23 U. C. R.	14 U. C. C. P.	11 Gr.			
1865	24 U. C. R.	15 U. C. C. P.	12 Gr.		3 E. & A.	
1866	25 U. C. R.	16 U. C. C. P.	13 Gr.	4 P. R.		2 Ch. Ch.
1867	26 U. C. R.	17 U. C. C. P.	14 Gr.			
1868	27, 28 U. C. R.	18 U. C. C. P.	15 Gr.			
1869	28, 29 U. C. R.	19 U. C. C. P.	16 Gr.	5 P. R.		
1870	30 U. C R.	20 U. C. C. P.	17 Gr.			3 Ch. Ch.
1871	31 U. C. R.	21 U. C. C. P.	18 Gr.			
1872	32 U. C. R.	22 U. C. C. P.	19 Gr.	6 P. R.		4 Ch. Ch.
1873	33, 34 U. C. R.	23 U. C. C. P.	20 Gr.			

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1879	44 U. C. R.	30 U. C. C. P.	27 Gr.	8 P. R.	4 A. R.	3 S. C. R.
1880	45 U. C. R.	31 U. C. C. P.	28 Gr.		5, 6 A. R.	4 S. C. R.
1881	46 U. C. R.	32 U. C. C. P.	29 Gr.	9 P. R.	7 A. R.	5, 6 S. C. R.
1882	1, 2 O. R.				8 A. R.	7 S. C. R.
1883	3, 4 O. R.			10 P. R.	9 A. R.	8 S. C. R.
1884	5, 6, 7 O. R.				10, 11 A. R.	9, 10 S. C. R.
1885	8, 9 O. R.			11 P. R.	12 A. R.	11 S. C. R.
1886	10, 11, 12 O. R.				12, 13 A. R.	12, 13 S. C. R.
1887	13, 14 O. R.			12 P. R.	14 A. R.	14 S. C. R.
1888	15, 16 O. R.				15 A. R.	15 S. C. R.
1889	17, 18 O. R.			13 P. R.	16 A. R.	16 S. C. R.
1890	19 O. R.			14 P. R.	17, 18 A. R.	17, 18 S. C. R.
1891	20 O. R.				19 A. R.	19 S. C. R.
1892	21 O. R.			15 P. R		20, 21 S. C. R.
1893	22, 23 O. R.				20 A. R.	22 S. C. R.
1894	24 O. R.			16 P. R.	21 A. R.	23 S. C. R.

1895	25, 26 O. R.		17 P. R.	22 A. R.	25, 26 S. C. R.
1896	27 O. R.			23 A. R.	27 S. C. R.
1897	28 O. R.			24 A. R.	28 S. C. R.
1898	29 O. R.		18 P. R.	25 A. R.	29 S. C. R.
1899	30 O. R.		19 P. R.	26 A. R.	30 S. C. R.
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ANNOTATIONS

TO THE

Revised Statutes of Ontario

1914

CHAPTER 1.

The Interpretation Act.

Refer to Hardcastle on Statute Law; Maxwell on the Interpretation of Statutes; see also Bicknell and Kappele, Practical Statutes, p. 14.

6. See Morris v. Huron, 26 O. R. 689, 27 O. R. 341; Re Lee, 14 O. W. R. 180.

8. As regards the character and construction of a Private Act, and the effect of a recital therein, see City of Quebec v. Quebec Central, 10 S. C. R. 563, at p. 580 *et seq.* Persons not named are not affected by Private Acts: Re Goodhue, 19 Gr. 366. Construction as affecting Public Acts: Bickford v. Chatham, 16 S. C. R. 235, 14 A. R. 32, 10 O. R. 257. The Courts are bound to take judicial notice of every Public Act of the Provincial Legislature, though its operation may be locally restricted: Darling v. Hitchcock, 25 U. C. R. 463. See Kiely v. Kiely, 3 A. R. 438; Girdlestone v. O'Reilly, 21 U. C. R. 409. Acts conferring powers on private persons or bodies are treated as contracts between such persons and the public, and are construed strictly: St. Hyacinthe v. St. Hyacinthe, 25 S. C. R. 168. Action for damages will not usually lie for breach of duty imposed by Private Act, where penalty or other remedy provided: Johnston v. Consumers Gas, 1898, A. C. 447; Cowley v. Newcastle, 1892, A. C. 345. Pleading, see Bailey v. Birkenhead, 12 Beav. 443; Kiely v. Kiely, 25 Gr.

463, 3 A. R. 438. Private Acts bind only the parties mentioned therein: See Armour on Titles, pp. 122, 123.

9. The preamble is undoubtedly part of the Act: Salkeld v. Johnson, 1848, 2 Ex. 283. See Toronto v. Crookshank, 4 U. C. R. 309; Woodhill v. Sullivan, 14 C. P. 265; R. v. Washington, 46 U. C. R. 221. Where the enacting portion is ambiguous, it may be explained by reference to the recitals. "Headings" referred to to determine doubtful expressions: Hammer-Smith v. Brand, L. R. 4 H. L. 171; Donly v. Holmwood, 4 A. R. 555; Toronto v. Virgo, 1896, A. C. 88; R. v. Currie, 31 U. C. R. 582; R. v. McGregor, 4 O. L. R. 198. Headings and side notes: T. H. and B. v. Simpson Brick Co., 13 O. W. R. 215, 17 O. L. R. 632. As to different divisions of a statute: see note to R. S. O., 1914, ch. 2, sec. 2.

10. Collocation of certain sections in an Act, may suggest that a liberal reading is to be given: Mattei v. Gillies, 11 O. W. R. 1083, 16 O. L. R. 558. Remedial interpretation: Campbell v. C. P. R., 18 O. L. R. 466.

11. Effect of statutes on the Crown: See Hardcastle, Chapter VI. This section of the Interpretation Act is not limited or qualified by an exception such as is mentioned in the Magdalen College Case, 11 Rep. 70b; "that the King is impliedly bound by statutes passed for the general good . . . . or to prevent fraud, injury or wrong": Reg v. Pouliot, 2 Ex. C. R. 49. Statute exempting certain articles from seizure, not binding on Crown: R. v. Davidson, 21 U. C. R. 41. Improvements under mistake of title: Commissioners, etc., v. Colt, 22 A. R. 1. The Crown cannot be a claimant in interpleader: McGee v. Baines, 3 L. J. 15, nor proceed under statutes to attach debts: R. v. Benson, 2 P. R. 350.

14. See Morris v. Huron, 26 O. R. 689, 27 O. R. 341, where there was a right of action existing in the plaintiffs at the time of the repeal of a statute, and the repeal was held not to affect the right. See also Fowler v. Vail, 4 A. R. 267; Winter v. Keown, 22 U. C. R. 341; Brock v. City of Toronto, 45 U. C. R. 53; Dig. Ont. Case Law 6735. Similar provisions, see Int.

Act (Imp.), (1889), sec. 38 (2). See Thom v. McQuilty, 4 O. W. R. 322; Gordon v. Moose Mountain, 17 O. W. R. 661, 2 O. W. N. 333, 22 O. L. R. 373; R. v. Cornwall St. Ry., 11 O. W. R. 222, 12 O. W. R. 942. Repeal of statute after action brought: Ruttan v. Burk, 7 O. L. R. 56. Rule of construction for two Acts seemingly repugnant: see Way v. St. Thomas, 12 O. L. R. 240, at p. 243. Effect of repeal of statute on "second offence": R. v. Teasdale, 1 O. W. N. 398, 15 O. W. R. 242, 20 O. L. R. 382. Clause (c) applied: Brockville, etc., Road Co. v. Leeds and Grenville, 5 O. W. N. 362; and see also Re Lee, 14 O. W. R. 180. This provision does not extend to By-laws, in regard to which the effect of repealing a repealing clause is to revive the former by-law: R. v. La Forge, 12 O. L. R. 308. As to assignments of choses in action prior to 31st December, 1897, see Judicature Act, R. S. O. 1897, sec. 58 (5). H. & L. notes, p. 66. Conveyancing and Law of Property, R. S. O. 1914, ch. 109, sec. 49.

15. Wentworth v. Saltfleet, 2 O. W. N. 339, 17 O. W. R. 697.

16. Revised statute not to be considered new law: See H. & L. notes to Con. Rules 529 (p. 735) and 795. Rules as to security in P. C. appeals under repealed Act: see Stavert v. Campbell, 21 O. W. R. 172, 174, 370; 3 O. W. N. 591, 641, 716; 25 O. L. R. 515.

20. Where words have received a judicial interpretation, and are repeated without alteration, in a subsequent statute, the legislature must be taken to have used them according to the meaning placed on them: Crain v. Ottawa Col. Inst., 43 U. C. R. 498; Nicholls v. Cummings, 1 S. C. R. 395. But in Dominion Acts, where same terms differently construed in different provinces: Davidson v. Ross, 24 Gr. 22, and see Toronto Ry. v. Reg., 1896, A. C. 551. Re-enactment: Nat. Trust v. Miller, 19 O. W. R. 38, 2 O. W. N. 933, 46 S. C. R. 45.

23. Administration of oath by Crown Timber Agent: R. v. Johnston, 17 O. W. R. 78, 2 O. W. N. 106.

26. See R. v. Irwin, 11 O. W. R. 728.

27. This sub-section read with the Public School Act, invests an Urban School Board with all necessary powers of a corporation: Toronto School Board and City of Toronto, 2 O. L. R. 727.

28.—(*d*) The Court will not be punctilious in adhering to the letter of the statute, where there is reasonable accuracy and no prejudice: Fitzgerald v. Wilson, 8 O. R. 559. Variations according to reason and common sense may be made, so long as the material matters are correctly given: Gemmill v. Garland, 12 O. R. 139. Question of the authority of schedules discussed: Truax v. Dixon, 17 O. R. 366. The covenants and provisions in the Short Forms Act were not deprived of the meaning given them by the Act because they were not numbered, as in the schedule to it: Northey v. Trumenhiser, 30 U. C. R. 426, and see Dig. Ont. Case Law, 6708-9. It may sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case "it would be quite contrary to the recognized principles upon which Courts of law construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience sake in a schedule." Per Lord Penzance: Dean v. Green, 1882, 8 P. D. 89. If the enactment and the form cannot be made to correspond, the latter must yield to the former: Re Baines, 1 Cr. and Ph. 31. Form illustrative or exemplary of what it should contain by way of information: Re South Fredricksburgh, 10 O. W. R. 746. Defect in form of ballot: Giles v. Almonte, 21 O. L. R. 362, 1 O. W. N. 698, 920, 16 O. W. R. 530; Milne v. Thorold, 2 O. W. N. 1009, 19 O. W. R. 29, 20 O. W. R. 983, 3 O. W. N. 536, 25 O. L. R. 420.

28.—(*e*) Exercise of power conferred "from time to time:" Re Boyle and Toronto, 5 O. W. N. 97, 25 O. W. R. 67.

28.—(*g*) The fact of corporate action being embodied in a by-law implies its revocability: Per Boyd, C., Attorney-General v. Toronto, 6 O. L. R., at p. 168.

28.—(*h*) When the last day falls on Sunday: see article, 48 C. L. J. 281. "Two clear days," Division Courts

Act: Re Stoddard and Eastman, 12 O. W. R. 226. Where last day under Statute of Limitations falls on Sunday: see Gilmini v. Moriggici, 1913, 2 K. B. 549.

28.—(*i*) Lord Selborne laid down as of general validity part of this rule in Conolly v. Steer, 1881, 7 Q. B. D. 570, 577. "In construing a statute plural is to be read as singular whenever the nature of the subject-matter requires it." The Division Courts Act provided that the plaintiff, to prove the amount ascertained by the signature of the defendant within the meaning of the section, could not give evidence "beyond the mere production of a document, and the proof of the signature to it." "Document" was read "documents:" Slater v. Laberee, 9 O. L. R. 545. "Instrument" was read instruments: Youlden v. London Guarantee, 28 O. L. R. 228. Where three infants were concerned in the sale of lands, and two of them consented, the sale was made, notwithstanding the provision that a sale of the lands of an infant over 14 shall not be made without his consent: Re Harding, 13 P. R. 112. See Rule 71, H. & L. notes, p. 231 (1913, Rule 724).

28.—(*l*) A suit was tried in a Division Court before a deputy Judge, duly appointed, and the defendant applied for a new trial, under which proceedings were stayed. Four days after, the Judge died. The deputy did nothing further. A new Judge was appointed three months after, and still three months later ordered a new trial. He could do so under the Division Courts Act and this taken together. Re Appleby, 27 U. C. R. 486.

29.—(*i*) "Herein," see McGill v. Peterborough, 12 U. C. R. 44.

29.—(*l*) Evidence at a trial not being concluded before the close of the preceding Good Friday, the Judge, counsel consenting and the jury desiring it, adjourned the Court to the following day, when he delivered his charge, received a verdict and entered judgment. It was held competent for him to do so. The only day on which no judicial act can be done

in this province is the Lord's Day or Sunday; other statutory holidays are not *dies non juridici* in this sense: Foster v. Toronto Railway, 31 O. R. 1. In reckoning 21 days after the election return for the presentation of a petition under the Controverted Elections Act, Good Friday and Easter Monday were excluded: Re West Toronto, 31 U. C. R. 409. Filing chattel mortgages: see McLean v. Pinkerton, 7 A. R. 490. There is nothing to forbid holding a municipal council meeting on Good Friday, either in the statute or at common law: Re Schumacher and Chesley, 1 O. W. N. 1041. Holiday: see Re Stoddard and Eastman, 12 O. W. R. 226; see Con. Rule 343, H. & L. notes, p. 551 (1913 Rule 172-4).

29.—(*o*) Lieutenant-Governor: see R. v. Spellman, 13 O. L. R. 43.

29.—(*s*) "May" read as "must." Naturally "may" is permissive: Julius v. Bishop of Oxford, 5 App. Cas. 214; Re Baker, Nichols v. Baker, 44 Ch. D. 262. Sometimes where a power is conferred by the word "may" a duty arises to exercise it: R. v. Mitchell, 108 L. T. Rep. 76.

29.—(*u*) The word "month" has now the meaning of calendar and not lunar month, not only in England (Int. Act, sec. 34), but also in the U. S., whether in Federal or State Acts. The old English Rule: Lacon v. Hooper, 1795, 6 T. R. 226, was never followed. Guaranty Co. v. Green Cove, 139 U. S., at p. 145. See Con. Rule 342, H. & L. notes, p. 550, Armour, R. P., p. 140. Standard Time: see R. S. O. 1914, ch. 132. "Month:" see also Con. Rules 1023, 1044. R. S. O. 1914, ch. 83, secs. 4, 22; also R. S. O. 1914, ch. 159, sec. 34.

29.—(*x*) "Person belonging to such ship" includes passengers as well as master and crew: The Fusilier, 3 Mo. P. C. N. S. 51. Is not necessarily restricted to persons over 21 years of age: O'Shannessy v. Joachim, 1876, 1 App. Cas. 90. Without the aid of such an enactment may not include a corporation: Shoreditch v. Franklin, 1878, 3 C. P. D. 380; Pharmaceutical Soc. v. London, etc., 1880, 5 App. Cas.

857, at p. 861. Does not include a firm or partnership: Bickerton v. Dakin, 20 O. R. 192, 265. See also Royal Canadian Bank v. G. T. R., 23 C. P. 225, see Dig. Ont. Case Law, 6718. Query, is the Attorney-General or the Department of Crown Lands a "person"?: A. G. v. Hargrave, 11 O. L. R. 530, at p. 533. Corporation as person "rogues and vagabonds." Whipping and imprisonment: Hawke v. Hulton, 1909, 2 K. B. 93. Company a person under Dentists' Act: A. G. v. Smith Limited, 1909, 2 Ch. 524. See Con. Rule 159, H. & L. notes, p. 292 (1913, Rule 23).

29.—(*z*) See In re Huron, 7 O. L. R. 44.

29.—(*aa*) Rules of Court, see H. & L. notes, p. 199.

29.—(*cc*) The Interpretation Act here does not introduce any new rule, but is declaratory only of that established by judicial decision: Lincoln, A. R. 324. For cases in which statutes are construed as imperative, directory or permissive, see Dig. Ont. Case Law, 6710-6. The words "It shall be lawful," confer a faculty or power, and they do not of themselves do more. But there may be something in the nature of the thing empowered to be done, which may couple the power with a duty. Whether such is the case under our system of law usually falls to the Court to decide on an application for a mandamus: see Lord Cairns' remarks in Julius v. Bishop of Oxford, 1881, 5 App. Cas. 214. In certain Acts "shall and may" are put together. They seem to create a judicial duty, but in certain cases may be held to create a ministerial duty.

29.—(*hh*) Shorthand is "writing": R. v. Leach, 12 O. W. R. 1016, 17 O. L. R. 643.

31. Operation of this provision, see Belleville Bridge Co. v. Ameliasburg, 15 O. L. R. 174, at p. 179, 10 O. W. R. 988.

CHAPTER 2.

THE STATUTES ACT.

2. The short title is part of the Act, and may be cited as proof of the intention of the legislature, so as "to make that short title a good general description of all that was done by the Act." Per Lord Selborne in Middlesex Justices v. R., 1884, 9 App. Cas. 772. The title of the Act may be considered to ascertain the general scope of the Act: McKay v. Davey, 28 O. L. R. 322. As to the various parts of an Act of Parliament, and their effect on one another: see Hardcastle on Construction of Statutes, Chapter VI. See also O'Connor v. Nova Scotia Tel. Co., 22 S. C. R. 276; Green v. Provincial Insurance, 4 A. R. 521. Headings on different portions of a statute may be looked to to determine the sense of a section ranged under them: Hammersmith, etc., v. Brand, L. R. 4 H. L. 171. The Consolidated Statutes may be treated as one great Act, and the several chapters as being enactments which are to be construed collectively and with reference to one another just as if they had been sections of one statute instead of being separate Acts: per Lord Westbury, Boston v. Lelièvre, L. R. 3 P. C. 162. Dig. Ont. Case Law, 6745. The divisions of a statute may be looked to as affording a key to its construction: Lawrie v. Rathbun, 38 U. C. R. 255. The headings may be referred to to assist the construction of ambiguous provisions: Donly v. Holmwood, 4 A. R. 555. See also Wood v. Hurl, 28 Gr. 146, and cases cited, also Peters v. Stoness, 13 P. R. 235. The numbers and sections are constituent parts of an Act: Washington v. G. T. R., 28 S. C. R. 184. See further as to headings and preamble, notes to R. S. O., 1914, ch. 1, sec. 9, and, as to consolidation, Ib., sec. 16.

4. See remarks of Lord Ellenborough in Nares v. Rowles (1810), 14 East 510.

5. An Act of Parliament takes effect in law from the earliest moment of the day on which it is passed: Cole v. Porteous, 19 A. R. 111; see also Converse v. Michie, 16 C. P. 167. The fraction of a day is never taken into consideration in determining the operation of a statute: Mitchell v. Dobson, 3 L. J. 185; McIntyre v. East Williams Mutual, 18 O. R. 79. The Act comes into operation immediately on the expiry of the day previous to giving the royal assent or to the datea specific in the Act. The definition applies also to Orders in Council, orders, warrants, schemes, letters patent, rules, regulations, and by-laws made under statutory powers. Hardcastle, 177.

CHAPTER 3.

The Territorial Division Act.

2. (51) The word "Timmins" is struck out of paragraph 51 and inserted in paragraph 52: 4 Geo. V. ch. 2, Schedule (1) (?).

6. Boundaries of Townships lying on certain lakes and rivers: Effect of this provision in view of international law and the administration of the Liquor License Act: see R. v. Meikleham, 11 O. L. R. 366, notes to Liquor License Act, R. S. O. 1914, ch. 215, sec. 11.

11. New Townships: Municipal Act, R. S. O. 1914, ch. 192, sec. 26.

CHAPTER 4.

The Haliburton Act.

CHAPTER 5.

The Representation Act.

CHAPTER 6.

The Ontario Voters' Lists Act.

2. (1*b*) "Scrutiny": see Re Ellis and Renfrew, 23 O. L. R. 427, and see notes to sec. 24. All words after "election" in the second line of the clause are struck out: 4 Geo. V. ch. 2, Schedule (2).

6. (1) "Appearing to be voters": See Elections Act, R. S. O. 1914, ch. 8, sec. 12; Re Huron, 7 O. L. R. 44; Duty of Clerk: Re McGrath and Durham, 12 O. W. R. 149, 17 O. L. R. 514.

6. (7) Conditions of residence of rural M. F. Voter: see R. S. O. 1914, ch. 8, sec. 16, ch. 195, secs. 22, 26. Urban M. F. Voters: see R. S. O. 1914, ch. 7, sec. 17, ch. 8, sec. 17; see Re Adolphustown, 12 O. W. R. 827, 17 O. L. R. 312. Residential qualification: Re Norfolk Voters' Lists, 10 O. W. R. 743, 15 O. L. R. 108; (Cases collected). "M. F. and": Re Carleton Place, 3 O. L. R. 223.

6. (16) Application: Re Dale and Blanchard, 1 O. W. N. 729, 16 O. W. R. 86, 349, 21 O. L. R. 497.

9. The list of voters was prepared and certified by the clerk ready for transmission on a certain day, but he died before that day came and they were transmitted by his successor without alteration. The list was regular and sufficient to give jurisdiction to the Judge to revise it: Re Goderich, 6 P. R. 213.

13. The date mentioned by the clerk in the advertisement as that on which the voters' lists have been posted up in his office is the date from which the time for taking proceedings limited by section 17 runs, even though the clerk has in fact posted up the lists some days before the date named: In re Huron, 7 O. L. R. 44.

14. The duty of the Judge only extends to correct and vary the list in respect of the qualification of those who are before him on revision: Lincoln, 2 A. R. 316.

(1) Revision of list: No person is entitled to be entered as an appellant except a person who is entered or entitled to be entered on the list as a voter: Re South Fredricksburg, 10 O. W. R. 746, 15 O. L. R. 308.

If the assessor has placed the name of a person on the roll as rural M. F. Voter under R. S. O. 1914, ch. 195, the duty of the clerk of the municipaliaty is to place the name of such person on the voters' list, and the conditions of that Act as to residence and domicile are those to be regarded by the Judge when revising the list: Re Adolphustown, 12 O. W. R. 827, 17 O. L. R. 312.

(4) See as to Judges' powers: Re Mitchell and Campbellford, 11 O. W. R. 941, 16 O. L. R. 578.

A person resident in and entitled to be placed on the manhood suffrage register for a town forming part of an electoral district is entitled to require the revision of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists as required by section 23: Re Huron, 7 O. L. R. 44. The Judge has the right to examine and decide whether the complainant is a voter or entitled to be a voter, though his name appears on the voters' list. His decision cannot be reviewed: Re Parsons, 36 U. C. R. 88.

15. Right to be entered on list: Re St. Thomas, 2 E. C. 154; Lincoln, 2 A. R. 316. "Any voter whose name is entered, etc.," is the equivalent of "appellant or complainant" in sec. 33: Re West York Voters' List, 11 O. W. R. 248, 15 O. L. R. 303.

17. The clerk's certificate was false and intended to deceive the Judge and the clerk has designedly withheld the lists: yet as soon as the list was posted, time for making complaints began to run, and if no complaint was made within the statutory time the Judge was bound to certify. The omission to transmit copies, whether negligent or wilful, could not authorize an extension of time and the Judge's certificate was final: In re Johnson, 9 P. R. 425. The applicant did not discover the omission of his name

until after the 30 days: his application for a mandamus was refused: In re Browning, 43 U. C. R. 13. Where a notice of complaint with a list of voters was received by the clerk through the mail by registered letter in due time, the Act was held complied with: Re Madoc, 2 E. C. 165. A complaint with list attached was handed to the clerk. When the list was produced in Court by the clerk the complaint was missing. Parol evidence was admissible as to the form and effect of the notice and of its loss, and if satisfactory the complaint could be dealt with: Re Marmora, 2 E. C. 162. The notice of complaint required must be signed by the voter. The name at the beginning is not sufficient signature. It seems the question of validity can be raised before the Judge after it has been received and entered by the clerk: In re Simpson, 9 P. R. 358; see also Re St. Thomas, 13 O. R. 3. The notice of complaint consisted of 15 sheets each in itself in the schedule form, only the notice of complaint on the last sheet being filled out and signed by the complainant. Evidence was received that the originals were attached together. The notice referred to the subjoined lists. Held that the lists were part of the complaint and sufficient: Re Carleton Place, 3 O. L. R. 223. Date from which time runs: see Re Huron, 7 O. L. R. 44, note to sec. 13. The words "give to the clerk or leave for him," etc., mean that where the notice is not given to the clerk, personally, it is to be left for him at his residence or place of business in such a place and under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute: Re Hungerford, 5 O. L. R. 63. Procedure: Form 5 considered and application of forms generally: Re South Fredricksburg, 10 O. W. R. 746, 15 O. L. R. 308. Where two names wrongly added without the notice required by section: Re Ryan and Alliston, 22 O. L. R. 200. Omission of notice does not *per se* vitiate the list: Re Ryan and Alliston, 22 O. L. R. 200.

(4) Omission to comply with requirements of this subsection where list certified: Re Ryan and Alliston, 16 O. W. R. 794, 21 O. L. R. 582, 1 O. W. N. 1116, 17 O. W. R. 222, 2 O. W. N. 161, 841, 18 O. W. R. 731, 22 O. L. R. 200.

21. The proper list of voters to be used is the one certified and delivered or transmitted as provided by this section, even though there be a later list validly certified, but not delivered or transmitted to the clerk of the peace: R. ex rel. Black v. Campbell, 18 O. L. R. 269, 13 O. W. R. 553. The time for delivering or transmitting the list to the clerk of the peace is, semble, before the time at which nomination takes place: R. ex rel. Black v. Campbell, 18 O. L. R. 269, 13 O. W. R. 553. *Quaere*, whether a list certified on Sunday can be valid: R. ex rel. Black v. Campbell, 18 O. L. R. 269, 13 O. W. R. 553.

23. Person entitled to require revision: see Re Huron, 7 O L. R. 44, note to sec. 14.

24. Finality of list: see Re Dale and Blanchard, 1 O. W. N. 729, 21 O. L. R. 497, 16 O. W. R. 86, 349, 23 O. L. R. 69; Re Schumacher and Chesley, 1 O. W. N. 1041, 21 O. L. R. 522, 16 O. W. R. 641; Re Ryan and Alliston, 16 O. W. R. 794, 21 O. L. R. 582, 18 O. W. R. 731, 22 O. L. R. 200; Stowe v. Joliffe, L. R. 9 C. P. 734 at p. 750; Re Ellis and Renfrew, 15 O. W. R. 880, 16 O. W. R. 952, 18 O. W. R. 703, 1 O. W. N. 710, 2 O. W. N. 27, 837, 21 O. L. R. 74, 23 O. L. R. 427; Re Aurora Scrutiny, 4 O. W. N. 1069, 28 O. L. R. 475; Re Port Arthur, 14 O. L. R. 345; Re Saltfleet, 16 O. L. R. 293; R. ex rel. McKenzie v. Martin, 28 O. R. 523; Re Armour and Onondaga, 14 O. L. R. 606; Re Cleary and Nepean, 14 O. L. R. 392 (not followed); Re Mitchell and Campbellford, 16 O. L. R. 578, 11 O. W. R. 941; Re McGrath and Durham, 12 O. W. R. 1091; Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451; Re Sturmer and Beaverton, 24 O. L. R. 65; Re Fitzmartin and Newburgh, 24 O. L. R. 102. Finality of voters' lists: see R. S. O. 1914, ch. 7, sec. 33, ch. 8 secs. 19, 20, 21, 95.

24.—(2) The voters' lists as finally settled by the Judge are upon a scrutiny conclusive evidence that all persons named therein and no others are qualified to vote except as mentioned, and therefore no evidence can be given touching alienage or minority of any voters

named therein, or as to whether the name of a married woman is properly on the list or not: Re Saltfleet, 11 O. W. R. 545, 16 O. L. R. 293. Prohibition of enquiry as to persons appearing on list except becoming by change of residence disentitled to vote: Re Orangeville, 15 O. W. R. 565, 20 O. L. R. 476, 1 O. W. R. 536. The certificate of the County Judge as to the correctness of the voters' list should not be gone behind, or the steps investigated by which he arrived at his conclusions: Re North Gower, 24 O. W. R. 489, 25 O. W. R. 224, 4 O. W. N. 1177, 5 O. W. N. 249; and see Re Ryan and Alliston, 18 O. W. R. 131, 21 O. L. R. 583, 22 O. L. R. 200. Change of status or loss of qualification between the final revision of the voters' list and the election: Re Armour and Onondaga, 14 O. L. R. 606, 9 O. W. R. 833; Re McGrath and Durham, 17 O. L. R. 514; see also S. Wentworth, 11 E. C. 531. History of "Scrutiny" under the Election Acts and under the Municipal Act, with explanation of the present position: see Re McGrath and Durham, 17 O. L. R. 514. The word scrutiny covers not only such an investigation as on the authority of Re Saltfleet, 16 O. L. R. 293, 11 O. W. R. 356, the County Judge may conduct, but also the enquiry in the nature of a scrutiny which the Courts have always deemed it within their jurisdiction to entertain upon motions to quash by-laws: Re McGrath and Durham, 17 O. L. R. 514: see also Re Mitchell and Campbellford, 16 O. L. R. 578, 11 O. W. R. 941; Re Port Arthur, 14 O. L. R. 345, 9 O. W. R. 347. Scrutiny—meaning of, and what it includes: See Re Saltfleet, 11 O. W. R. 545, 16 O. L. R. 293. A motion to quash a local option by-law is a "scrutiny": Re Mitchell and Campbellford, 16 O. L. R. 578, 11 O. W. R. 941. Finality of list on scrutiny and on motion to quash local option by-law: Re Mitchell and Campbellford, 11 O. W. R. 941, 16 O. L. R. 578; Re McGrath and Durham, 12 O. W. R. 149, 1091, 17 O. L. R. 514. A County Court Judge holding a scrutiny under the Municipal Act, may go behind the list to enquire if a tenant whose name is on the list has the residential qualification entitling him to vote. He may not enquire whether rejected ballots were cast for or against the by-law: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R.

267, 26 O. L. R. 339, 47 S. C. R. 451. A scrutiny under the Municipal Act includes jurisdiction to investigate the voter's qualificataion, so long as it does not conflict with the finality of the lists certified under this Act. The Judge has jurisdiction also to investigate as to whether or not, in a given case, the right to vote finally and absolutely certified by the list was subsequently so exercised as to constitute the ballot deposited a legal vote: Re Aurora Scrutiny, 28 O. L. R. 475. The West Lorne Case has became unimportant as regards local option contests, since the enactment of the provision which now appears as R. S. O. 1914, ch. 215, sec. 137 (2): Re Aurora Scrutiny, 28 O. L. R. 475; see R. S. O. 1914, ch. 8, sec. 19 (notes), also sec. 130, *et seq.* (recount); R. S. O. 1914, ch. 192, sec. 279 (scrutiny under Municipal Act).

32. If it were necessary in order to make the notice of complaint (sec. 17) a good one, to amend it in some material point, there is no jurisdiction to do so: Re Carleton Place, 7 O. L. R. 223. It is not essential that the form given in the schedule for objections to names wrongfully inserted should be followed with exactness. The nature of objections are to be stated with reasonable clearness: Re North Hastings, 6 O. L. R. 631.

33. "Appellant or complainant." Substitution of qualified appellant: Re West York Voters' List, 11 O. W. R. 248, 15 O. L. R. 303. Difference in wording between this and former section: see Re West York Voters' List, *Ib.*

39. Character of questions to be submitted, "general questions": Re Norfolk Voters' Lists, 10 O. W. R. 743, 15 O. L. R. 108. Stated case: Re Adolphustown, 12 O. W. R. 827, 17 O. L. R. 312. See Judicature Act, R. S. O. 1914, ch. 56, sec. 26 (2*a*).

Form 1: see Re Fitzmartin and Newbourg, 2 O. W. N. 1114, 1177.

CHAPTER 7.

The Manhood Suffrage Registration Act.

2. The letters "M. F." in voters' lists can properly be read as "Manhood Franchise": Re Carleton Place, 3 O. L. R. 223. As to residential qualification of M. F. voters: R. S. O. 1914, ch. 6, sec. 6; ch. 7, sec. 17; ch. 8, secs. 16, 17; ch. 195, secs. 22, 26; Re Adolphustown, 12 O. W. R. 827, 17 O. L. R. 312.

33. Finality of voters' lists: See R. S. O. 1914, ch. 6, secs. 24, 68; ch. 8, secs. 19, 20, 21, 95; and notes to these sections, esp. R. S. O. 1914, ch. 6, sec. 24.

CHAPTER 8.

The Ontario Election Act.

Refer to: Hodgins, Reports of Election Cases; Hodgins' Franchises; Ermatinger, Franchise and Election Laws; Holmested, Dominion Election Rules; McPherson, Elections in Canada.

4. Irregularities not affecting the result: Re Port Arthur, 12 O. L. R. 453 (see same case, 12 O. L. R. 508, 13 O. L. R. 17, 14 O. L. R. 345); Welland, 1 E. C. 383. Irregularities at nomination and polling; East Simcoe, 1 E. C. 291; Monk, H. E. C. 154. Also: East Middlesex, 1 E. C. 250; Prescott, 1 E. C. 88; Lincoln, H. E. C. 489; West Hastings, H. E. C. 539. Where R. O. did not take oath of office: R. v. Forget, 1 L. N. 542. See further as to trifling and unimportant irregularities, notes to sec. 180.

10. Although the respondent did not become a "candidate" until a later date, yet if any corrupt acts were done by him before that date they would affect the election, for the Act applies to everything done before an election by one who is subsequently elected: Re East Middlesex, 5 O. L. R. 644.

11. A member of the Ontario Legislature is not disqualified by reason of filling the office of postmaster, with no permanent salary, for a place which is not a city or town: see R. S. O. 1914, ch. 11, sec. 12 (*j*); South Norfolk, 31 C. L. J. 68. Contract for carrying mails does not disqualify: Centre Simcoe, 31 C. L. J. 68. Contract with His Majesty: Prince, 14 S. C. R. 265 Where respondent notoriously disqualified, Court will not necessarily award seat to petitioner: West York, H. E. C. 156. See S. Renfrew, 1 E. C. 359; note to sec. 58. A returning officer who has attempted to resign, but has not done so effectively, is ineligible as a candidate: Le Boutillier v. Harper, 1 Q. L. R. 4; see R. S. O. 1914, ch. 11, sec. 12, notes.

12. Finality of voters' lists on scrutiny: see Voters' Lists Act, R. S. O. 1914, ch. 6, sec. 24. Sub-postmaster in charge of a post office, not the principal post office in a city or town: Lancaster v. Shaw, 10 O. L. R. 604, Rev. 12 O. L. R. 66. Deputy Registrar of Deeds: Re Huron, 7 O. L. R. 45. Crown Lands Agent: Re Port Arthur, 12 O. L. R. 453; Shrigley v. Taylor, 4 O. R. 396, 6 O. R. 108. Official in course of appointment: Shrigley v. Taylor, 4 O. R. 396, 6 O. R. 108.

13. Deputy Returning Officers are entitled to vote if qualified otherwise, if their names appear on the voters' list. They may vote at the place where they act, though it be not their proper polling division: Re Saltfleet, 11 O. W. R. 545, 16 O. L. R. 293; Re Joyce and Pittsburg, 16 O. L. R. 380; and see also Re Armour and Onondaga, 14 O. L. R. 606, 610, 9 O. W. R. 833 (not followed). Abortive resignation of R. O.: see Boutillier v. Harper, 1 Q. L. R. 4.

15. Disqualification of voter: Beauharnois, 4 Que. P. R. 23.

16. The conditions of residence of the rural M. F. voter are to be looked for in this section, and in R. S. O. 1914, ch. 195, secs. 22, 26, and see also R. S. O. 1914, ch. 6, sec. 6. The urban M. F. voter is dealt with by R. S. O. 1914, ch. 7; and by R. S. O. 1914, ch. 8, sec. 17. See Re Adolphustown, 12 O. W. R. 827, 17 O. L. R. 312. "Resided." Where the absence is temporary the qualification is not affected: Re Seymour, 2 E. C. 69.

19. "Resided continuously" does not mean *de die in diem;* where the absence is temporary the qualification is not affected: Re Seymour, 2 E. C. 69. Non residence disqualification where name is on list: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 26 O. L. R. 339, 47 S. C. R. 451. No enquiry can be made as to voters being under the age of 21 years. The voters' lists are final on the point: S. Perth, 2 E. C. 144; N. Victoria (Dom.), H. E. C. 584. As to raising the question of alien and infant voters on a scrutiny: see Re Port Arthur, 13 O. L. R. 17, and remarks of Meredith, J.A., on finality of voters' lists at pages 28 *et seq.,* and at 14 O. L. R. 345. Finality of voters' lists: see R. S. O. 1914, ch. 6, secs. 24, 68, R. S. O. 1914, ch. 7, sec. 33, R. S. O. 1914, ch. 8, secs. 19, 20, 21, 95. And see for cases on finality, note to R. S. O. 1914, ch. 6, sec. 24.

36. Where R. O. did not take oath of office, election not avoided: R. v. Forget, 1 L. N. 542.

38. Question whether this provision is regulative or imperative. Where a Returning Officer was accidentally detained until 2 p.m.: see East Simcoe, 1 E. C. 291.

43. Election Clerk: Le Boutillier v. Harper, 1 Q. L. R. 4.

58. A Returning Officer's duties are both ministerial and judicial. He may refuse the nomination of a candidate who is undoubtedly not qualified: see as to R. O.'s duties and functions: South Renfrew, H. E. C., 705; see also Nipissing, 37 C. L. J. 355. At the nomination a protest was handed to the Returning Officer signed by the defeated candidate and three electors, alleging that the respondent was disqualified and claiming the seat. Notice was also posted in some polls. On the evidence the trial Judges refused to award the seat to the defeated candidate, and the Court in appeal would not interfere: S. Renfrew, 1 E. C. 359. A meeting of electors for nomination of candidates is a "meeting assembled for the purpose of promoting the election: North Middlesex, H. E. C. 376. Technical objections to form of nomination papers not to defeat manifest purpose of statute: Re Two Mountains, 47 S. C. R. 185.

70.—(2) Name of candidate printed in wrong division: Re South Perth, 2 E. C. 47.

70.—(6) The official number printed on the back of the counterfoil as required by sub-secs. (2) and (6), is not a mark by which the voter can be identified within the meaning of sec. 114 (*c*), and, where the D. R. O. omitted to detach the counterfoil, the ballots were properly counted: Re Stormont, 17 O. L. R. 171.

74. "Proper voters' list": see East Durham, 1 E. C. 489; Brockville, H. E. C. 129; Port Arthur, 12 O. L. R. 453 at 460, 13 O. L. R. 17, 14 O. L. R. 345. See notes to sec. 19, ante, and sections there referred to. Where irregular voters' list used in part of electoral division: see Re Monk, H. E. C. 154; Re Prince Edward, H. E. C. 160.

80. List defective in not being true copy: see East Durham, 1 E. C. 489.

89.—(1) Transfer certificate: on what evidence granted: see Re Port Arthur, 8 O. W. R., p. 46, at p. 51: see S. C. 8 O. W. R. 419, 606, 12 O. L. R. 453, 508, 13 O. L. R. 17, 9 O. W. R. 347, 14 O. L. R. 345. An elector engaged by the D. R. O. to drive voters to the poll is not an "agent" who is entitled to a transfer certificate: Re Port Arthur, 12 O. L. R. 453.

The votes of persons voting at a polling place other than that at which they were entitled to vote, without a transfer certificate, were improperly received. No one can vote unless his name appears on the list in the poll book, unless under a transfer certificate or by tendered ballot: Re Port Arthur, 12 O. L. R. 453, 13 O. L. R. 17, 14 O. L. R. 345, and see same case as to votes of persons voting on certificates issued in blank and afterwards filled in, and on certificates issued without personal or written request, certificates sent by telegraph and votes of persons voting on certificates from polling sub-divisions where their names did not in fact appear.

89.—(2) The defendant voted without taking the oath required to be taken by agents voting under certificate; but as the defendant was not asked to take the

oath, the D. R. O. not being aware that it was necessary and the plaintiff himself was present and did not object, the penalty was reduced to $40 under R. S. O. 108: Smith v. Carey, 5 O. L. R. 203; Carey v. Smith, 5 O. L. R. 209.

95. Who entitled to vote: Re St. Thomas, 2 E. C. 154. A voter properly assessed was accidentally omitted from the list in No. 1 Division where his property lay, and entered in No. 2 Division. He voted without question in Division No. 1, though not on the list, and his vote was held good: Brockville, H. E. C. 129. The name of a voter being on the poll book is *prima facie* evidence of his right to vote: Re Stormont, H. E. C. 21. A voter duly qualified in other respects was entered as tenant instead of owner. Held not disfranchised: Stormont, H. E. C. 21. Reside: see Re Seymour, 2 E. C. 69. As to residence: see sec. 19 notes, and notes to R. S. O. 1914, ch. 6, sec. 24.

98. A ballot properly marked but initialled, not by the D. R. O., but by the poll clerk, was held good: West Huron, 2 E. C. 58. A D. R. O. put as his initials "H. G." instead of his full initials "H. C. G.," and another used "McN." instead of "W. D. McN." The ballots were properly initialled. The initialling is for identification only, and when there is no suggestion that the number of ballots cast is incorrect the ballots should not be rejected even if not initialled at all: Re Muskoka, 4 O. L. R. 253. Two ballots consecutive in number were supposed to have been handed a voter, sticking together as one, with the D. R. O.'s initials on the lower one, and the voter was supposed to have marked the upper one not initialled. The ballot marked but not initialled was rejected: West Huron, 9 O. L. R. 602. The candidate's number is not an essential part of the ballot paper; where the Returning Officer in detaching the ballot did so as to leave the candidates' numbers on the counterfoil, the ballots were not rejected: Prince Edward, 4 O. L. R. 255. Where the D. R. O. erroneously placed the number of the polling sub-division opposite the voter's name in the poll book, and another inserted no number on the counterfoil, the ballots were held good: Re Stormont, 12 O. W. R. 518. D. R. O.'s initials and number: see East Hastings

(Dom.), H. E. C. 764; Re Russell (2) (Ont.), H. E. C. 519; South Perth, 2 E. C. 47; Re North Grey, 4 O. L. R. 286; West Huron, 9 O. L. R. 602; Bothwell, 8 S. C. R. 676; Wentworth, 36 S. C. R. 497; Soulanges, 10 S. C. 652; North Victoria, H. E. C. 671; Queens (P. E. I.), 7 S. C. R. 247; Muskoka and Parry Sound, 18 C. L. J. 304. Penalty, see sec. 199, notes.

100. The D. R. O. in polling votes of illiterates asked each of them if he was unable to "read or write," requested him to put his mark to the declaration of illiteracy and then openly marked the ballot as instructed by the voter in the presence of both candidates, their agent and the poll clerk, all of whom had taken the declaration of secrecy. Held that there was substantially no violation of the Act: see remarks of Osler, J.A., and Spragge, C.J.O., Prescott, 1 E. C. 88. A voter who could neither read nor write came into a booth and in the presence of the D. R. O. asked for one not present to instruct him how to mark his ballot. The D. R. O. gave the voter a ballot paper, who stated he wished to vote for respondent. Respondent's agent then marked the ballot for the voter and handed it to the D. R. O.; no declaration was made. Held, no one but D. R. O. entitled to mark the ballot and that the D. R. O. had violated his obligation to maintain secrecy: Halton, H. E. C. 283. Irregular marking of illiterates' ballots: see Hickson v. Abbott, 25 L. C. J. 289; see Municipal Act, R. S. O. 1914, ch. 192, sec. 109, notes.

102. If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the Act according to a fair and reasonable construction of it, the vote should be allowed: West Elgin (No. 1), 2 E. C. 38. A ballot paper is properly marked if the voter has so placed his mark as to make it clear for which particular candidate he intended to vote, although the mark as placed is outside the ruled space printed on the paper for its reception. Re Pontardawe Election, 1907, 2 K. B. 313. Misplaced marking: West Elgin, 2 E. C. 38; South Perth, 2 E. C. 47; North Victoria, H. E. C. 671; Monk, H. E. C. 725; South Wentworth, H. E. C. 531; Re Muskoka, 4 O. L. R. 253; Re Lennox, 4 O. L. R.

378; Re West Huron, 9 O. L. R. 602; Queens (P.E.I.), 7 S. C. R. 247; Haldimand, 15 S. C. R. 495; Queens (P.E.I.), 7 S. C. R. 247. Incomplete crosses: West Huron, 2 E. C. 58; North Victoria, H. E. C. 671; Monk, H. E. C. 725; Re Muskoka, 4 O. L. R. 253; Re West Huron, 9 O. L. R. 602; Queens (P.E.I.) Case, 7 S. C. R. 247; North Victoria, H. E. C. 671; Re Prince Edward, 9 O. L. R. 463; Queens (P.E.I.), 7 S. C. R. 247; Bothwell, 8 S. C. R. 676. Identification marks: North Victoria, H. E. C. 671; Monk, H. E. C. 725; Re Lennox, 4 O. L. R. 378; White v. MacKenzie, 20 L. C. J. 23. Any written word or name upon a ballot presumably written by the voter ought to vitiate the vote as a means by which he can be identified: Re Lennox, 4 O. L. R. 378. Any mark which contains in itself means of identifying the voter, such as his initials, or some mark known to be used by him: Monk, H. E. C. 725. Marks in addition to cross: Monk, H. E. C. 725; Re Muskoka, 4 O. L. R. 253; Re Lennox, 4 O. L. R. 378; Re West Huron, 9 O. L. R. 602; Re Prince Edward, 9 O. L. R. 463; Queens (P.E.I.), 7 S. C. R. 247; Bothwell, 8 S. C. R. 676; North Victoria, H. E. C. 671. Marks other than crosses: North Victoria, H. E. C. 671; South Wentworth, H. E. C. 531; Monk, H. E. C. 725; Re Lennox, 4 O. L. R. 378; Re North Grey, 4 O. L. R. 286; Wentworth, 36 S. C. R. 497. Inadvertent marks: Monk, H. E. C. 725; Re Muskoka, 4 O. L. R. 253; Re Lennox, 4 O. L. R. 378; West Huron, 2 E. C. 58; Re North Grey, 4 O. L. R. 286; West Huron, 9 O. L. R. 602. Words, etc., written on the ballot paper: West Huron, 2 E. C. 58; Re Lennox, 4 O. L. R. 378; Re West Huron, 9 O. L. R. 602; North Victoria, H. E. C. 671. Undetached counterfoil is not an identification mark: Re Stormont, 17 O. L. R. 171. Cross not made with black lead pencil: Monk, H. E. C. 725. Where D. R. O. omitted to detach counterfoil the ballots were counted: Re Stormont, 12 O. W. R. 518; 17 O. L. R. 171; and see Re London, 4 O. W. R. 402; Re North Simcoe, 41 C. L. J. 29. For summary of law relating to counting ballots, see Biggar, Municipal Manual, p. 193.

104. Names of persons were entered as "freeholders" on the assessment and by mistake, on the voters'

lists as "farmers' sons." Their votes were challenged and they refused to take the oath as farmers' sons. Subsequently they offered to take the oath as owners and were allowed to vote by the D. R. O. who knew them. It was held that having been rightly entered on the assessment roll the mistake in the voters' list did not disfranchise them. Their refusal was not a refusal to take the oath required by law, which means the oath appropriate to the voter's description; and their votes stood: Prescott, H. E. C. 780.

109. "Conveniently" means "conveniently for the voter and for his wish, purpose, and intention in voting": Hastings v. Summerfeldt, 30 O. R. 577. A voter inadvertently marked his ballot for the candidate against whom he intended to vote. The D. R. O., to whom it was handed unfolded, exposed it, and, contending it was not spoiled, placed it in the ballot box. The D. R. O. was held guilty of breach of duty which entitled the plaintiff to judgment for penalty: Hastings v. Summerfeldt, 30 O. R. 577. A voter who had inadvertently torn his ballot and whose ballot was rejected in counting was allowed his vote, the evidence being that no trick was intended for the purpose of showing how he intended to vote: South Wentworth, H. E. C. 531.

113. Votes cast at a particular poll are not made invalid or void in case the D. R. O. fails to observe the requirements of the Act at the close of the poll. When the D. R. O. omits a statement of the votes cast, but the Returning Officer has no difficulty in ascertaining the facts, the votes ought to be counted: Re Prince Edward, 9 O. L. R. 463.

114. The official number on the counterfoil and which the D. R. O. neglected to detach was held not to be a mark by which the voter could be identified: (see sec. 70, note); Re Stormont, 17 O. L. R. 171, 12 O. W. R. 518; Re Wentworth, 9 O. L. R. 201, 5 O. W. R. 282, 26 S. C. R. 497, and see notes to sec. 102.

122. The R. O. cannot reject the votes cast for one candidate on account of that candidate's defective nomination: Ex parte Baird, 29 N. B. 162.

130. A County Court Judge is not confined on a recount to the consideration of cases in which an objection was made before the D. R. O. when counting votes at the close of the poll: (see sec. 115); Re Lennox, 4 O. L. R. 378; but see Queens (P.E.I.), 7 S. C. R. 247. A Deputy County Court Judge, in case of illness of the County Judge, has jurisdiction to hold a recount: Re Prince Edward, 9 O. L. R. 463; and see Re North Grey, 4 O. L. R. 286. Injunction to restrain recount: see McLeod v. Noble, 28 O. R. 528, 24 A. R. 459. Mandamus to compel recount: Centre Wellington, 44 U. C. R. 132. Recount is a ministerial proceeding: Meigs v. Comeau, Q. R. 10, Q. B. 56, 3 Que. P. R. 307. Where recount to take place: see Meigs v. Comeau (supra). Proceedings on recount and appeal under sec. 144: see Re Stormont, 12 O. W. R. 518, 17 O. L. R. 17. "Scrutiny of the votes polled:" Re West Lorne Scrutiny, 26 O. L. R. 339, 47 S. C. R. 451. History of "Scrutiny:" Re McGrath and Durham, 17 O. L. R. 514; and see Re Mitchell and Campbellford, 16 O. L. R. 578, 11 O. W. R. 941; Re Port Arthur, 14 O. L. R. 345. "Recount" and "Scrutiny," what is meant by these terms: see Re Saltfleet, 9 W. R. 545, 16 O. L. R. 293; and see notes to R. S. O. 1914, ch. 6, sec. 24.

144. Notice of appeal from the decision of a Judge upon a recount need not be signed by the candidate himself, but may be signed by his solicitor or agent. Where both candidates appear and the result of the first appeal is to give the opponent a majority, the opponent's appeal will be heard even though the only result will be to increase the majority. Neither appeal being limited to particular ballots, it was open to the candidate whose appeal was first heard to object, when his opponent's appeal was being heard, to certain ballots not previously objected to: Re North Grey, 4 O. L. R. 286.

160. Secrecy of the ballot is a rule of public policy and cannot be waived: Haldimand, 1 E. C. 529; Wentworth, 36 S. C. R. 497; see Municipal Act, R. S. O. 1914, ch. 192, sec. 131, notes.

164. Obligation of D. R. O. to maintain secrecy: see Re Halton, H. E. C. 283, note to sec. 100.

166. A voter may disclose the name of the person for whom he voted: North Victoria, H. E. C. 671; see as to ballot stuffing prosecutions: R. v. Saunders, 11 Man. 550.

167. American citizens having intervened in provincial elections and committed corrupt acts, their foreign nationality or residence did not exempt them from the penal consequences of violation of this Act: Re Sault Ste Marie, 10 O. L. R. 356; and see R. S. O. 1914, ch. 10, sec. 76, note. A statement that a certain offer was made in jest should be received with great suspicion: North Middlesex, H. E. C. 376. Payment of a debt to silence hostile criticism not bribery: North Ontario, H. E. C. 785. Payment of debt: in these cases it is always open to enquire if it was paid in accordance with legal obligation: North Ontario, H. E. C. 304. Where charitable donations are given generally and not with a view to influence an individual voter, they will not vitiate an election: South Ontario, H. E. C. 751. Settling an account in regard to which liability had previously been denied; election not referred to at the time; held not bribery: South Ontario, H. E. C. 751. Not bribery to give money to the widowed sister of the voter, an old friend in reduced circumstances, the evidence showing that the payment was not connected with the election and that it was not the first: North Victoria, H. E. C. 252.

167.—(1*a*) The effect of the amendment by which persons committing various forms of bribery enumerated become on conviction liable to a fine of $200, and imprisonment, is to take the penalties imposed by this section out of the category of those recoverable by action under sec. 200: Asseltine v. Shibley, 9 O. L. R. 327; Carey v. Smith, 5 O. L. R. 209. "Corruptly" does not mean "wickedly" or "immorally" or "dishonestly;" but doing what the legislature plainly meant to forbid; as an act done by a man knowing that he is doing what is wrong and doing it with an evil object: Halton, H. E. C. 736. A grossly inadequate price paid for an article is bribery: Cornwall, H. E. C. 547. Acts of colorable charity: Cornwall, H. E. C. 547. Giving goods to elector's wife—immaterial whether the elector voted:

Muskoka and Parry Sound, 1 E. C. 197. Surrender of right to cut down timber is a "valuable consideration" within the meaning of the bribery clauses: North Victoria, H. E. C. 252.

167.—(1*b*) A candidate's appeal to his business and the employment of his capital, if honestly made, is not prohibited: West Peterboro, H. E. C. 274. The respondent stated that he considered it was the constitutional practice for the ministry to dispense patronage on the recommendation of the person contesting the constituency on their side, and that he would have this patronage whether elected or not; held that such words did not offer any place, or employment, or a promise thereof to any voter, &c., and that the respondent was not guilty of undue influence, either by Statute or Common Law: Muskoka, H. E. C. 458. Promise to work for a voter made without reference to election, not bribery: Halton, H. E. C. 736.

167.—(1*c*) Distribution of a large sum amongst agents and sub-agents: Niagara, H. E. C. 568; West Toronto, H. E. C. 97; see note to sec. 167 (2).

167.—(2) Bona fide employment and payment of a voter to canvass voters belonging to a particular religious denomination, or the same trade, or who only understand French or Celtic, is not illegal: West Toronto H. E. C. 97. "A little money for knocking around, going about to solicit votes," may be open to unfavorable construction: West Toronto, H. E. C. 97. The respondent and another employed a lawyer and professional public speaker to address meetings in the respondent's interest and promised to pay his travelling expenses if it were legal to do so; not bribery: North Ontario, 4 S. C. R. 430, H. E. C. 785. Personal expenses of candidate; payment of canvassers; refreshments; treating: East Toronto, H. E. C. 70.

168. A charge of treating a meeting failed where the evidence showed that the meeting had come to an end before anything was said about treating. Nor did the evidence support a charge of corrupt treating of individuals in order to be elected, as the agent

was a customer of the factory and followed a previous habit of treating the men: East Middlesex, 5 O. L. R. 644. Furnishing liquor to meetings and what is a meeting: see East Middlesex, 1 E. C. 250; Muskoka and Parry Sound, 1 E. C. 197. Association meeting: North Ontario, 1 E. C. 1. Treating at meetings: Glengarry, H. E. C. 8; North Middlesex, H. E. C. 376; North Ontario, H. E. C. 304. "Meeting of electors:" see East Middlesex, 1 E. C. 250; North Grey, H. E. C. 362.

169. Treating on nomination day a corrupt practice: Dundas, H. E. C. 205; see also, Re East Middlesex, 5 O. L. R. 644. The nature of a treat in the bar room of a country tavern raises the presumption that the treat was of spirituous liquors, and when made by an agent on polling day was a corrupt practice: North Victoria, H. E. C. 252. Treating to quiet a meeting of partizans on both sides, who were becoming disorderly, not a corrupt practice: North Ontario, H. E. C. 304. Treating the D. R. O. and poll clerk by the scrutineer, not a corrupt practice: North Ontario, H. E. C. 785. Treating generally, extensively or miscellaneously, is only *prima facie* a corrupt practice. If it be shown that it was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of sub-sec. 2. There may still be innocent treating. An antecedent habit of treating must still help among other things to rebut the inference of corrupt intent: East Middlesex, 5 O. L. R. 644. The action for penalty under sec. 200 is maintainable for the penalties imposed by sections 169, 171, 172, 174, 177: Asseltine v. Shibley, 9 O. L. R. 327. The respondent was a physician and horse fancier, and was in the constant habit of treating, although an abstainer himself. He continued the habit after nomination. No corrupt intent was shown: East Middlesex, 5 O. L. R. 644. Treating by a candidate: London, H. E. C. 214. Treating on nomination day: North Middlesex, H. E. C. 376. Treating a meeting; treating and bribery distinguished: North Waterloo, 2 E. C. 76. A number of voters met at a voter's house to go over the lists and have a card-party. Refreshments were supplied by the host, but the

beer, according to German custom, that of the locality, was paid for by subscription; not a corrupt practice: South Perth, 2 E. C. 144. Treating is not *per se* a corrupt act, except when made so by Statute, but the intent may make it so, *e.g.*, when it is done by the candidate in order to make for himself a reputation of good-fellowship and hospitality, and thereby to influence the electors to vote for him: North Middlesex, H. E. C. 376; see also, North York, H. E. C. 62; South Grey, H. E. C. 52; North Ontario, 1 E. C. 1; Dundas, H. E. C. 205; Glengarry, H. E. C. 8; North Middlesex, H. E. C. 376; W. Northumberland, 10 S. C. R. 635. Corrupt treating; corrupt practice by tavern keeper as sub-agent: Welland, H. E. C. 187. Candidate treating with corrupt intent; treating in a private house: London, H. E. C. 214; North Ontario, H. E. C. 785. Free dinners: North Victoria, H. E. C. 671. Excessive treating and common custom: East Elgin, H. E. C. 769. Refreshments: East Toronto, H. E. C. 70; Sault Ste. Marie, 10 O. L. R. 356; Dig. Ont. Case Law, cols. 4963-4974. From the time of his nomination the candidate frequently treated electors and others. He did not ordinarily frequent bar-rooms or treat. The inference was that the treating was done with corrupt intent: West Wellington, H. E. C. 16; see East Middlesex, 5 O. L. R. 644. Treating and participation therein as a cause of disqualification: see North Middlesex, H. E. C. 376; Muskoka, H. E. C. 458, and cases collected; Dig. Ont. Case Law, col. 4985.

170. Where the effect of bets made by the respondent's agents was that, to win, the voters must vote for the respondent, the bets were corrupt practices: Lincoln, H. E. C. 489. Money given to make bets without previous understanding: South Norfolk, H. E. C. 660. Bet amounting to colorable bribery: West Northumberland, 10 S. C. R. 635. Providing money: East Elgin, 2 E. C. 100; see Trebilcock v. Walsh, 21 A. R. 55, and Walsh v. Trebilcock, 23 S. C. R. 695.

171. Giving money to vote to pay for horse hire after election: Halton, H. E. C. 736. Hiring cabs: West Toronto, H. E. C. 97. Hiring cabs and conveyances: East Toronto (Dom.), 10 C. L. J. 248. Cabs and carriages for committee men: West Toronto, H. E. C.

97. Where a committee man's cab was used to convey voters without respondent's consent and not colorably hired for the purpose, not a corrupt practice: West Toronto, H. E. C. 97. What amounts to hiring: North Victoria, H. E. C. 252. Money given to hire a team to go canvassing, not a corrupt practice: North Victoria, H. E. C. 612. Where agent's authority has ceased before payment made and hiring was not corruptly to influence voter, not a corrupt practice: Halton, H. E. C. 736. Where one who had attended private meetings, held on behalf of the respondent, hired a conveyance, held a corrupt practice: North Ontario, H. E. C. 785. Qualification of persons conveyed is immaterial: Muskoka and Parry Sound, 1 E. C. 197. Where an agent, partner of livery stable keeper, took out carriages and paid his partner half hire, held corrupt practice: West Middlesex, 1 E. C. 465; see Cornwall, 10 C. L. J. 313; Selkirk, 4 S. C. R. 494; Levis, 11 S. C. R. 133. Transportation by public steamboat did not come within the former words of the section: Sault Ste. Marie, 10 O. L. R. 356. Hiring a vehicle to convey a voter to the poll by a person who attended meetings of the respondent's friends to promote his election; corrupt practice: North Ontario, H. E. C. 785. Payment of voter's expenses: South Grey, H. E. C. 52.

173. The Government would look sharply after those in arrears for their land who did not vote for the Government; held an expression of opinion only: North Ontario, 1 E. C. 304. Where a company's manager intimated that acting as scrutineer for the other side was not satisfactory to the company, but no threat was made, no intimidation was shown: see East Simcoe, 1 E. C. 291; see also Halton, H. E. C. 283; Soulanges, 10 S. C. R. 652; Muskoka, H. E. C. 458; Welland, H. E. C. 187. A candidate's appeal to his business or to employment of his capital in promoting the prosperity of his constituency, not undue influence: West Peterboro, H. E. C. 274. Offer by agent to look after voter: see Halton, H. E. C. 283. Patronage; statement by candidate that patronage by contitutional usage remained in hands of Government candidate even if defeated was not undue influence either by Statute or Common Law. To sustain such a charge it would be necessary to prove

intimidation so general and extensive that freedom of election had ceased in consequence: Muskoka, H. E. C. 458. Impropriety of Division Court bailiffs canvassing: North Victoria, H. E. C. 612. Leaving a voter on island without boat, held undue influence: North Ontario, H. E. C. 785. Clerical influence may amount to undue influence: Charlevoix, 1 S. C. R. 145.

174. A mandamus to a police magistrate properly proceeding to convict for personation was refused. The D. R. O. had no status to apply and (per Britton, J.), a mandamus could not be granted for the purpose; Rex v. Case, 6 O. L. R. 104. See Smith v. Carey, 5 O. L. R. 203, note to sec. 177; see Rex v. Coulter, 6 O. L. R. 114.

177. Conviction justified under this section, although evidence showed that the defendant's offence consisted in inducing R., who was himself a voter but had no vote at the polling place mentioned, to impersonate a voter at such polling place: Rex v. Coulter, 6 O. L. R. 114. Meaning of expression "voting knowing he had no right to vote:" see Smith v. Carey, 5 O. L. R. 203. Where the defendant removed out of the city and applied for and obtained registration as a city voter, not knowing that his name was on the township voters' list. Afterwards acting as scrutineer he voted on a certificate, no oath being tendered, and not being aware that a non-resident could not vote, he was held not liable under this section: Smith v. Carey, 5 O. L. R. 203. Actual knowledge on the part of a voter that he has no right to vote is necessary to constitute a corrupt practice: Re Perth S. R., 2 E. C. 30. Under the section, not merely the voter's knowledge of the facts upon the legal construction of which the right depends must be proved, but *mala mens* on the part of the voter: East Elgin, 2 E. C. 100.

179. The Common Law of England relating to Parliamentary elections is in force in Ontario. In Parliamentary elections the principal is liable for all acts of his agent, even such as are expressly contrary to instructions. Mere canvassing does not prove agency, but tends to prove it. Repeated acts may amount to conclusive proof of agency. Where a

meeting assembles and has the sanction of the candidate, he is responsible for its acts and the acts of its agents, but where the meeting is large, this only extends to the committee and individual canvassers: Cornwall, H. E. C. 547; see also Joliette, 12 L. N. B., Chambly, 19 L. C. J. 185, 332; Lisgar, 14 Man. 310. It seems no limit can be placed to the number of parties through whom sub-agency may extend: Niagara, H. E. C. 568. When the candidate accepted the nomination of the convention of the party, he intimated that he looked to the active exertions of those present in carrying on the contest. This constituted authorization to those present to carry on canvass, and thus, agency for the authority to canvass covers agency. Even without express authorization the agency of those attending the convention is established in the absence of any repudiation or rejection of the offer of services which is implied from the fact of attending and making the nomination. Agency in election matters differs from agency in other matters, inasmuch as the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are outside the scope of his express authority, but may be directly contrary to his principal's express directions: Muskoka and Parry Sound, 1 E. C. 197. Where the candidate went to considerable trouble to prevent corrupt practices and carefully explained the law to his election committee and expressed the desire to have it obeyed, although the acts done created doubt and hesitation, the Judge upheld the election, affirming that he should be satisfied beyond all reasonable doubt: West Toronto, H. E. C. 97. Agents and sub-agents: West Toronto, H. E. C. 97. The law of election agency is not capable of precise definition, but is a shifting, elastic law capable of being moulded from time to time to meet the inventions of those who in election matters seek to get rid of the consequences of their acts: North Ontario, H. E. C. 785. Agency of Provincial Government: see West Huron, 1 O. R. 433. Agent with powers expressly limited: Berthier, 9 S. C. R. 102. Membership of committees of candidate: E. Northumberland, H. E. C. 577; Lisgar, 14 Man. 310; N. Ontario, H. E. C. 785. Agents appointed by candidate's committee: Cornwall, H. E. C. 547. Political affiliation, activity at elections and

recognition as supporter as proof of agency: Haldimand, 17 S. C. R. 170, 1 E. C. 572. Membership in political association: West Prince, 27 S. C. R. 241. Volunteer worker: Cornwall, H. E. C. 803; Haldimand, 1 E. C. 529; S. Norfolk, H. E. C. 660. Delegates to a political convention who never meet the candidate and never canvass on his behalf cannot be considered his agents: Welland, H. E. C. 187. Responsibility of agents and sub-agents: South Grey, H. E. C. 52; Charlevoix, 5 S. C. R. 133; Niagara, H. E. C. 568; Cornwall, H. E. C. 547; Hickson v. Abbott, 25 L. C. J. 290. Evidence of admissions made by an agent after his agency has expired is inadmissible: West Peterboro, H. E. C. 274. Acts of agency and decisions thereon discussed: North Ontario, H. E. C. 304.

180. Each charge is a separate indictment, and the respondent cannot be placed in a worse position, because a number of charges are advanced in each of which the Judge arrives at a similar conclusion: Muskoka, H. E. C. 458. A number of separate charges of corrupt practices against an agent, each on the oath of separate witnesses not corroborating one another. The agent contradicted each. Held, the more frequently a witness is contradicted by others, although each single witness contradicts him on a single point, the more is confidence in him shaken until by a number of contradicting witnesses he may be disbelieved: North Renfrew, H. E. C. 710. The respondent was charged with being implicated in bribery with one of his agents. The evidence was conflicting. Before an election Judge finds a respondent guilt of a corrupt practice involving a personal liability he ought to be free from reasonable doubt: Centre Wellington, H. E. C. 579. Recriminatory charges are permitted in the interests of the electors to prevent a successful petitioner from gaining a seat if he has violated the Election Law: North Victoria, H. E. C. 252. In penal statutes questions of doubt are construed favourably to the accused, and where the Court of first instance in a *quasi* criminal trial has acquitted the respondent, the appellate Court will not reverse the finding: North Ontario, H. E. C. 305. The extent of the influence of corrupt acts is to be measured with regard to the influence

and opportunities of the person committing them (per Cameron, J.): East Simcoe, 1 E. C. 291. Where only one trivial act was proved against an agent, but such agent had been taken with the respondent on his canvass and there were circumstances which should have aroused the respondent's suspicion, who should have warned him, the election was avoided: West Prince, 27 S. C. R. 241. A scheme was entered into for violating the secrecy of the ballot, and two clear acts of bribery were proved. Election was avoided: East Northumberland, 1 E. C. 434. Payment of travelling expenses of one voter by an agent was proved, and two acts of bribery and one of giving liquor by persons not proved agents. The election was not set aside: Welland, 1 E. C. 383. *Prima facie* corrupt acts void an election and the onus of proof that they were not sufficient to affect the majority rests upon the respondent: West Hastings, H. E. C. 539. Disagreement of trial Judges on charges of corruption: Re Lennox, 6 O. L. R. 203. The power of saving an election should be exercised cautiously, *a fortiori* by an appellate Court where the *rota* judges have not deemed the case a proper one to apply the principle: West Simcoe, 1 E. C. 128. Corrupt practice of trivial, unimportant and limited character: see East Simcoe, 1 E. C. 291; East Middlesex, 1 E. C. 250; Prescott, 1 E. C. 88; Lincoln, H. E. C. 489; West Hastings, H. E. C. 539. Trifling acts of bribery by active and important agents, especially where paid out of election fund, will void election: North Waterloo, 2 E. C. 76; see also East Elgin, 2 E. C. 100. Unimportant acts: see sec. 4, notes.

182. Where accounts and records of election are intentionally destroyed by respondent's agent, every presumption will be made against the legality of the acts concealed by such conduct: South Grey, H. E. C. 52. The respondent gave $700 to an agent for election purposes and did not supervise its expenditure. This did not make him a party to every illegal application, but an argument of a corrupt purpose was reasonable: South Grey, H. E. C. 52; see also East Toronto, H. E. C. 70. Wilful intentional ignorance on the part of the candidate is, it seems, the same as

actual knowledge: see London, 24 C. P. 434, H. E. C. 560; Lincoln, H. E. C. 391. But where corrupt acts were committed by agents without candidate's knowledge or consent, he was not disqualified: Cornwall, H. E. C. 647. Evidence to disqualify should be such as would justify conviction on an indictment: Ryan v. Devlin, 20 L. C. J. 77; Lisgar, 13 Man. 478; St. James, 33 S. C. R. 137; Centre Wellington, H. E. C. 579. Section applies equally to the elected and defeated candidates if found assenting parties to corrupt practices: North Wentworth, H. E. C. 343. Before subjecting candidate to disqualification, the Judge should be assured beyond all possibility of mistake. If there is an honest conflict of testimony or the acts are capable of two interpretations, one innocent and one culpable, the Judge should only adopt the culpable after most careful consideration: Welland, H. E. C. 187; Centre Wellington, H. E. C. 579; Kingston, H. E. C. 625. When a corrupt practice is proved the onus is shifted to the respondent to bring himself within the saving clause: Muskoka and Parry Sound, 1 E. C. 197.

183. Persons reported for corrupt practices: Cornwall, H. E. C. 647.

184. There is no appeal from the decision of trial Judges finding that a candidate or other person has not been guilty of corrupt practices: Re South Oxford, 6 O. L. R. 232. Court of Appeal; jurisdiction: see Judicature Act, R. S. O. 1914, ch. 56, sec. 26 (2) (*b*).

185. Payment of illegal accounts after judgment avoiding election to influence voters at new election will disqualify candidate: Owens v. Cushing, 20 L. C. J. 86; Benoit v. Jodoin, 19 L. C. J. 185, 332. New election; former law: see Cornwall, H. E. C. 647.

192. Corrupt acts by foreign citizens who leave Canada immediately: see Re Sault Ste. Marie, 10 O. L. R. 356. Evidence on charge of corrupt practices; indemnification of defendant against penal results of his own disclosures: see Re Sault Ste. Marie, 10 O. L. R. 85; see also R. v. Walsh, 39 C. L. J. 366, 5 O. L. R. 527; R. v. Case, 6. O. L. R. 104.

193. Destruction of accounts and vouchers: see sec. 182, 204, notes.

199. A returning officer refuses at his peril to give a ballot paper to a person on the voters' list claiming the right to vote and willing to take the prescribed oath. The officer's refusal is a wilful act, and renders him liable to the statutory penalty without proof of malice or negligence: Wilson v. Manes, 26 A. R. 398. But see Johnson v. Allen, 26 O. R. 550.

200. The sum declared by sec. 12 to be forfeited is a penalty within the meaning of this section: Srigley v. Taylor, 4 O. R. 396, 6 O. R. 108. Imprisonment cannot be adjudged under sec. 200 which intends a proceeding by action to recover money: Asseltine v. Shibley, 9 O. L. R. 327; Carey v. Smith, 5 O. L. R. 209. Penalty or common law action: see Rose v. Croden, 3 O. L. R. 383. Meaning and extent of limitation in sub-sec. (*c*): Halton, 2 E. C. 158. And see also as to penalties: Re Cross, 2 E. C. 158, 4 Can. C. C. 173.

204. Where accounts are destroyed by agent, every presumption will be made against the acts concealed: South Grey, H. E. C. 52. Money was given by friends of the candidate to different persons who kept no accounts or vouchers. Bribery was not inferred against the candidate who neither knew nor desired this state of things. Remarks on keeping vouchers: East Toronto, H. E. C. 70; and see also W. Huron, 37 C. L. J. 350; Levis, 11 S. C. R. 133.

207. Election expenses and statement: see Bellechasse, 6 Q. L. R. 100, 5 S. C. R. 91; Lisgar, 13 Man. 478; Benoit v. Jodoin, 19 L. C. J. 185, 332; Terriault v. Ducharme, 25 L. C. J. 320.

CHAPTER 9.

Punishment for Personation.

Summary trial under this Act: functions of Magistrate and D. R. O. considered: Re Denison; R. v. Case, 6 O. L. R. 104, and note to R. S. O. 1914, ch. 8, sec. 174.

CHAPTER 10.

CONTROVERTED ELECTIONS.

Refer to: Holmested, Dominion Election Rules; Hodgins, Franchises; Ermatinger, Franchise and Election Laws; McPherson, Elections in Canada. Rules under Dominion Act printed in 17 O. L. R., pp. 675-686.

2.—(*e*) Court: see R. S. O. 1914, ch. 56, sec. 26 (2) (*c*).

5. The rules of Court, 14th Dec., 1908, under the Dominion Controverted Elections Act, R. S. C. 1906, ch. 7, and forms thereunder, which are printed as appendix to 17 O. L. R., at pp. 675-686, and the rules respecting the Trial of Election Petitions (Ontario), 23rd December, 1903, are unrepealed by the Rules of 1913 of the Supreme Court: see 1913 Rules, schedule p. 144. The word "particulars" in Rule 24 means particulars of votes intended to be objected to (see Rule 20), and is not confined to further details of particulars already given. Where for the purpose of a scrutiny the respondent had filed and served particulars of votes objected to by him, and the scrutiny had been begun, but not completed, he was allowed (on terms) to add new particulars of other votes objected to: Re Port Arthur, 12 O. L. R. 453, 508; North Grey, 6 O. L. R. 673: see remarks of Osler, J.A., at p. 683, on rules and as to overcoming technical objections. The solicitor by whom the petition and affidavit are prepared, and by whom, as agent for the petitioner's solicitors, the petition is presented, is not disqualified from acting as commissioner to take the affidavit of *bona fides*, etc.: Re Lennox, 4 O. L. R. 647. Rules as to appeals: see sec. 61 notes.

7. The return of a member by the Returning Officer is only made when it has been duly received by the Clerk of the Crown in Chancery, not when the Returning Officer has placed it in the express or post office for transmission to such clerk. It is not essential that a notice of presentation of petition should

be served where such notice is endorsed on the petition: Ottawa, 2 E. C. 64; West Toronto, 31 U. C. R. 409.

8. Within a few days after presentation of an election petition signed in a solicitor's presence with affidavits sworn before another solicitor, and after a retainer to the first solicitor, two of the petitioners contradicted their former affidavits, one petitioner saying that he was intoxicated, the other that he could not read and was induced to sign. These latter facts were not corroborated and were contradicted by the parties interested and were held not sufficient to support an application made by the respondent to set aside the petition: Re North Renfrew, 7 O. L. R. 204, 8 O. L. R. 359. Except where there are recriminatory charges against the unsuccessful candidate or for the purpose of declaring the petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be enquired into, and in this there is no difference between a voter petitioner and a candidate petitioner: Re Dufferin, H. E. C. 529, 4 A. R. 420. An objection to the status of a petitioner cannot be taken by preliminary objection, and even were the petitioner guilty of corrupt practices at the election complained of, he would not lose his status as petitioner: Re Dufferin, H. E. C. 529, 4 A. R. 430; Re Cornwall, H. E. C. 803; North Simcoe, H. E. C. 617. It is not a champertous transaction that an association agreed to pay the costs of the petition. Even if it were, it would not suffice to stay proceedings. A charge that the petition was not signed *bona fide*, but the petitioner's name was used *mala fide* by other persons, cannot be raised by preliminary objection: North Simcoe, H. E. C. 617. A candidate may be a petitioner, although his property qualification be defective. If he claims the seat his want of qualification may be urged against his being seated, but he may shew that the respondent was not duly elected: North Victoria, H. E. C. 584. Charge that candidate petitioner was guilty of corrupt practices: Prince Edward, H. E. C. 45; and see Ont. Dig. Case Law, 5011-5021. Petitioner an alien: see Prescott, H. E. C. 1. The voters' list has now been supplanted by the last revised assessment roll as evidence of a petitioner's status: North Simcoe, H. E. C. 617.

9. There is no authority for making an agent of the candidate a respondent on a charge of personal misconduct: South Oxford, H. E. C. 238.

12. Reckoning time under the Act: see West Toronto, 5 P. R. 394, 31 U. C. R. 409; New Westminster, 9 B. C. R. 192. Presentation of petition after office hours on last day: extension of time cannot be granted by Court after prescribed time has elapsed: Re North Perth Dominion Election, 13 O. W. R. 657, 18 O. L. R. 661.

13. An allegation in the petition "that the respondent was by himself, etc., guilty of corrupt practices as defined by the Controverted Elections Act of Ontario, sufficiently charges the commission of corrupt practices under the Election Act: North Ontario, 1 E. C. 1: but see West Simcoe, 1 E. C. 128, where the same form of petition was held to be objectionable, as the affidavit filed with the petition is required to set out that the petitioners believe the petition true in substance and fact, and in such a case the affidavit could only honestly be made by one who had informed himself of the provisions of the statute, and even then would only be swearing to his construction of it: (see section 16). Where the particulars filed differed in wording from the petition on this point, it was held there was no power to amend: West Simcoe, H. E. C. 128. Where the petitioner charged an agent with corrupt practices and prayed to have him made a party, it was held that there was no authority to do so: South Oxford, H. E. C. 238. Evidence was given at a trial of a charge not properly set out in the petitioner's particulars of corrupt practices. At the close of the evidence the respondent objected that the charge was not in the particulars and not verified by the affidavit of the petitioners. It was held that the petitioners might amend their particulars and that the charges in the petition were wide enough to cover the charge. As the parties had in fact gone into the evidence, the petitioners' affidavit verifying was not necessary: Lincoln, H. E. C. 489.

15. Although a petitioner who does not leave with the local registrar a copy of the petition at the time of

filing to be sent to the Returning Officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court in a proper case to enlarge the time appointed. Where through inadvertence a solicitor had omitted to leave the copy and applied without delay, the time was extended: North Grey, 6 O. L. R. 273.

16. As to affidavit where general allegations made in petition: see West Simcoe, 1 E. C. 128, note to sec. 13.

17. See East Middlesex, 2 E. C. 150.

18. Abandonment of seat: West Elgin, H. E. C. 227.

21. Security for costs is required only in the case of the original or principal petition and not in that of a cross petition: Kingston, 2 E. C. 10.

23. A formal defect by which the petition, though not a true copy, cannot possibly mislead the respondent, is not fatal, and leave will be given to amend: Re Centre Bruce, 4 O. L. R. 263. A petition to unseat a member may be duly served out of the jurisdiction of the Court. It was not essential that an application should be made for leave to effect such service or for allowing service so made: West Algoma, 2 E. C. 13. Service of petition: Dominion Act: Re West Peterborough, 17 O. L. R. 612, 13 O. W. R. 16, 41 S. C. R. 410.

24. Disclosure of particulars of each charge in examination: Re West Peterborough, 14 O. W. R. 543.

37. Grounds for extending time for trial, when discretion exercised: form of order: see North Perth and North Norfolk, 6 O. L. R. 597: see also notes to sec. 42.

42. While there is nothing to prevent a petitioner from making application to fix time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiative are on the *rota* Judges, the only penalty being that if three months elapse without a day for trial being fixed, an elector

may, on application, be substituted for a petitioner on proper terms. Where the Judges' engagements are such as to make it difficult for them to fix a time to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course: Centre Bruce, 7 O. L. R. 28; see North Perth and North Norfolk, 6 O. L. R. 597: see North Renfrew, 7 O. L. R. 204, 8 O. L. R. 359.

49. On a summons against the defendant for corrupt practices, the only evidence taken was his own, and was given under a general objection that he should not be called on to incriminate himself. It was held that having answered truly, he was entitled to be indemnified against the penal results of his own disclosures. Also, held, that sec. 7 of the Evidence Act, R. S. O. 1914, ch. 76, had no application: Re Sault Ste. Marie, 10 O. L. R. 85.

51. Ruling of trial Judge as to disqualification of voter: appeal: see Re Port Arthur, 8 O. W. R. 606, 13 O. L. R. 17.

55. The trial Judges having disagreed as to two charges of corrupt practices, the petitioner appealed to the Court of Appeal. As there was no judgment or finding of the trial Judges to appeal from, the Court of Appeal would require to entertain it as a matter of original jurisdiction and declined to do so: South Oxford, 6 O. L. R. 232. There is no right of appeal to the Court of Appeal where two of the trial Judges, who try the charge, fail to agree: Re Lennox, 6 O. L. R. 203. See sec. 70.

60. Court: see R. S. O. 1914, ch. 56, sec. 26.

61. No machinery has been provided by the Act or by the Rules for the settlement of a case upon an appeal to a Court of Appeal from the judgment upon the trial of a petition. The trial Judges can give no direction as to the evidence to be submitted. Semble, that either party may treat the whole evidence taken at the trial as being before a Court of Appeal: Re South Oxford, 5 O. L. R. 58. The existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect

of other charges as to which there would otherwise be no right of appeal: Re Lennox, 6 O. L. R. 203, and notes to section 55: see also Re Lennox, 1 E. C. 422. Observations on anomalies and difficulties in the procedure. No jurisdiction to entertain appeal from ruling of trial Judge as to disqualification of voter: Re Port Arthur, 8 O. W. R. 606, 13 O. L. R. 17: see Re North York, 10 O. L. R. 93, note to sec. 77.

71.—(3) See North Renfrew, 7 O. L. R. 204, 8 O. L. R. 359.

74. Circumstances justifying substitution of a petitioner: Re Renfrew, 7 O. L. R. 204, 8 O. L. R. 359.

76.—(6) American citizens who committed corrupt acts were properly served under Rule LXIV., and judgment was pronounced in their absence: Re Sault Ste. Marie, 10 O. L. R. 356: see also Re Cross, 2 E. C. 158, 4 Can. C. C. 173.

76.—(7) See Re Sault Ste. Marie, 10 O. L. R. 85, note to sec. 49, *supra*.

76.—(21) Limitation: see Halton, 2 E. C. 158.

77. Where a petition is dismissed without costs, the petitioner must pay the sheriff the costs incurred in publishing the notice of trial, and payment out of Court of the money deposited as security was only ordered on its being made good to the sheriff. No charge can be allowed to the sheriff for attending to the publication, not being authorized by the tariff: East Middlesex, 2 E. C. 150. It is not a champertous arrangement for an association to agree to pay the petitioner's costs: North Simcoe, H. E. C. 617. Where there were grounds for appeal but the Court declined to interfere, the appeal was dismissed without costs: South Huron, 24 C. P. 488, H. E. C. 576. Although the petition was dismissed, owing to the unwise and foolish acts of the respondent, he was allowed only half his costs: Glengarry, H. E. C. 8. The petitioner allowed his costs but not the costs of charges not established: Cornwall, H. E. C. 803. Petitioner allowed his costs where he succeeded, and the respondent his costs where the petitioner failed: North

Renfrew, H. E. C. 710: see also South Essex, H. E. C. 235; W. Wellington, H. E. C. 231; Welland, 1 E. C. 283. Unfounded charges: Welland, H. E. C. 187; Scrutiny: Lincoln, H. E. C. 489; N. Victoria, H. E. C. 671. Election sustained but enquiry in public interest, no costs against petitioner: West Toronto, H. E. C. 97; and see East Elgin, H. E. C. 769; South Renfrew, H. E. C. 556. Mistakes of Returning Officer—each party bear his own costs: Russell, H. E. C. 519; South Renfrew, H. E. C. 519. Personal charges failing: Cornwall, 10 C. L. J. 313; South Grey, H. E. C. 52; Kingston, H. E. C. 625; Cornwall, H. E. C. 547; East Toronto, H. E. C. 70; Witness fees: Niagara, H. E. C. 568; Prescott, 32 U. C. R. 303; Niagara, 10 C. L. J. 317; West Middlesex, 10 P. R. 509; Re North Norfolk, 4 O. W. R. 314, 8 O. L. R. 566. Conduct of respondent, 14 Man. L. R. 310. Where after an appeal from the judgment of the trial Judges voiding the election of the respondent had been argued and while it was standing for judgment, the Legislative Assembly was dissolved, the Court of Appeal could make no order as to costs or otherwise: Re North York, 10 O. L. R. 93.

80. Counsel fees: see Miller v. McCarthy, 27 C. P. 147; N. Victoria, 39 U. C. R. 147.

CHAPTER 11.

The Legislative Assembly Act.

12. Postmaster a candidate—resigning before election: West York, H. E. C. 156. Postmaster with no permanent salary: South Norfolk, 31 C. L. J. 68. Notice to electors of disqualification: South Renfrew, 1 E. C. 359; West York, H. E. C. 156. Carrying mails: Centre Simcoe, 31 C. L. J. 68. Interest in a ferry: Prince, 14 S. C. R. 265. Contracts for the public service: Re Samuel, 1913 A. C. 514. See notes to R. S. O. 1914, ch. 8, sec. 11.

25. "The interval between two sessions" means between two sessions of the same assembly: West Durham, 31 U. C. R. 404.

33. " Any of the causes " refer to those in the preceding section. A voluntary resignation therefore does not create a vacancy within the meaning of this section: West Durham, 31 U. C. R. 404.

CHAPTER 12.

The Lieutenant-Governors' Act.

3. This does not affect offences against criminal laws which are the subject of Dominion legislation, and in that sense the enactment is *intra vires* the Provincial Legislature: Atty.-Gen. Can. v. Atty.-Gen. Ont., 20 O. R. 222, 19 A. R. 31, 23 S. C. R. 458.

5. See Armour, Titles, pp. 131, 343, 327: see also Con. Rule 193, H. & L. notes, p. 339, 1913, Rule 74.

CHAPTER 13.

The Executive Council Act.

CHAPTER 14.

The Public Service Act.

15. A Government official may be committed in default of payment under order made in judgment summons proceedings in the Division Court, although he has no other source of income than his official salary: Re Hyde v. Cavan, 31 O. R. 189. For note on attachment of pensions, superannuation allowances, fees, salaries of municipal officers, civil servants, etc.: see H. & L. notes, p. 1152; ses also B. & S. Division Courts Act, p. 327.

18. In Balderson v. The Queen, 6 Ex. C. R. 8, 28 S. C. R. 261, under a similar section of the Dominion Civil Service Superannuation Act, it was held that such allowance was entirely in the discretion of the executive authority.

CHAPTER 15.

The Public Officers' Act.

8. Security: see Carpenter v. Solicitor to the Treasury, 46 L. T. 821.

17. In line 4 "Supreme Court" is substituted for "High Court Division": 4 Geo. V. ch. 2, Schedule (3).

CHAPTER 16.

The Sheriffs' Act.

2. The plaintiff, a sheriff, resigned his office and the defendant was appointed in his place under a commission containing a condition that he should pay the plaintiff "out of the revenues of the said office" a sum for life. The revenues were insufficient and the defendant resigned and was thereafter appointed under a commission without condition. It was held that want of good faith could not be imputed to the Crown and the contract ceased with the occupancy of the office: Smart v. Dana, 2 O. W. R. 287, 3 O. W. R. 89, 5 O. L. R. 451, 9 O. L. R. 427.

9. See Re Mack and Board of Audit, 2 O. W. N. 1413, 3 O. W. N. 282, 19 O. W. R. 740, 20 O. W. R. 454, 25 O. L. R. 121.

12.—(6) Action against sheriff and his sureties for failure to arrest: Nelson v. Baby, 14 U. C. R. 235; and see Reg. v. Sheriff of Hastings, 1 C. L. Ch. 230. No action lies against the deputy sheriff for money received by him and paid over to the sheriff. The action is against the sheriff himself: Bird v. Hopkins, H. T. 5 Vict.; see Holt v. Jarvis, Dra. 190. Sheriff's liability on a warrant of goods given by a deputy sheriff at sale: Mink v. Jarvis, 8 U. C. R. 397; 13 U. C. R. 84. Actions against sheriffs' sureties: cases under old law, see Dig. Ont. Case Law, col. 6434.

14. A sheriff cannot in any manner become a purchaser of property sold under execution: Doe d. Thompson v. McKenzie, M. T. 2 Vict.

15. Where the sheriff goes to the known residence of a debtor and *bona fide* searches for him to make an arrest without success because the debtor has absconded, he has done all that is required and is not liable for not arresting after the debtor's return unless he had notice: Rigney v. Ruttan, 5 O. S. 707. Diligence: O'Connor v. Hamilton, 4 U. C. R. 243.

16. Action by sheriff against bailiff for escape: Ruttan v. Shea, 5 U. C. R. 210. Sheriff not liable for escape when writ was void: Smith v. Jarvis, H. T. 3 Vict. Nor where a bailiff arrests without warrant: Rigney v. Ruttan, 5 O. S. 707; Falconbridge v. Hamilton, E. T. 2 Vict. Sheriff acting on authority of attorney: Brock v. McLean, Tay. 310; Davis v. Cunningham, 5 L. J. 254; Stocking v. Cameron, 6 O. S. 475. What is an escape: Wragg v. Jarvis, 4 O. S. 317. Sheriff now liable only for damages sustained: for cases under old law see Dig. Ont. Case Law, 6392.

18. A sheriff mulct in the costs of an action for wrongfully charging lands with an execution was held entitled to recover in an action brought by him against the solicitor who gave him directions to charge such lands, though the solicitor acted merely as agent for his client: Robertson v. Taylor, 21 C. L. T. 270. A sheriff cannot be held liable in a penal action for any excess in the amount of fees collected in a legal proceeding for the solicitor in the cause or for other officials, where he had acted in good faith and under instructions of the solicitor: Nicholas v. Creighton, 13 E. L. R. 275. Action against sheriff for improper sale: McNichol v. McPherson, 15 O. L. R. 393. Execution against deputy sheriff: see Gorden v. Bouter, 6 L. J. 112. See cases under old law, Dig. Ont. Case Law, col. 6438.

25. A bond to secure the sheriff a fixed salary by his deputy is void: Foott v. Bullock, 4 U. C. R. 480.

37. Money paid to the sheriff upon arrest for debt is held by the sheriff as statutory trustee, and the interest, if any, upon such money must be accounted for by him in the same way as the principal: McKane v. O'Brien, 10 E. L. R. 19, 40 N. B. 392.

33. The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation or removal of the sheriff, of right belong to the deputy himself: McKellar v. Henderson, 27 Gr. 181.

38. Armour, Titles, p. 396.

CHAPTER 17.

The Public Officers' Fees Act.

4.—(1) In line 1 "Supreme" is substituted for "High": 4 Geo. V. ch. 2, Schedule (4).

CHAPTER 18.

The Public Inquiries Act.

2. See particular provisions as to evidence re R. R. Gamey charges, 3 Edw. VII., ch. 10, and comment on bearing of Canada Evidence Act and R. S. O. 1897, ch. 73, sec. 5. See R. S. O. 1914, ch. 76, sec. 7.

CHAPTER 19.

The Official Notices Publication Act.

CHAPTER 20.

The Consolidated Revenue Fund Act.

CHAPTER 21.

THE PROVINCIAL LOANS ACT.

CHAPTER 22.

THE PUBLIC REVENUE ACT.

CHAPTER 23.

THE AUDIT ACT.

19. In lines 8 and 9, for " this section " read " section 18 ": 4 Geo. V. ch. 2, Schedule (5).

Section inserted: 4 Geo. V. ch. 2, Schedule (6).

CHAPTER 24.

THE SUCCESSION DUTY ACT.

Refer to: Bayly, Succession Duty in Canada; Hanson, Estate Legacy and Succession Duties; Remsen, Interstate Succession; Dos Passos, Collateral Inheritance Tax; Article, 16 C. L. T. 296, Succession Duty on Foreign Assets.

1. There is no considerable number of Ontario decisions as yet in regard to this tax. The Imperial Finance Act, 1894, the New York Statute (ch. 713 Laws of 1887) and amendments, the Pennsylvania Statute (Laws of 1887, No. 37), and the New York Taxable Transfers Act (Laws of 1896, ch. 908), are the principal similar statutes. The decisions of the Ontario Courts have in several instances been met by amendments to the statutes.

2.—(*a*) Aggregate value was held in Ross v. The Queen, 32 O. R. 143, (1901), 1 O. L. R. 487, to be properly

arrived at by deducting the debts of the estate. This was met by amendments to the statute (1 Edw. VII., ch. 8), and in Atty.-Gen. v. Lee, 9 O. L. R. 9, 10 O. L. R. 79, it was held that in establishing the aggregate value of the property of a deceased person the value of the land of the deceased, where such land was mortgaged, was to be regarded and not merely the value of the deceased's equity of redemption. The statute has been amended again: see 5 Edw. VII., ch. 6. See also Rec.-Gen. of N. B. v. Hayward, 35 N. B. Reps. 453. Recently see Atty.-Gen. v. Woodruff, 9 O. W. R. 18, 11 O. W. R. 82, 15 O. L. R. 416, 12 O. W. R. 611, 1908 A. C. 508, as to property properly omitted in aggregate value: and see also Re Lee, 14 O. W. R. 180, 18 O. L. R. 550. Life insurance payable to wife is part of aggregate of estate for purposes of fixing amount of duty, though in itself exempt from duty: Re Shambrook Estate, 44 C. L. J. 461, 28 C. L. T. 575, 12 O. W. R. 261 (see sec. 6 (d)).

2.—(*g*) Atty.-Gen. v. Newman, 31 O. R. 340, 1 O. L. R. 511. "Property": Re Roach, 10 O. L. R. 208.

4. Retrospective construction of enactments fixing the "aggregate" and dutiable value: Re Lee, 18 O. L. R. 550. The dutiable value of land is its fair market value at the date of the testator's death: Re Marshall Estate, 14 O. W. R. 1199, 1 O. W. N. 256, 20 O. L. R. 116. Succession duties are not a "debt" or testamentary "expenses." Legacies, unless exonerated, must pay their proportion of the duties levied on the whole estate: Re Bolster, 10 O. L. R. 591; Re Holland, 3 O. L. R. 406; Manning v. Robinson, 29 O. R. 483; Re Mackey, 6 O. L. R. 292: see sec. 18 (1), note, and notes to sec. 2 (*a*) supra. Sums *bona fide* paid by executors for the purpose of settling claims against them as such must be considered debts, for the purpose of administration and ascertaining the amount of succession duty: Ross v. The Queen, 32 O. R. 143, 1 O. L. R. 487. Succession duties are not "expenses" under a will: Re Meudell, 11 O. W. R. 1093.

5. "In a foreign country": mortgages on lands in Michigan, the mortgages being in decedent's custody

in Ontario at the time of his death, held liable for duty: Treasurer of Ontario v. Pattin, 22 O. L. R. 184. Had the securities been located out of Ontario at the time of death, the rule laid down in Woodruff v. A.-G., 1908, A. C. 508, would prevail. *Ib.* Simple contract debts which would have to be sued for out of Ontario are not taxable here. *Ib.*

6.—(*b*) See Cullen v. Atty.-Gen., L. R. 1 H. L. 190. " Carried out in Ontario: Re Gwynne Estate, 22 O. W. R. 405, 3 O. W. N. 1428.

6.—(*c*) See Atty.-Gen. v. Newman, 1 O. L. R. 511; Ross v. The Queen, 32 O. R. 143, 1 O. L. R. 487; Re Renfrew, 29 O. R. 565: see sec. 8, note.

6.—(*d*) " Money received ": see Insurance Act, R. S. O. 1914, ch. 183, sec. 178 *et seq.* Query, whether the effect of these sections of the Insurance Act is not to prevent such insurance moneys forming part of the deceased's estate for Succession Duty or otherwise. Query, if they must be disclosed in the inventory required to lead to grant of probate or administration or in the affidavit of value and relationship. See Re Shambrook Estate, 12 O. W. R. 261.

For " subsection 3 " in line 3 read " clause (c) ": 4 Geo. V. ch. 2, Schedule (7).

7.—(1) The question of domicile and local situs arises under this section. When the deceased was domiciled in Ontario at the time of his death and the tax is levied on property elsewhere, a constitutional question arises, as also when the deceased's last domicile was elsewhere and property locally situated is taxed: see Dicey Conflict of Laws; Hansen on Death Duties: Re Phipps, 143 N. Y. 641; Irwin v. Bank of Montreal, 38 U. C. R. 375; B. N. A. Act, sec. 92 (2), (13); In re Campbell's Estate (Manitoba Act); In re Templeton, 6 B. C. R. 180; Re Abbott, 29 Misc. 567; Dos Passos, Col. Inheritance Taxes: Hoyt v. Commers, 23 N. Y. 224; Re Romaine, 127 N. Y. 80; Re James, 144 N. Y. 6; Wallace v. Atty.-Gen., L. R. 1 Ch. Ap. 1; Thompson v. Atty.-Gen., 12 Cl. & Fin. 1; Atty.-Gen. v. Jewish Col. Ass'n, 1901,

1 Q. B. 123. See O. C. 12 Jan., 1906: Atty.-Gen. v. Woodruff, 15 O. L. R. 416, 12 O. W. R. 611, 1908, A. C. 508. Payment of duty under this Act is based upon administration, and duty is payable upon any property which can be administered in Ontario. Payment of non-negotiable deposit receipts payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, and succession duty is payable here in respect of the amount covered by them: Atty.-Gen. v. Newman, 31 O. R. 340, 1 O. L. R. 511. See also, In re McDonald Est., 9 B. C. R. 174; Atty.-Gen. v. Lovitt, 35 N. S. Reps. 223; Lovitt v. Atty.-Gen., 23 Occ. N. 212, 33 S. C. R. 350; The King v. Lovitt, 1912, A. C. 212; Lambe v. Manuel, 21 Occ. N. 250, Q. R. 18 S. C. 184, (1903), A. C. 68. Foreign bonds transferable by delivery and transferred by deceased to sons in foreign country are not within the Act, the powers of the legislature being strictly limited to direct taxation within the province: (B. N. A. Act, sec. 92 (2)). Any attempt to levy a tax on property locally situate outside the province is beyond their competence: Atty.-Gen. for Ontario v. Woodruff, 9 O. W. R. 82, 11 O. W. R. 82, 15 O. L. R. 416, 12 O. W. R. 611, 1908, A. C. 508. It is not within the powers of a Provincial Legislature to impose taxation on property situate outside the province: Woodruff v. Atty.-Gen. for Ontario, 1908, A. C. 508. Personal property "situate in Ontario:" The King v. Lovitt, 43 S. C. R. 106. Simple contract debts are liable to succession duty whether the deceased was domiciled in the jurisdiction or not: The King v. Lovitt, 1912, A. C. 212; Blackwood v. R., 1882, 8 App. Cas. 82. Non-resident deceased: all property which can only be administered in Ontario is property situate within Ontario: Irwin v. Bank of Montreal, 38 U. C. R. 375. Mortgages on foreign land, the property of a person resident in Ontario at the time of his death: Treasurer of Ontario v. Patten, 22 O. L. R. 184. Application of rule in Woodruff's case (1908 A. C. 508): see Treasurer of Ontario v. Patten, 22 O. L. R. 184. Duties on transmission of moveables having a local situs outside the provincial boundaries—Constitutionality: Cotton v. The King, 45 S.

C. R. 469; and see same case before Privy Council, 1914, A. C. 176, where it was held that the taxation imposed by the Quebec Succession Duty Act, 1906, was not direct taxation within the meaning of sec. 92 of the B. N. A. Act and consequently was *ultra vires* the Provincial Legislature. On the question of what is direct and what is indirect taxation within the meaning of the B. N. A. Act: see also Atty.-Gen. for Quebec v. Reed, 10 App. Cas. 141; Bank of Toronto v. Lambe, 12 App. Cas. 575; Brewers of Ontario v. Atty.-Gen. Ontario, 1897, A. C. 231. Taxation of "specialties:" Hope's Case, 1891, A. C. 476; Winans v. R., 1908, 1 K. B. 1022; Payne v. R., 1902, A. C. 522. Inheritance taxes upon estates of non-residents: see article, 49 C. L. J. 273.

7.—(2*a*) The testator, more than a year before his death and while in comparatively good health, conveyed the homestead to his two daughters, the conveyance being at once registered. No change of possession took place, the testator continuing to live in the house until his death. Held, that the conveyance to the daughters could not be deemed to be made in contemplation of death within sub-section (*a*), but it came within sub-section (*b*) taken in connection with section 2 (*g*) whereby property includes real as well as personal estate and was subject to duty: Re George Roach Estate, 10 O. L. R. 208. See Atty.-Gen. v. Woodruff, 1908, A. C. 508, and Lord Advocate v. Fleming, 1897, 1 A. C. 152; Lord Advocate v. Galloway, 1884, 11 R. 541; Simms v. Registrar of Probates, 1900, A. C. 323. See Dos Passos, Col. Inh. Tax for American Cases.

7. —(2*b*) *Donatio mortis causa* given in pursuance of contractual obligation for value not dutiable: Att.-Gen. for Ontario v. Brown, 3 O. L. R. 167.

7.—(2*d*) Where money passed from the intestate to his niece in pursuance of a contractual obligation for value, it was held not dutiable. The transfer was not a gift but implementing a contract: Atty.-Gen. v. Brown, 5 O. L. R. 167. Nor was it survivorship: *Ib.* See Receiver-General of N. B. v. Schofield, 35 N. B. Reps. 67. Settlement: see R. S. O. 1914, ch. 74, *e.g.*

7.—(2 *e*, *f*) See Atty.-Gen. v. Cameron, 27 O. R. 380: see R. S. O. 1914, ch. 183, sec. 178 *et seq.*

7.—(2*g*) Double duty: power of appointment: Atty.-Gen. v. Stuart, 2 O. L. R. 403.

8. Legislation as to percentage of value of estate payable as duty does not apply retrospectively: Re Lee, 18 O. L. R. 550. Computation of duty where deceased died domiciled abroad, having an aggregate estate over the taxable amount, but leaving property in Ontario under the taxable amount to persons in the preferred class: Re Renfrew, 1897, 29 O. R. 565. Rate of duty leviable: Re Lee, 18 O. L. R. 550, 14 O. W. R. 180.

9. By Imperial Order in Council, 26th October, 1896, it was ordered that the 20th section of the Finance Act, 1894, shall apply to the Province of Ontario. This section reads as follows:

20.—(1) Where the Commissioners are satisfied that in a British possession to which this section applies duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty payable in respect of that property on the same death.

(2) Nothing in this Act shall be held to create a charge for estate duty on any property situate in a British possession while so situate, or to authorize the Commissioners to take any proceedings in a British possession for the recovery of any estate duty.

(3) Provides that the section may be applied by Order in Council.

(4) Provides that the Order in Council may be revoked when it appears that the law of the British possession has been so altered that it would not authorize making the order.

Orders in Council extending the provisions of sec. 9 as to allowance of duty paid elsewhere have been passed with regard to the following: United Kingdom, 1906; British Columbia, 1908; Manitoba, 1909; New Brunswick, 1907; Nova Scotia, 1907; Saskatchewan, 1908; Prince Edward Island, 1912.

11. The Lieutenant-Governor by Order in Council has approved of the following companies and the bonds of these companies may be filed as security under the Succession Duty Act: Dominion of Canada Guarantee and Accident Insurance Company; Guarantee Company of North America; London Guarantee and Accident Company, Limited; Employers' Liability Assurance Corporation, Limited; United States Fidelity and Guaranty Company; Imperial Guarantee and Accident Company; London and Lancashire Guarantee and Accident Company of Canada; The Maryland Casualty Company; National Surety Company; Railway Passengers Assurance Company of London, England; The Guardian Accident and Guarantee Company of Montreal; Ocean Accident and Guarantee Corporation, Limited; Canadian Surety Company.

12.—(1) The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate of which probate or administration is sought is liable or not to pay succession duty and the amount of such duty: his decision being subject to appeal: Re Renfrew, 29 O. R. 565.

12.—(4) See Re George Roach Estate, 10 O. L. R. 208.

13. "Legacy given by way of annuity": Bethune v. The King, 26 O. L. R. 117.

14. Under the former reading of the section "any person dissatisfied may," etc., it was held that the Treasurer had a right of appeal that he was not limited to the grounds expressly stated, the whole appraisement being open to appeal. And the appeal being for an amount in excess of $10,000, there was a further appeal to a Judge in Court: Re George Roach Estate, 10 O. L. R. 208. Appeal: see Judicature Act, R. S. O. 1914, ch. 56, sec. 26 (2) (*n*).

15. In computing the duty on an annuity payable at the testator's death and of which there is present actual enjoyment, the duty thereon must be assessed on its then cash value. On a deferred annuity duty is payable when the right to enjoy it commences.

Duty is also payable on the capital producing an annuity when it becomes distributable as legacies or as part of the final distribution of the estate. The payment of duty on future estates being deferred until they become estates in possession, the duty then payable is not that fixed at the time of the death, but that assessed on the value of such estates or interests at the time the right of possession or enjoyment ensues: Atty.-Gen. v. Cameron, 27 O. R. 380. The duty payable on deferred annuities when payable, includes the amount actually distributed whether increased by accumulations or decreased by loss: Atty.-Gen. v. Cameron, 28 O. R. 571. Income payable for life or years; when duty payable on corpus: Atty.-Gen. v. Toronto General Trusts, 5 O. L. R. 216.

16.—(7) An executor in negotiating and settling the amount of tax may be a Crown agent and may require for his own protection the consent of the parties liable: (see under the Pennsylvania Act, Seibert's appeal, Pa. Supp., 6 Atl. 105).

18. Liability of real property residue for payment of succession duty: Foxwell v. Kennedy, 24 O. L. R. 189. Mixed fund for payment of debts and succession duty: Re Gordon, 1877, L. R. 6 C. D. 531; Foxwell v. Kennedy, 2 O. W. N. 821, 18 O. W. R. 782, 24 O. L. R. 189. Succession duty payable in respect of pecuniary legacies should be deducted from them and not from the residue: Kennedy v. Protestant Orphans' Home, 25 O. R. 235; Manning v. Robinson, 29 O. R. 484; Ross v. The Queen, 32 O. R. 143, 1 O. L. R. 487; see sec. 4, note. A direction in a will to executors to pay debts, funeral and testamentary expenses, does not operate so as to make succession duty a charge on the residue and to exonerate the residue from payment thereof: Re Holland, 3 O. L. R. 406; Re Bolster, 10 O. L. R. 591. A bequest free of "legacy duty" in Ontario, is interpreted as free of "succession duty": Re Gwynne Estate, 22 O. W. R. 405, 3 O. W. N. 1428.

19. Where executors erroneously and in ignorance of the existence of claims over valued the estate and paid succession duty for which the estate would not

have been liable had the amount of such claims been deducted therefrom, they were held entitled to recover back from the Crown the amount of the duty wrongly paid: Ross v. The Queen, 32 O. R. 143, 1 O. L. R. 487.

21. Under the former reading of the Act, the High Court had no jurisdiction to entertain an appeal from a Surrogate Registrar. A special forum was held to have been created by the statute: Atty.-Gen. v. Cameron, 26 A. R. 103. In litigation under this Act express power is given to the Supreme Court to deal with the costs thereof, and where an estate had paid or was ready to pay all duties which could properly be claimed against it, it was entitled to the costs of opposing a claim for higher duties: Atty.-Gen. v. Toronto Gen. Trusts, 5 O. L. R. 607. Recovery of money paid as succession duty in respect of an annuity: Belhune v. Rex, 21 O. W. R. 559, 3 O. W. N. 941. "Dutiable" property: A.-G. Ontario v. Brown, 5 O. L. R. 167. Costs against the Crown: A.-G. Ontario v. T. G. T. Co., 5 O. L. R. 607; Lovitt v. A.-G. Nova Scotia, 33 S. C. R. 350.

23. Rules and regulations made by the Lieutenant-Governor in Council, 5th May, 1909, for carrying into effect the Succession Duty Act have been printed for distribution by the Department. A recent amendment provides for the filing of an account in the office of the Surrogate Registrar, where it is desired to register the original will or an exemplification of a foreign probate and obtain his certificate under the Registry Act, R. S. O. 1914, ch. 124, sec. 55, sub-sec. 4. Forms have also been approved and published covering, 1, Affidavit of Value and Relationship; 2, Short Affidavit of Value (optional where gross value under $5,000), Schedules A and B to the foregoing affidavits; 2a, Notice of Application for Letters; 3, Bond by Applicants; 4, Affidavit of Debts and Schedule of Debts; 5, Direction to Surrogate Judge to Make Valuation and Assess Duty; 6, Order of Judge Directing Hearing and Service of Persons Interested; 7, Notice by Surrogate Judge to Interested Persons; 8, Report of Sheriff; 9, Certificate of Discharge; 10, Certificate of Filing Account for Registration.

CHAPTER 25.

The Law Stamps Act.

6. An appearance to a writ was filed in the office of a deputy clerk of the Crown who was also clerk of the County Court, but, by mistake, was put with County Court papers and a stamp necessary for appearance in the Superior Court was not affixed. The plaintiff signed judgment as on default of appearance. It was held that the appearance was a nullity and was absolutely void under the Stamp Act, and leave was refused to have the stamp affixed as of the date of filing or to take it off the County Court files: Bank of Montreal v. Harrison, 4 P. R. 331. Until the law stamps have been attached to or impressed on the paper upon which a judgment is drawn up, there is no complete effective or valid judgment. An appearance tendered after all the work of signing judgment in default of appearance has been completed, except attaching the stamps, should be received and entered: Smith v. Logan, 17 P. R. 219: see Macbeth v. Smart, 1 Ch. Ch. 269; Jones v. Jones, 4 P. R. 194; Denmark v. McConaghy, 8 P. R. 136. Deeds executed in England conveying land in this province do not require to be stamped under the provisions of the English Stamp Acts: Murray v. Vanbrocklin, 1 Ch. Ch. 300. Constitutionality: see Attorney-General v. Reed, 10 App. Cas. 141, 3 Cart. 190; County of Hastings v. Ponton, 5 A. R. 543; Atty.-Gen. for Quebec v. Queen Ins. Co., 3 App. Cas. 1090, 1 Cart. 117.

CHAPTER 26.

The Mining Tax Act.

14. "Income derived from the mine": see Re Coniagas and Cobalt, 15 O. L. R. 386. See also R. S. O. 1914, ch. 195, sec. 40.

21. Where lands were sold in a Mechanic's Lien action, the purchaser took subject to the tax: Wesner Drilling Co. v. Tremblay, 18 O. L. R. 439, 13 O. W. R. 1017.

37.—(1) In line 8 for "High Court Division" read "Supreme Court": 4 Geo. V. ch. 2, Schedule (8).

43. In line 1 for "29" read "28": 4 Geo. V. ch. 2, Schedule (9).

CHAPTER 27.

The Corporations Tax Act.

CHAPTER 28.

The Public Lands Act.

2.—(*d*) Slides and dams constructed on streams running through Crown lands, out of logs the property of the Crown, are not assessable. Timber licenses are not assessable and there is nothing to remove the lands over which they are granted from the category of Crown lands exempt from taxation: Re Shier; Re Dyment, 14 O. L. R. 210. Public lands: law in regard to fences and cattle running at large: Fensom v. C. P. R., 7 O. L. R. 254, 8 O. L. R. 688. See R. S. O. 1914, ch. 247. "Virgin soil . . . hardly deserves to be called waste lands. The waste lands of the Crown in England are something entirely different. . . . There is no sort of suggestion of any commonable rights over such lands; the contrary is abundantly evident": Per Meredith, J.: Fensom v. C. P. R., 7 O. L. R., at p. 270.

14. A receipt for purchase money of land from the Crown entitles the purchaser to maintain trespass: Deedes v. Wallace, 8 C. P. 385; Glover v. Walker, 5 C. P. 478; Alexander v. Bird, 8 C. P. 539; Whiting v. Kernahan, 12 C. P. 57, but actual possession is necessary: Henderson v. McLean, 8 C. P. 42. What

is a purchaser: see Wells v. Cummings, 27 U. C. R. 470. A person holding land under a license of occupation from the Crown is entitled to a demand of possession before ejectment brought by a grantee of the Crown: Doe d. Creen v. Friesman, 5 O. S. 661. The Crown cannot at its pleasure divest a purchaser of his right to eject intruders nor change a wrongful occupant into a rightful occupant to the prejudice of their own vendee; Doe d. Henderson v. Seymour, 9 U. C. R. 47; Doe d. Henderson v. Westover, 1 E. & A. 465. A widow is entitled to dower in the lands purchased from the Crown by her deceased husband and of which he died possessed, although no patent had issued and the purchase money was not all paid. She is also entitled to one-third of the rents and profits for six years before commencement of action: Craig v. Templeton, 8 Gr. 483. Where a dispute arose between vendor and purchaser before issue of patent the Court would not interfere as the whole estate legal and equitable was in the Crown: Bown v. West, 1 O. S. 287. A widower was locatee and agreed to assign his interest to his son in return for certain services. The locatee married again and subsequently the patent issued to the son. The widow was refused dower: Burns v. Burns, 21 Gr. 7. One through whom the plaintiff claimed obtained a receipt on sale of a certain lot, in 1855. Thirteen years later the person in whose possession the receipt was handed it back, procured his name fraudulently to be substituted and he and the defendant who claimed under him remained in possession of the land. The application was pending until 1889, when the Commissioner ordered a patent to issue to the defendant, but allowed the plaintiff time to assert his title in the Courts. It was held he was not barred by the Statute of Limitations: McLure v. Black, 20 O. R. 70. The locatee of Crown lands under the Act of 1868 had no power to sell or dispose of pine timber growing thereon: Hughson v. Cook, 20 Gr. 238. The interest of a debtor in land bought from the Crown and for which at his death he had not fully paid and had not obtained a patent, is available for the benefit of his creditors and their right is not destroyed by a friend having paid the balance of the purchase money and having procured

the issue of the patent to the heirs: Ferguson v. Ferguson, 16 Gr. 309. Court will order sale of locatees' interest under an execution, and order him to join in the conveyance to enable the purchaser to apply for a patent as vendee or assignee of the locatee: Yale v. Tollerton, 13 Gr. 302. Trespass: Henderson v. McLean, 8 C. P. 42, and 16 U. C. R. 630. Nicholson v. Page, 27 U. C. R. 505; Bruyea v. Rose, 19 O. R. 433; Killichan v. Robertson, 6 O. S. 468; Greenlaw v. Fraser, 24 C. P. 230. A patent operates by way of feoffment with livery of seizin. (*Ib.*) A receipt was not sufficient evidence of title to maintain ejectment. A license of occupation or a patent was necessary: Walker v. Rogers, 12 C. P. 327. But is sufficient to maintain trespass: Whiting v. Kernihan, 12 C. P. 57; and see Deedes v. Wallace, note to sec. 14; and also Armstrong v. Campbell, 4 C. P. 15. In Young v. Scobie, 10 U. C. R. 372, it was held that receipts *prima facie* imported a sale to the plaintiff in ejectment. Where a married woman claims under letters patent from the Crown, her husband need not have entered on the land in order to entitle him to a tenancy by the curtesy, the letters patent constituting seizin in fact: Weaver v. Burgess, 22 C. P. 104. Non-compliance with the terms of the Act: see Barton v. Muir, L. R. 6 C. P. 134; Tooth v. Power, 1891, A. C. 284. Distress for taxes on located Crown lot: Pattison v. Emo, 4 O. W. N. 807, 28 O. L. R. 228. Ejectment as between trespassers on unpatented lands: Effect of possessory acts under colour of title: See Annotation, 1 D. L. R. 28; see also notes to R. S. O. 1914, ch. 75, secs. 5 and 6 (4).

15. Where the Department has considered opposing claims and a patent is directed to issue to one claimant the Court cannot review the decision although it might have taken a different view in the first instance: Kennedy v. Lawlor, 14 Gr. 224; see Boulton v. Jeffrey, 1 E. & A. 111; Barnes v. Boomer, 10 Gr. 224. The Court has jurisdiction to relieve against a fraudulent assignment by a locatee before the issuing of letters patent, but the complainant must shew why it was necessary to come to the Court: Bull v. Frank, 12 Gr. 80; see Yale v. Fullerton, 13 Gr. 302, *supra*. Express notice of an un-

registered assignment of unpatented land has the same effect as the like notice of an unregistered conveyance after patent issued: Goff v. Lister, 13 Gr. 406, 14 Gr. 451. Mortgagee of Crown vendee: see Garside v. King, 2 Gr. 673. The omission to register does not invalidate the transfer as against the assignor; it operates to prevent the locatee dying beneficially entitled and defeats any claim of the widow under the Dower Act: Brown v. Brown, 8 O. L. R. 332. It is no part of the functions of the Court to take evidence or find facts upon which the officers of the Crown may act in the disposition of the rights to claimants to grants of Crown lands: Brouse v. Cram, 14 Gr. 677.

16. Court will not review decision of the Commissioner: Kennedy v. Lawlor, 14 Gr. 224. Evidence required for cancellation: Attorney-General v. Garbutt, 5 Gr. 181. Concealment: Fritch v. Scheck, 10 Gr. 254; Mahon v. McLean, 13 Gr. 361; Attorney-General v. McNulty, 8 Gr. 324; Lawrence v. Pomeroy, 9 Gr. 474. Fraudulent misrepresentation: Atty.-Gen. v. Contois, 25 Gr. 346. Commissioner's error: McIntyre v. Attorney-General, 14 Gr. 86. Grant to wrong person: Atty.-Gen. v. Garbutt, 5 Gr. 383. Grant of reserved square: Saugeen v. Church Society, 6 Gr. 538. Concealment of improvements: Bailey v. Du Cailland, 6 O. W. R. 506. Concealment: Atty.-Gen. v. McGowan, 24 Occ. N. 136. Nondisclosure: Lakeview Mining Co. v. Moore, 36 N. S. Reps. 333. Description to accord with grants of other parcels: Drulard v. Welsh, 7 O. W. R. 575, 11 O. L. R. 647 (also 9 O. W. R. 491, 14 O. L. R. 54). Derogation from previous grant: Kilgour v. Port Arthur, 10 O. W. R. 841. Issue by error or improvidence, *scire facias*, Attorney-General's *fiat*: Farah v. Bailey, 10 O. W. R. 252; see also Farah v. Glen Lake Mining Co., 11 O. W. R. 1020, 17 O. L. R. 1. Misrepresentation: Zock v. Clayton, 4 O. W. N. 1047, 28 O. L. R. 447. Grant by Dominion Government: subsequent statutory grant by province: McGregor v. Esquimault, etc., Ry., 1907, A. C. 450. Occupancy of lands under French title and title of occupants under Imp. Acts, 14 Geo. III., ch. 83, and 31 Geo. III., ch. 31, sec. 33: see Drulard v. Welsh, 11 O. L. R. 647 (also see S. C. 14 O. L. R. 54). The Crown cannot, any more than

a private person, derogate from its own grant: Boehner v. Hirtle, 6 D. L. R. 548, 11 E. L. R. 222. As to dealing with title by legislation and refusal of Dominion Government to disallow: see 7 Edw. VII., ch. 15, 45 C. L. J. 297; and see article by Prof. Dicey, 45 C. L. J. 457, and see Florence Mining Co. v. Cobalt Lake, 10 O. W. R. 38, 225, 18 O. L. R. 275, 13 O. W. R. 837. Where a bill is filed by a private individual to repeal letters patent the onus of proof is on the plaintiff, even if it may involve proof of a negative: McIntyre v. Atty.-Gen., 14 Gr. 86. Consideration of the provisions of the Land Titles Act where patents affected: see Farah v. Bailey, 10 O. W. R. 252; Farah v. Glen Lake Mining Co., 17 O. L. R. 1; Zock v. Clayton, 28 O. L. R. 447. See notes to sec. 22, *infra*.

17. Adverse possession: see Maddison v. Emmerson, 24 Occ. N. 204. Ejectment as between trespassers of unpatented lands. Possessory acts under colour of title: see Annotation, 1 D. L. R. 28.

20. A patent of land is to be upheld rather than avoided, and is to be construed most favourably for the grantee: Doe d. Devine v. Wilson, 10 Moo. P. C. 502; Hyatt v. Mills, 20 O. R. 351; see 19 A. R. 329. When the Crown has issued letters patent in view of all the facts the grant is conclusive and a party cannot set up equities behind the patent: Farmer v. Livingstone, 8 S. C. R. 140. Reference may be had to papers in Crown lands office in construing patent: Brady v. Sadler, 13 O. R. 462, 16 O. R. 49, 17 A. R. 365. Grants from the Crown for value or special favour are to be construed in the same manner as deeds from subject to subject: Clark v. Bonnycastle, 5 O. S. 528.

22. Cases in which the High Court has exercised jurisdiction in respect of Crown Patents are collected in Holmested and Langton, pp. 24, 25. Action by Atty.-Gen. to set aside patent obtained by fraud: A.-G. v. Devlin, 15 O. W. R. 584, 1 O. W. N. 554. An action to declare void a Crown patent for land on the ground that it was issued through fraud, error or improvidence, may be maintained in the Supreme Court of Ontario and the Attorney-General is not

a necessary party. History of jurisdiction and legislation and review of authorities: see Farah v. Glen Lake Mining Co., 17 O. L. R. 1; Zock v. Clayton, 4 O. W. N. 1047, 28 O. L. R. 447. See In re Clarke, 7 Moo. P. C. 77. See also cases noted sec. 16 *supra*, and as to operation of Land Titles Act where patents affected.

24. Liability of locatee for taxes unpaid by previous locatee: Pattison v. Emo, 28 O. L. R. 228.

29. Administration of oath by Crown Timber Agent: R. v. Johnston, 17 O. W. R. 78, 2 O. W. N. 106.

30. Nicholson v. Page, 27 U. C. R. 318.

31. The Ontario Legislature had jurisdiction to enact this section except so far as it relates to land in the harbours and canals, if any of the latter be included in the words " other navigable waters of Ontario ": A.-G. of Canada v. A.-G.'s of Ontario, Quebec and Nova Scotia, 1898, A. C. 700.

33. What is Free Grant Territory: Lakefield v. Shairp, 17 A. R. 322, 19 S. C. R. 657.

35. See O'Shanassy v. Joachim, 1 App. Cas. 82.

38. Meek v. Parsons, 31 O. R. 529; Chapiewski v. Campbell, 29 O. R. 343. False representation as to performance of settlement duties: Atty.-Gen. v. Devlin. 1 O. W. N. 554, 15 O. W. R. 584.

39. Where by forfeiture the interest of a locatee in land has ceased, the lien of the municipality for taxes which is a charge on the interest of the locatee, ceases also to exist: Pattison v. Emo, 28 O. L. R. 228, 4 O. W. N. 807, 12 D. L. R. 309.

42. A locatee of free grant lands who has sold the pine trees on his land before the issue of the patent and contrary to the provisions of the Act, is not, nor anyone claiming under him, after its issue, estopped from denying the validity of the sale: Chapiewski v. Campbell, 29 O. R. 343. The right of the locatee is only to cut and dispose of trees during the process of actually clearing the land for cultivation,

where it appears to be and is requisite that the trees should be removed. He cannot sell the standing timber on the parcel *en bloc,* even though he may *bona fide* intend to clear the land: McArthur v. Deans, 21 O. R. 380. A patent in the usual form of a patent in fee was issued referring to the lot as "located and sold." The township was within the geographical limits of the section, but had never been appropriated or set apart under the provisions of the Act. It was held that the patent was not subject to the reservations as to timber. Persons entering and cutting timber after the issue of this patent were liable in damages: Lakefield, &c., v. Shairp, 17 A. R. 322, 19 S. C. R. 657. Under a patent containing the clause usual in 1796, reserving to the Crown all white pine trees, a transferee of the patentee could maintain trover for the white pine—for the soil where they grew was his and he was entitled to their shade as against a stranger: Casselman v. Hersey, 32 U. C. R. 333. See as to power to enter and cut pine: Martin v. Romleskie, 12 O. W .R. 1165. Logs: ownership of: McWilliams v. Dickson, 8 O. W. R. 211. Non-compliance with terms of Act: see Tooth v. Power, 1891, A. C. 284.

44. This section does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof. Where such agreement was entered into it was enforced after the issue of the patent and where all requisites had been complied with by the locatee. The Act refers to alienation and any transfer short of a conveyance of title is not alienation: Meek v. Parsons, 31 O. R. 54, 529; see Re Beatty and Finlayson, 27 O. R. 642. See also, Chaprewski v. Campbell, 29 O. R. 343; Hoig v. Gordon, 17 Gr. 599. The section is considered in Meek v. Parsons, 31 O. R. 529, which must be considered as overruling Chaprewski v. Campbell, 29 O. R. 343, so far as opposed to it. Incumbering unpatented lands: McMillan v. American-Abell Engine Co., 11 West. L. R. 185, 42 S. C. R. 377. Effect of this section where wife of locatee does not join in conveyance of an interest in the land: Austin v. Riley, 16 O. W. R. 668, 19 O. W. R. 40, 23 O. L. R. 593. A patentee was described as a Free Grant settler, but the patent did not contain the necessary

statements under the Free Grants Act. The patentee took absolutely and unconditionally: Canada Permanent v. Taylor, 31 U. C. C. P. 41. Wife of locatee not joining, agreement void: American Abell Co. v. McMillan, 42 S. C. R. 377. Where locatee and wife negotiated an exchange of their free grant land within 20 years after issue of patent but the wife failed to sign the contract, the contract was held valid and enforceable: Asselin v. Aubin, 16 O. W. R. 566, 1 O. W. N. 986. See Armour, Real Property, pp. 305-306.

44.—(3) For "High Court Division" in line 11 read "Supreme Court": 4 George V. ch. 2 Schedule (10).

45. An execution against the lands of a patentee on a judgment for a debt incurred before location of the lands, does not operate as a charge against the lands when sold by his devisee even after the expiry of twenty years from the date of the location: Re Beatty & Finlayson, 27 O. R. 642. A locatee duly obtained patents, subsequently he and his wife sold, taking back mortgages to secure the purchase money. These mortgages were not interests in the lands exempt from levy under execution. The exemption only extends to the original location title. Where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him qua locatee. The word interest does not extend to the chattel interest of a mortgagee: Cann v. Knott, 19 O. R. 422, 20 O. R. 294; Armour, Titles, pp. 181 and 392. See notes to R. S. O. 1914, ch. 80, sec. 3.

47. Armour, Real Property, pp. 122 and 133. Seizure of goods of new locatee for taxes: Pattison v. Emo, 28 O. L. R. 228, note to sec. 39, *supra*.

53. Martin v. Romleskie, 12 O. W. R. 1165.

53, 54. Sections construed as to ownership of minerals: Austin v. Riley, 2 O. W. N. 1007, 19 O. W. R. 40, 23 O. L. R. 593.

57. A reservation in a Crown grant of a right to resume possession for public purposes not void for perpetuity: Cooper v. Stuart, 14 App. Cas. 286: see also as

to resumption of possession by Crown in virtue of reservation in original grant: Natal (Col. Sec.) v. Behrens, 14 App. Cas. 331; Sydney Municipal Council v. Atty.-Gen. New South Wales, 1894, A. C. 444; Davenport v. R., 3 App. Cas. 115. Conditions in grants: Hoggan v. Esquimalt, 1894, A. C. 478; Abbott v. Minister of Lands, 1895, A. C. 425; Tearle v. Edols, 13 App. Cas. 183. Reservation in Crown grant; land bordering on river: Williams v. Pickard, 17 O. L. R. 547. Reservation of "free access to the shore for all vessels, boats and persons" gives a right of access only from the water to the shore: Regina v. Davy, 27 A. R. 508. Effect of pine reservations under the Mines Act: Gordon v. Moose Mountain, 22 O. L. R. 373. Consideration of reservations in Crown grants: Farquharson v. Barnard, etc., Oil and Gas Co., 20 O. W. R. 351, 25 O. L. R. 93, 1912, A. C. 864. Presumptions in grants from the Crown: Bartlett v. Delaney, 27 O. L. R. 594, 5 O. W. N. 200. Construction of grants: Riparian owners on "navigable and floatable rivers:" MacLaren v. Atty.-Gen. Quebec, 1914, A. C. 258. Reservation of mines and minerals by the Crown and subsequent rescission (8 Edw. VII. ch. 17) of such reservation. Effect of the Statute is to operate as a withdrawal *ab initio* of the reservation and confirmation of the title of the original patentee and those claiming under him: Austin v. Riley, 19 O. W. R. 40, 2 O. W. N. 1007, 23 O. L. R. 593. See R. S. O. 1914, ch. 32, sec. 111 and notes. As to reservation of pine trees in grants of mining lands, R. S. O. 1914, ch. 32, sec. 112.

CHAPTER 29.

The Crown Timber Act.

3.—(1) The plaintiff (timber licensee) sold his interest in the license and limits to W., but the transfer was not approved by the Crown as required. It was held that the legal title to the limits and timber was in the plaintiff, and W.'s possession was the plaintiff's, who was entitled to maintain an action for damages to the limits: Booth v. McIntyre, 31 C. P. 183. Where timber licenses were subject to the right of a railway acquired before Confederation to construct across the lands in question, the defendants, assignees of the railway, were not liable for damages for cutting timber on the limits in carrying on the building of the railway: Foran v. McIntyre, 45 U. C. R. 288; see Booth v. McIntyre, 31 C. P. 183. Crown timber agents have no right to dispose of timber on lands sold by Crown land agents, and cannot affect the rights of purchasers against trespassers: Alexander v. Bird, 8 C. P. 539; see Farquharson v. Knight, 25 U. C. R. 413. A purchaser holding a receipt for an instalment, and having actual possession, may maintain trespass against all comers, though not against the Crown: Glover v. Walker, 5 C. P. 478.

4. Effect of sale of lands on license and of issue of patent: Farquharson v. Knight, 25 U. C. R. 413; McMullen v. Macdonell, 27 U. C. R. 36. Replevin against a wrongdoer in interval between licenses: Gilmour v. Burk, 24 C. P. 187. Hay on lands under license: Graham v. Heenan, 20 C. P. 340; McDonald v. Bonfield, 20 C. P. 73. Timber on road allowances: see Burleigh v. Campbell, 20 C. P. 369; note to sec. 11. A party obtaining from the Crown agent a license to enter and cut a quantity of timber of particular dimensions, not having exclusive possession, cannot maintain trespass: McLaren v. Rice, 5 U. C. R. 151. An agreement for the sale of a share in a timber limit held under license is an agreement for the sale of an interest in land within the 4th section of the Statute of Frauds: Hoeffler v. Irwin, 8 O. L. R. 740. The appellants cut timber on land afterwards

licensed to the respondent, and removed the timber after the actual grant of the license to the respondent, their contention being that the logs having been cut before the commencement of the respondent's title were not his property, but the property of the Crown. The appellants were held wrongdoers. The respondents' title was good as against them, and they were not entitled to set up a *jus tertii* against the respondents: Glenwood Lumber Co. v. Phillips, 1904, A. C. 405. The licenses are granted simply for a year, and under the Crown Lumber Regulations, expire on April 30th, each year. In case a license is not renewed promptly and a fire occurs in the interval, the licensees have no status to claim damages: Gillies v. Temiscaming and Northern (No. 1), 10 O. W. R. 971. Timber licenses are not real property, and are not assessable. What the holder has is the right to convert into personal property and thereby acquire a title in himself, in that which until the act of conversion is real property of the Crown: Re Shier, 14 O. L. R. 210. Lumber camps and slides and dams on Crown lands are not assessable: Re Shier, 14 O. L. R. 210. What amounts to taking possession and part performance: Thomson v. Playfair, 25 O. L. R. 365. Where timber unlawfully taken from Crown property was taken by force out of the hands of the first takers who recovered a judgment against the trespassers which included the value of the timber, the Crown was held entitled to claim so much of their payment as represented the value of the timber exclusive of the labour and money expended on it. Attorney-General v. Price, 15 Gr. 304. And the defendant was ordered to pay the costs of the relators. Atty.-Gen. v. Price, 18 Gr. 7. Licenses are personal estate: Bennett v. O'Meara, 15 Gr. 396. Query, whether as was assumed in this case the holder of a license which has expired may sue for trees cut during its currency: White v. Dunlop, 27 U. C. R. 237. The licenses are sufficiently proved by the evidence of the Crown timber agent who issued them in the discharge of his duty and acting as such agent: Boyd v. Link, 29 U. C. R. 365. Interest of lienor in insurance moneys representing value of logs: Chew v. Caswell, 13 O. W. R. 548, 14 O. W. R. 415, 19 O. L. R. 77. A firm being Crown timber licensees with a right to cut timber on specified lands wrong-

fully entered on other lands, cut pine and manufactured railway ties which they proceeded to deliver under contracts. The Crown Timber Agent ordered them to desist when they had removed all but a few ties and afterwards permitted removal of the others, charging dues in respect of all pine cut, including that cut on the respondent's lands. It was held that the property in the pine continued in the Crown after it was cut. The respondents if they had possession, were merely bailees for the Crown and could not maintain trover or detinue against the appellants, who were entitled to rely on the title of the Crown. Also that the appellants were not by reason of having received the benefit of the pine trees cut, liable in trespass for the acts committed by them: Eastern Construction Co. v. National Trusts, 1914, A. C. 197. A judgment debtor's interest in lands as a licensee thereof under the Crown Timber Act is liable to seizure and sale under a Fi. Fa. goods and lands: Glenwood Lumber Co. v. Phillips, 1904, A. C. 405; McPherson v. Temiscaming, 1913, A. C. 145. Where an execution is levied on timber cut by an assignee of a Crown timber licensee under an assignment made subsequently to the issue of the writ, the levy is valid unless the assignee took in good faith, for value, and without notice of the execution, and has paid his purchase money: McPherson v. Temiscaming, 1912, A. C. 145, 23 O. W. R. 458, P. C.

6. Manufacturing condition as to pine on Crown lands; application of Statute: Smylie v. The Queen, 31 O. R. 202.

11. Licensees of timber limits are not liable for cutting timber on road allowances under the authority of the Crown: Burleigh v. Campbell, 18 C. P. 457. See also under former rule as to by-laws: Barrie v. Gillies, 20 C. P. 369.

12. See Public Lands Act, R. S. O. 1914, ch. 28, secs. 44, 45, 52, 53, 55, as to timber on Free Grant lands.

14. Authority of Crown Timber Agent to administer oaths: R. v. Johnston, 17 O. W. R. 78, 2 O. W. N. 106.

20. A Crown agent was not authorized to seize boards made from Crown timber wrongfully: Miller v. Clark, 10 U. C. R. 9.

CHAPTER 30.

THE FOREST RESERVES ACT.

CHAPTER 31.

THE BED OF NAVIGABLE WATERS ACT.

2. Navigable water within meaning of this statute: Williams v. Salter, 23 O. W. R. 34. Right of Crown grantee to land encroached on by waters of Lake Erie: Volcanic Oil Co. v. Chaplin, 27 O. L. R. 34, 484. Lands bordering on Lake Erie: Poulin v. Eberle, 4 O. W. N. 1545, 24 O. W. R. 792. History of Toronto Harbour: proprietary and riparian rights in Ashbridge's Bay: Merritt v. Toronto, 23 O. L. R. 365, 27 O. L. R. 1, 48 S. C. R. 1. Title to lands in Detroit River: Bartlett v. Delaney, 4 O. W. N. 577, 27 O. L. R. 594. The Act does not apply where the patent expressly grants bed of river: Bartlett v. Delaney, 5 O. W. N. 200. The title to a piece of land in the St. Lawrence River above tide-water and formed by earth and stone deposited in the bed of the river was held to be in the Crown. The presumption in Keewatin v. Kenora, 16 O. L. R. 184, that the title to the *alveus* is in the riparian proprietor was rebutted and this section was held to justify the conclusion: Haggerty v. Latreille, 29 O. L. R. 300. See also Dixon v. Snetsinger, 23 C. P. 235. Crown grant of lands bordering on river: Williams v. Pickard, 15 O. L. R. 655, 17 O. L. R. 547. See the Surveys Act, R. S. O. 1914, ch. 166, sec. 34. See also R. S. O. 1914, ch. 28, sec. 57, notes.

3. Bed of navigable waters: Keewatin v. Ontario, 13 O. L. R. 237, 16 O. L. R. 184; Johnson v. O'Neil, 1911, A. C. 552; Minor v. Gilmore, 12 Moo. P. C. 131. Navigable waters: 26 S. C. R. 444; 1898, A. C. 700. Review of cases: Merritt v. Toronto, 22 O. W. R. 710, 3 O. W. N. 1550, 27 O. L. R. 1, 48 S. C. R. 1.

CHAPTER 32.

The Mining Act.

Refer to: Price, Ontario Mining Commissioners' Cases; Mining and Water Cases Annotated; McPherson and Clark, Law of Mines in Canada; Article, 42 C. L. J. 89, J. M. Clark; Armstrong, Law of Gold Mining in Australia; De Lissa, Kemp, (Austral.), MacSwinney, Bainbridge (Eng.).

2.—(*k*) "Mining": Coniagas v. Cobalt, 13 O. W. R. 333, 15 O. W. R. 761, 20 O. L. R. 622.

2.—(*l*) Meaning of a reservation of mines of coal, ironstone, slates and other mineral: Lord Provost of Glasgow v. Fairlie, 13 App. Cas. 657. See also *post*, notes to sec. 119.

2.—(*m*) Commission on sale of "Mining Lands": Cavanagh v. Glendenning, 10 O. W. R. 475; Wiley v. Blum, 10 O. W. R. 565. Mining rights: Florence Mining Co. v. Cobalt Lake, 13 O. W. R. 837, 18 O. L. R. 275. Meaning of "mining rights" in conveyances of land other than from the Crown: see R. S. O. 1914, ch. 109, secs. 16-19.

2.—(*r*) Crown prerogative to precious metals: Florence Mining Co. v. Cobalt Lake, 10 O. W. R. 38, 225, 13 O. W. R. 837, 18 O. L. R. 275: and see sec. 111 note.

2.—(*w*) Meaning of "mining rights" and "surface rights" in conveyances of land other than from the Crown: see R. S. O. 1914, ch. 109, secs. 16-19.

2.—(*x*) "Valuable Mineral": Re Blye and Downey, 11 O. W. R. 393, 12 O. W. R. 986; Florence Mining Co. v. Cobalt Lake, 13 O. W. R. 837, 18 O. L. R. 275, and see note to R. S. O. 1914, ch. 28, sec. 16.

8. In line 11 for "in which" read "of which": 4 Geo. V. ch. 2, Schedule (11).

19. Cf. R. S. B. C. ch. 18, sec. 104.

22. Prospecting after expiry of license: Re Sanderson and Saville, 3 O. W. N. 1560, 22 O. W. R. 672, 26 O. L. R. 616; and see sec. 176 (*n*). A licensee is not required by the Act to do the staking, blazing, etc., but the affidavit must be made on first hand knowledge and not guess work or information of others: Re McLeod and Armstrong, 5 O. W. N. 145.

28. Cf. R. S. B. C., ch. 18, sec. 7.

31. Cf. R. S. B. C., ch. 18, sec. 6.

35. In Ontario, the essential starting point is a sufficient discovery of mineral; the proper location of it follows: Re Wright and Coleman, 12 O. W. R. 248, 13 O. W. R. 900; Atty.-Gen. of Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319; Re McNeil and Plotke, 17 O. L. R. 621. The primary requisites are the possession of a miner's license and discovery made on lands open for prospecting: Florence Mining Co. v. Cobalt Lake, 18 O. L. R. 275, at 286. Discovery: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986. No *bona fide* discovery: Re Spurr & Murphy, 14 O. W. R. 1239, 1 O. W. N. 287. Action for services in discovering claims and for fees paid: Rasch v. Heckler, 1 O. W. N. 288. Contest between one alleging valuable discovery and one who has reset posts marking a cancelled claim: Munro v. Downey, 14 O. W. R. 523, 19 O. L. R. 249. The Act does not permit the affidavit on which the claim is based to be made on information and helief. The knowledge must be first hand: Re McLeod and Armstrong, 5 O. W. N. 145. "Transfer his interest." The section does not prescribe how the transfer is to be made nor apparently does it relate back prior to 14th May, 1906, when the section came in force. As to application of Statute of Frauds to such transfers: see Harrison v. Mobbs, 12 O. W. R. 465; (see sec. 71, notes). Sale by sheriff under *fi. fa.* to one who is not a licensee: see Re Clarkson v. Wishart, 22 O. W. R. 901, 3 O. W. N. 1645, 1913, A. C. 828. Compensation for surface rights: see sec. 104, notes.

36. This section referred originally only to town sites transferred by O. C. to the T. and N. O. Ry. Commission under 4 Edw. VII., ch. 7, sec. 3, and not to

lands included on plans registered by private individuals: Western and Northern Lands Corporation v. Goodwin, 18 O. L. R. 63, 13 O. W. R. 177. Mines and minerals under right of way of Temiskaming and Northern Ontario Ry.: Right of Way Mining Co. v. La Rose Mining Co., 10 O. W. R. 1110. Application of Act to town site of town of Cobalt: Coniagas Mines v. Cobalt, 13 O. W. R. 333. Lands open to prospecting: Re Smith and Hill, 14 O. W. R. 881, 1 O. W. N. 98, 19 O. L. R. 577. Construction of Crown grant of mining lands: reservation of railway right of way: La Rose Mining Co. v. T. and N. O. Ry. Commission, 9 O. W. R. 513, 10 O. W. R. 516. *Prima facie* a railway is not entitled to minerals under land purchased by it or taken under compulsory powers: R. S. O. 1914, ch. 185, sec. 133.

39. Withdrawal of lands from prospecting rights: Florence Mining Co. v. Cobalt Lake, 10 O. W. R. 38, 225, 12 O. W. R. 297, 13 O. W. R. 837, 18 O. L. R. 275. Lands open to prospecting: Re Smith and Hill, 19 O. L. R. 577.

51. Having regard to the instructions that claims must be 20 acres, this section can only apply where lands have been surveyed into 640 acres and 320 acres, and to lands unsurveyed: Re McLeod and Armstrong, 5 O. W. N. 145.

54.—(1) Planting discovery post: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986.

54.—(2) Claim extending to shore of lake: boundary extends to edge of non-tidal lake in its natural condition at low water mark: Re Sinclair, 12 O. W. R. 138.

55. Consideration of procedure after discovery: Staking out: Recording: Time: Munro v. Smith, 10 O. W. R. 97, at 101. A claim can be staked and recorded though previously staked and recorded, the previous staking continuing to exist on the lands when the party re-staking has knowledge which justifies his belief that the prior claim has expired, lapsed, been abandoned or cancelled: Re McNeil and Plotke, 17 O. L. R. 621.

57. A licensee who had staked out a mining claim on the following day took up the stakes, obliterated the markings and restaked and subsequently recorded in the last staking. It was held that his claim was barred and that he had no status to question the claim of another licensee: Re Munro and Downey, 19 O. L. R. 249, 14 O. W. R. 523; and see Re Cashman and Cobalt and James, 10 O. W. R. 658. Re staking periodically as a device for retaining claim which is in dispute, and position of intervening *bona fide* discoverer: Re Wright and Coleman, 12 O. W. R. 248, 13 O. W. R. 900, 1 O. W. N. 1129.

59.—(1) The first staking must be recorded: Re Munro and Downey, 19 O. L. R. 249: Re Cashman and Cobalt and James, 10 O. W. R. 658. Consideration of results flowing from failure to record within fifteen fifteen days: Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97. Not to record within 15 days is an abandonment within section 83: Re Wright and Coleman, 12 O. W. R. 248, but see 13 O. W. R. 900. The boundaries of a mining claim are those shewn on the claim filed. If the mining record shews them more extensive, that does not enlarge the true area. Re Olmstead and Exploration Syndicate: 5 O. W. N. 8; 24 O. W. R. 974.

59.—(3) An affidavit of discovery which complies with the requirements of the Act is not invalidated by reason of a reference to a prior claim which had been staked and recorded but which the deponent stated he believed to be invalid: Re McNeil and Plotke, 17 O. L. R. 621, 13 O. W. R. 6. History of the legislation and difference where application is for working permit: see Re McNeil and Plotke, 13 O. W. R. 6 at p. 11; (see note to sec. 94). What the affidavit contemplates; full disclosure: Munro v. Smith, 8 O. W. R. 452, 10 O. M. R. 97. An untrue affidavit of discovery will invalidate the Crown lease. The Land Titles Act gives no protection when the root of title is thus founded: Atty.-Gen. for Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319. Affidavit not in accordance with the requirements of the Act; adverse claims: Re Isa Mining Co. and Francey, 10 O. W. R. 31. Affidavit of discovery: Re Smith and Hill, 1 O. W. N. 98, 14 O. W. R. 881, 19 O. L. R. 577.

62.—(1) The recorder has no judicial function to perform in reference to the filing of the application or its remaining on the files: Re Isa Mining Co. and Francey, 10 O. W. R. 31. After an application has been received to record a claim the mining recorder may not refuse to receive an application from another person to record the staking out of the same claim. It is the duty of the recorder to receive the application so that it may be dealt with under the provisions of the Act: Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97. There is nothing in these sections requiring anything like the exercise of judicial functions: Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97; see also Re Wright and Coleman, 12 O. W. R. 248, 1 O. W. N. 1129, 13 O. W. R. 900. (As to recorder's judicial functions, see secs. 130-132, *post*).

62.—(2) Priorities: secs. 60-66 discussed. See Campsall v. Allen, 4 O. W. N. 130, 23 O. W. R. 140.

63. Disputing applications: by licensee not entitled to interest in lands or mining rights: Re Smith and Hill, 1 O. W. N. 98, 14 O. W. R. 881, 19 O. L. R. 577: see also: Re McNeil and Plotke, 17 O. L. R. 621. Service on disputant of notice of appeal: Re Pinnelle & Thompson, 2 O. W. N. 711, 18 O. W. R. 683.

65. See Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97.

67. The Act requires more than a "belief" in a discovery of mineral in place. It requires a discovery in fact: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986. Setting aside Crown lease at instance of the Crown: Atty.-Gen. for Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319.

68. Property right arising from location made under Mining Act: Bucknall v. B. C. Power Co., 4 O. W. N. 164, 23 O. W. R. 155. After issue of certificate the licensee is a tenant at will of the Crown: see position discussed: Re Clarkson & Wishart, 22 O. W. R. 901, 3 I. W. N. 1645, 27 O. L. R. 70. Under a writ of *fi. fa.* an undivided interest in a mining claim in respect of which a certificate of record but no patent has issued, is liable to seizure and sale: Clarkson v. Wishart, 1913, A. C. 828.

70. Declaration of trusteeship: Re Wright and Coleman, 12 O. W. R. 248, 1 O. W. N. 1129, 13 O. W. R. 900.

71. As to questions arising out of transfers of mining claims before 1906 and under the Acts of 1906 and 1907: see Harrison v. Mobbs, 12 O. W. R. 465. This section and section 72 now prescribe the manner in which the sale of a staked and recorded mining claim is to be evidenced so as to be capable of enforcement. It may become a question whether the doctrine of part performance is not superseded: Harrison v. Mobbs, 12 O. W. R. 465, at p. 468. Application of the Statute of Frauds: Chevrier v. Trust and Guarantee, 18 O. L. R. 547, 14 O. W. R. 101.

72. Seizure by sheriff of licensee's interest: Re Clarkson and Wishart, 22 O. W. R. 901, 3 O. W. N. 1645, 27 O. L. R. 70, 1913 A. C. 828, see secs. 68, 77, notes.

74. See Irish v. Smith, 2 O. W. N. 1302, 19 O. W. R. 529, 21 O. W. R. 297.

75. Appeal within 15 days: see sec. 133, notes; Cf. R. S. O. 1897, ch. 136, sec. 92; see R. S. O. 1914, ch. 124, sec. 75.

77. Independently of the amendment of 1912, the Privy Council held that an unpatented mining claim was "lands" within the meaning of the Execution Act: Clarkson v. Wishart, 24 O. W. R. 937 (P. C.), 1913, A. C. 828. The interest of the holder of an unpatented mining claim is not a mere tenancy at will and is exigible under a writ of execution: Clarkson v. Wishart, 24 O. W. R. 937, P. C., 1913 A. C. 828, reversing 27 O. L. R. 70.

78. Object of these provisions considered: Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97. "Immediately following" construed: Burns v. Hall, 3 O. W. N. 315, 20 O. W. R. 526, 25 O. L. R. 168. Non-performance of working conditions: Re Perkins and Dowling, 1 O. W. N. 290.

81. Application: Irish v. Smith, 2 O. W. N. 1302, 19 O. W. R. 529, 21 O. W. R. 297.

82. A second location made for the purpose of protecting the original location of itself constitutes no evidence of abandonment of the first: Re Wright and Coleman, 12 O. W. R. 248, but see 13 O. W. R. 900; (see sec. 57, notes).

83. The claim owner is possessor for an estate determinable only by voluntary abandonment *de facto* or by those breaches of conditions which amount to a constructive abandonment or forfeiture: Walhalla v. Mulcahy, 40 L. J. P. C. 43, quoted with approval: Re Wright and Coleman, 12 O. W. R. 248, but see 13 O. W. R. 900.

84. Lack of discovery goes to the root of the title: see secs. 35 and 89; Atty.-Gen. for Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319; Re McNeil and Plotke, 17 O. L. R. 621. Forfeiture of hydraulic mining lease on breach of condition: right of Crown to re-enter: R. ex rel. Atty.-Gen. for Canada v. Bonanza Creek Hydraulic, 40 S. C. R. 281. Discovery by miner with expired license: Re Sanderson and Saville, 3 O. W. N. 1560, 22 O. W. R. 672, 26 O. L. R. 616.

85. Special renewal license: Re Sanderson and Saville, 26 O. L. R. 616.

91. Cancellation of claim after office hours stands as of the following day: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986. Application of section: Irish v. Smith, 19 O. W. R. 529, 3 O. W. N. 711, 21 O. W. R. 297.

94. Application for working permit: non-compliance with this section: see Re Isa Mining Co. and Francey, 10 O. W. R. 31; and see notes to sec. 59 (3), as to applications for mining claim. History of legislation and distinction between these two applications: Re McNeil and Plotke, 13 O. W. R. 6, at p. 11, 17 O. L. R. 621.

104.—(1) To what extent the patentee of the minerals must give support to surface: whether right of support extends to support of buildings: disturbance of surface where veins are vertical: Coniagas

Mines v. Cobalt, 13 O. W. R. 333. The compensation payable for damage done to surface rights is claimable only as against the licensee who staked out the claim, and not as against his transferee: Bassett v. Clarke Standard Mining Co., 10 O. W. R. 752, 12 O. W. R. 584, 13 O. W. R. 97, 18 O. L. R. 38. Compensation to be paid owners of surface rights: Western, etc., Corporation v. Goodwin, 18 O. L. R. 63, 13 O. W. R. 177. In spite of the determination of legal rights of locatee, it is usual for the Crown to exercise its grace in favour of the locatee, and may waive its rights as paramount owner: Clary v. Lake Superior Corporation, 11 O. W. R. 381. Measure of damages for unlawful working: Atty.-Gen. v. Tomlin, 5 Ch. D. 750; Re Merthyr Collieries Co., L. R. 15 Eq. 46. No legal right of complaint of an injury to right of support of land round a house arises until there has been an actual interference with the enjoyment of the property: Backhouse v. Bonomi, 9 H. L. Cas. 503.

104.—(4) The effect is to give a lien, not to affix a personal liability. The transfer of the rights of the staking licensee does not in itself operate as a transfer of liabilities: Bassett v. Clark Standard Mining Co., 12 O. W. R. 584, 13 O. W. R. 97, 18 O. L. R. 38.

111. Construction of Crown grant of mining lands: reservation of railway right of way: La Rose Mining Co. v. T. and N. O. Ry. Co., 9 O. W. R. 513, 10 O. W. R. 516. Semble, in a Crown grant of a mining location subject to the provisions of the Act of 1906, metals and minerals of every description, including the precious or royal metals, passed: Florence Mining Co. v. Cobalt Lake, 10 O. W. R. 38, 225, 12 O. W. R. 297, 18 O. L. R. 275. As to reservations of minerals in patents: see R. S. O. 1914, ch. 28, sec. 57; also Austin v. Riley, 23 O. L. R. 593.

112. Reservation of timber: Gordon v. Moose Mountain Co., 17 O. W. R. 661, 2 O. W. N. 333, 22 O. L. R. 373. Reservation of pine timber in grant of mining land: National Trust v. Miller, 19 O. W. R. 38, 2 O. W. N. 933, 46 S. C. R. 45. Effect of provisions in this section on patents issued under R. S. O. 1897, ch. 36, sec. 39: Gordon v. Moose Mountain, 22 O. L. R. 373.

Conversion of timber: measure of damages: Phillips v. Conger, 22 O. W. R. 436, 3 O. W. N. 1436; Greer v. Faulkner, 40 S. C. R. 399.

118. China clay as a mineral: Great Western Ry. v. Carpalla U. C. C. Co., 1909, 1 Ch. 218. Brick clay as mineral and compensation for loss of lands of special value taken for railway right of way: Davies v. James Bay, 28 O. L. R. 544; and see R. S. O. 1914, ch. 185, sec. 133.

119. " Gas " is not within the term " mines or minerals " reserved in a deed in 1867. History of oil and gas fields in Western Ontario: Farquharson v. Barnard, etc., Gas Co., 22 O. L. R. 319, 25 O. L. R. 93, 1912, A. C. 864, see now, *ante* sec. 2 (*e*).

119.—(1*d*) For " providing " in line 1, read " proving ": 4 Geo. V. ch. 2, Schedule (12).

121. Breach of condition in hydraulic mining lease: right of Crown to re-enter: R. ex rel. Atty.-Gen. for Canada v. Bonanza Creek Hydraulic Concession, 40 S. C. R. 281.

123. Ownership of location: Armstrong v. Crawford, 10 O. W. R. 381, 534.

125. Powers of Commissioner: Bassett v. Clarke Standard Mining Co., 10 O. W. R. 752, see also S. C. 18 O. L. R. 38.

128. " Court or Judge " does not mean the Master in Chambers in this section: Harrison v. Mobbs, 9 O. W. R. 545. The Court of Appeal may remit case for trial by Mining Commissioner: Re Wright and Coleman, 13 O. W. R. 900.

130. Judicial powers of Recorder: Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97. Power to extend time: Re Pinnelle and Thompson, 2 O. W. N. 711, 18 O. W. R. 683.

130.—(3) Date of entry of cancellation: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986, see also 19 O. L. R. 249.

130.—(4) " Person affected ": Re Cashman and Cobalt and James Mines, 10 O. W. R. 658; and see Re Munro and Downey, 19 O. L. R. 249.

132. Enforcement of an award of the Commissioner under the Act of 1906: Bassett v. Clarke Standard Mining Co., 10 O. W. R. 752.

133.—(1) " Person affected by the decision " (sub-sec. 1); " parties adversely interested " (sub-sec. 3): see Re Cashman and Cobalt and James Mines, 10 O. W. R. 658; and see Re Munro and Downey, 19 O. L. R. 249. Appeal from Recorder: Re McNeil and Plotke, 17 O. L. R. 621. Where Commissioner found that claim was blunderingly but sufficiently staked: appeal: Re Sinclair, 12 O. W. R. 138.

133.—(3) The dates of the recording and the date of filing the appeal are matters of record and accepted: Re Munro and Downey, 19 O. L. R. 249, 14 O. W. R. 523. Under the provisions of this section the Mining Commissioner can make order extending time and can do so *ex parte*: Re Munro and Downey, 19 O. L. R. 249, 14 O. W. R. 523. Appeal from decision of Recorder: date of cancellation: Re Blye and Downey, 11 O. W. R. 323, 12 O. W. R. 986. Parties who alleging the discovery of valuable ore have staked out a claim and filed an application are " parties adversely interested " as against one who has staked out a similar claim on the property and filed his application, and if notice of appeal has not been duly filed and served upon them, the appeal must be dismissed: In re Petrakos, 9 O. W. R. 367, 13 O. L. R. 650. In line 4, for the first " of " read " on ": 4 Geo. V. ch. 2, Schedule (13).

137. Powers of Mining Commissioner within the scope of provincial legislative power: Munro v. Downey, 14 O. W. R. 523.

139. Right of inspection of defendant's mine in action to restrain defendants from trespassing: Right of Way Mining Co. v. La Rose Mining Co., 9 O. W. R. 678.

140. Meaning of section and of " justice of the case ": Campsall v. Allen, 23 O. W. R. 140, 4 O. W. N. 130.

151. Powers of Commissioner: Bassett v. Clarke Standard Mining Co., 10 O. W. R. 752. Appeal from decision of Commissioner that no *bona fide* discovery had been made: Re Spurr and Murphy, 14 O. W. R. 1239, 1 O. W. N. 287.

152.—(1) "Fifteen days": Hunter v. Bucknall, 9 O. W. R. 817.

152.—(2) "Deemed to be abandoned." Rogers v. McFarland, 14 O. W. R. 943, 19 O. L. R. 622. Special note on the use of the word "deem:" see 14 O. W. R. at pp. 951-2.

152.—(3) Re Smith and Hill, 1 O. W. N. 98, 12 O. W. R. 1258, 14 O. W. R. 881, 19 O. L. R. 577.

153. The same rules apply as in appeals from the decisions of any other judicial officer: Re Rodd, 10 O. W. R. 671. Matters in the High Court of Justice should not be intituled "Pursuant to the Mining Act": Munro v. Smith, 8 O. W. R. 452, at p. 456. Procedure on appeals: notice: Hunter v. Bucknall, 9 O. W. R. 817.

164. Results flowing from breach of statutory duty and liability for ensuing accident: Pressick v. Cordova Mines, 24 O. W. R. 631, 25 O. W. R. 228, 4 O. W. N. 1334, 5 O. W. N. 263; and see Groves v. Wimborne, 1898, 2 Q. B. 402.

164.—(23) Former wording "suitable pentice": see Siven v. Temiskaming, 3 O. W. N. 695, 25 O. L. R. 524, 46 S. C. R. 643, 23 O. W. R. 312.

164.—(40) Defect in works: Siven v. Temiskaming, 19 O. W. R. 436, 21 O. W. R. 454, 25 O. L. R. 524, 23 O. W. R. 312, 3 O. W. N. 695, 46 S. C. R. 643.

176. Prospecting after expiry of license: Re Sanderson and Saville, 26 O. L. R. 616.

181. See Crim. Code, sec. 164. The offence is none the less a crime: Re Sanderson v. Saville, 3 O. W. N. 1560, 22 O. W. R. 672, 26 O. L. R. 616.

185. In lines 5 and 6 for "section 1 and sections 3 to 11" read "section 2 and sections 4 to 11": 4 Geo. V. ch. 2, Schedule (14).

194. Effect of repeal on 7 Edw. VII., ch. 11, sec. 122, and R. S. O., 1897, ch. 36, sec. 39: Gordon v. Moose Mountain, 22 O. L. R. 373.

CHAPTER 33.

THE METAL REFINING BOUNTY ACT.

CHAPTER 34.

THE TOWN SITES ACT.

CHAPTER 35.

THE ONTARIO PUBLIC WORKS ACT.

CHAPTER 36.

THE PUBLIC WORKS PEACE PRESERVATION ACT.

CHAPTER 37.

THE BUREAU OF LABOUR ACT.

CHAPTER 38.

THE TEMISKAMING AND NORTHERN ONTARIO RAILWAY ACT.

4. Damages: limitation: Lumsden v. Temiskaming and Northern Ry. Co., 15 O. L. R. 469. Liability for non-feasance: Gillies v. Temiskaming and Northern, 10 O. W. R. 975.

13. Vesting lands in Commission: Lumsden v. T. & N. O. Ry., 15 O. L. R. 469. Reservation of railway right of way in Crown grant of mining lands an actual exception of a piece of land and not a mere easement: La Rose Mining Co. v. T. and N. O. Ry. Com., 9 O. W. R. 513, 10 O. W. R. 516. Damages for encroachment and taking mineral: T. and N. O. Ry. Com. v. Alpha Mining Co., 10 O. W. R. 1110. "Ungranted lands": Coniagas Mines v. Cobalt, 13 O. W. R. 333, 15 O. W. R. 761, 1 O. W. N. 625, 20 O. L. R. 622.

21. Mines and minerals under the right of way of the Temiskaming and Northern Ontario: Right of Way Mining Co. v. La Rose Mining Co., 10 O. W. R. 1110; 6 Edw. VII., ch. 11, sec. 109 (Mines Act, 1906), refers to town sites transferred to the T. and N. O. Ry. Commission and not to lands merely included on plans registered by private individuals: Western and Northern Lands Corporation v. Goodwin, 18 O. L. R. 63. See R. S. O. 1914, ch. 32, sec. 36.

23. Approval of withdrawal of lands from prospecting rights: Florence Mining Co. v. Cobalt Lake Mining Co., 12 O. W. R. 297, 13 O. W. R. 837.

24. Streets and lots: town site: plan: right to search for minerals: Coniagas Mines v. Cobalt, 13 O. W. R. 333, 15 O. W. R. 761, 20 O. L. R. 622, 1 O. W. N. 625.

32. In line 1 for "26 and 27" read "11, 31, 33 and 34": 4 Geo. V. ch. 2, Schedule (15).

CHAPTER 39.

The Power Commission Act.

7. Powers of Provincial Legislatures: right of Courts to enquire into validity of Statutes: Beardmore v. Toronto, 20 O. L. R. 165, 21 O. L. R. 505; Smith v. London, 20 O. L. R. 133. Professor Dicey's views on legislation, 9 Edw. VII., ch. 19; 45 C. L. T. 457. Hydro-Electric legislation *intra vires*: Beardmore v. Toronto, 20 O. L. R. 165, 21 O. L. R. 505; Smith v. London, 20 O. L. R. 133.

8.—(*a*) "Acquire": Felker v. McGuigan Cons. Co., 1 O. W. N. 946, 16 O. W. R. 417.

8.—(*c*) Does the doctrine of Fletcher v. Rylands apply to electricity? Young v. Gravenhurst, 22 O. L. R. 291. Jurisdiction of province to take water from Niagara River has no bearing on question of trespass arising out of construction of transmission line: Felker v. McGuigan, 1 O. W. N. 946, 16 O. W. R. 417.

18.—(2) The Ontario municipality is wholly a creature of the legislature without abstract rights, and the legislature has power to vary a contract made by a municipal corporation, thus interfering with rights as between litigants: Smith v. London, 13 O. W. R. 1148, 20 O. L. R. 133. 8 Edw. VII., ch. 22, sec. 4. Article on Hydro-Electric contracts and their validation: 24 C. L. J. 137, 257, 285. By-law: contract for supply of electric power: validation by legislature: Smith v. London, 11 O. W. R. 1148, 12 O. W. R. 668, 675, 13 O. W. R. 1148, 19 O. L. R. 139, 1 O. W. N. 280, 14 O. W. R. 148, 1248, 20 O. L. R. 133; Beardmore v. Toronto, 1 O. W. N. 278, 419, 14 O. W. R. 1262, 20 O. L. R. 165, 21 O. L. R. 505; Harrigan v. Port Arthur, 14 O. W. R. 973, 1087, 1 O. W. N. 169, 216.

18.—(5) Non-submission of contract to ratepayers: Harrigan v. Port Arthur, 14 O. W. R. 1087, 1 O. W. N. 169, 216.

18.—(6) It is a necessary implication from this section that municipal corporations cannot enter into contracts with the Hydro-Electric Power Commissioners without first obtaining the approval of the electors: Re Scott and Patterson, 12 O. W. R. 637, 17 O. L. R. 270. The Court will not compel a mayor to sign a contract which does not conform to the terms of the by-law submitted to the electorate: Re Scott and Patterson, 17 O. L. R. 270. By-laws authorizing contracts with the Hydro-Electric Power Commission confirmed: see 8 Edw. VII., ch. 22, and see also Re By-law of Galt; Scott v. Patterson, 17 O. L. R. 270, 12 O. W. R. 637.

35. The Power Commission and the Attorney-General's fiat from the standpoint of the Common Law: see 46 C. L. T. 100. Stay of action: Smith v. London, 11 O. W. R. 1148, 12 O. W. R. 668, 675, 13 O. W. R. 1148, 19 O. L. R. 139, 14 O. W. R. 148, 1248, 20 O. L. R. 133; Beardmore v. Toronto, 1 O. W. N. 278, 419, 14 O. W. R. 1262, 20 O. L. R. 165, 21 O. L. R. 505; Harrigan v. Port Arthur, 14 O. W. R. 973, 1087, 1 O. W. N. 169.

CHAPTER 40.

The Highway Improvement Act.

4. Action where land damaged by improvement to highway: Martin v. Middlesex, 4 O. W. N. 682, 23 O. W. R. 974.

22. Liability of county for maintenance and repair: Armstrong Cartage Co. v. Peel, 4 O. W. N. 1031, 24 O. W. R. 372, 10 D. L. R. 169.

CHAPTER 41.

The Colonization Roads Act.

CHAPTER 42.

THE PROVINCIAL AID TO DRAINAGE ACT.

CHAPTER 43.

THE MUNICIPAL DRAINAGE AID ACT.

CHAPTER 44.

THE TILE DRAINAGE ACT.

CHAPTER 45.

THE DEPARTMENT OF AGRICULTURE ACT.

CHAPTER 46.

THE AGRICULTURAL ASSOCIATIONS' ACT.

CHAPTER 47.

THE AGRICULTURAL SOCIETIES' ACT.

3. By his will a testator directed his executors to invest moneys and pay the yearly interest to an agricultural society. The legacy was payable out of a mixed fund consisting in part of impure personalty. It was held that the society came under the Mortmain Act and in so far as the bequest consisted of impure personalty it was void. The society was not bound to expend annually the interest received, but must not divert it from the purposes directed by

the testator: Kinsey v. Kinsey, 26 O. R. 99. Statutory rights: Ireson v. Holt Timber Co., 4 O. W. N. 1106, 24 O. W. R. 433.

CHAPTER 48.

THE HORTICULTURAL SOCIETIES ACT.

CHAPTER 49.

THE VITAL STATISTICS ACT.

7. Armour, Titles, pp. 125, 328.

15, 21, 22, 23. Armour, Titles, p. 328.

CHAPTER 50.

THE QUEEN VICTORIA NIAGARA FALLS PARK ACT.

2. There is no liability on the part of the Commissioners for the park to the public using the highways in the park by reason of the absence or insufficiency of a railing on the edge of the cliff, there being no such statutory obligation imposed on them. Nor are they liable for an accident happening to a visitor who is a bare licensee. There would be no liability unless the accident occurred by reason of some unusual danger known to the Commissioners and unknown to the person injured. The Commissioners are agents of the Crown, which is not liable for the acts of the subordinate servants of the Commissioners: Graham v. Commissioners, 28 O. R. 1.

27.—(2) In line 1, for "29 to 31" read "31, 33 and 34": 4 Geo. V. ch. 2, Schedule (16).

CHAPTER 51.

THE QUEENSTON HEIGHTS PARK ACT.

CHAPTER 52.

THE PROVINCIAL PARKS ACT.

CHAPTER 53.

THE BURLINGTON BEACH ACT.

21.—(2) In line 1 for " 26 and 27 " read " 11, 31, 33 and 34 ": 4 Geo. V. ch. 2, Schedule (17).

CHAPTER 54.

THE PRIVY COUNCIL APPEALS ACT.

Refer to: Beauchamp, Privy Council Jurisprudence; Bentwich, Practice in P. C.; Safford and Wheeler, Practice of the Privy Council (being Macpherson's Privy Council Practice); Masters, Canadian Appeals; Johnson, Costs; Judicial Committee Rules, see 41 S. C. R. Appendix.

2. Under the Statute permitting appeal only where the matter in controversy exceeds $4,000, it is essential that an appeal to the King in Council should be admitted by the Ontario Court. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent: Gillett v. Lumsden, 1905, A. C. 601, 74 L. J. P. C. 155. Special leave to appeal will not be given where the question has been settled by a colonial legislature, the function of the Judicial Committee being the application, not the policy of legislation: Tilonko v. Atty.-Gen. for Natal, 1907, A. C. 461. In cases where there is an alternative appeal either to the High Court or the Privy Council and parties have made their election to appeal to the High Court, special leave to appeal from the High Court will not be given except in very exceptional circumstances: Victorian Ry. Commissioners

v. Brown, 1906, A. C. 381. Concurrent judgments of fact in the Court below will not be reversed unless the appellant adduces the clearest proof of error and points to the source of that error: Allen v. Quebec Warehouse Co., 12 App. Cas. 101; Whitney v. Joyce, 95 L. T. 74 P. C. There is no power to relax or dispense with an enactment prescribing the exact conditions under which applications for a new trial must be made: George D. Emery Co. v. Wells, 1906, A. C. 515. Applications for special leave to appeal to the Privy Council will not be granted " save where the case is of gravity, involving matters of public interest or some important question of law or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character ": " Daily Telegraph " v. McLaughlin, 1904, A. C. 776; Prince v. Gagnon, 8 App. Cas. 103; Cité de Montréal v. Ecclésiastiques de St. Sulpice, 14 App. Cas. 660; Clergue v. Murray, 1903, A. C. 521; Ewing v. Dominion Bank, 1904, A. C. 806; C. P. R. v. Blain, 1904, A. C. 453. Court of Appeal has no jurisdiction to grant leave to appeal to Privy Council: Beardmore v. Toronto, 2 O. W. N. 479, 17 O. W. R. 1056. When appeal lies as of right under the Act and considerations affecting giving of leave: C. P. R. v. Toronto, 14 O. W. R. 1065, 1 O. W. N. 189, 19 O. L. R. 663. Reduction of amount of damages claimed so as to prevent appeal to Privy Council: McKay v. Toronto Ry., 9 O. W. R. 832, 893; Preston v. Toronto Ry., 13 O. L. R. 79, 8 O. W. R. 753. " Matter in controversy ": Milligan v. Toronto Ry., 12 O. W. R. 1103, 13 O. W. R. 513, 18 O. L. R. 109, see 42 S. C. R. 238; and cf. Supreme Court Act, sec. 48; Toronto v. Toronto Electric Light, 11 O. L. R. 310; Townsend v. Northern Crown Bank, 4 O. W. N. 1165, 1245, 24 O. W. R. 516. Judicial Committee Rules, 1908, with rules as to printing and schedule of fees: see 41 S. C. R. Appendix. Appeals to Privy Council from Supreme Court and from Court of Appeal: H. & L. notes, pp. 1082-3. Proceedings in obtaining leave to appeal: H. & L. notes, pp. 1083-4. Appeal *in forma pauperis*; H. & L. notes, p. 1085.

3. Construction of this and following sections: Stavert v. Campbell, 25 O. L. R. 515.

4. Effect of repeal of R. S. O. 1897, ch. 48; Stavert v. Campbell, 21 O. W. R. 172, 174, 370, 3 O. W. N. 591, 641, 716, 25 O. L. R. 515.

5. See former Con. Rule 831; H. & L. notes, p. 1085. Sections 5 to 9 inclusive correspond respectively to Con. Rules 831, 830 (5), 830 (6), 830 (7), and 830 (8). Payment into Court of $1,000 did not satisfy Rule 831: Florence Mining Co. v. Cobalt Lake, 14 O. W. R. 507, 19 O. L. R. 342. Bond of approved surety company: see R. S. O. 1914, ch. 56, sec. 69, ch. 190, sec. 8, note.

10. Judgment of Supreme Court of Canada: appeal to Privy Council: Forum to stay execution: Thompson v. Equity Fire, 1 O. W. N. 137. Stay of execution on perfecting security: Stavert v. Campbell, 25 O. L. R. 515.

13. When costs of appeal to the Privy Council have been allowed they are not subject to the rules of practice of the lower Courts: there is no right of set-off and no right to modify the direction to pay, which means forthwith after the amount is fixed: Metallic Roofing Co. v. Jose, 17 O. L. R. 237. See Earle v. Burland, 8 O. L. R. 174, 9 O. L. R. 663; see H. & L. notes, pp. 1061 and 1094; see former Con. Rule 818 (*a*), (*b*), 1255-6, and 1913, Rule 524, which give effect to this section.

CHAPTER 55.

The Dominion Courts Act.

2. See Atty.-Gen. of Ontario v. Atty.-Gen. of Canada, 39 S. C. R. 14, at p. 45.

3. Provision that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court except by leave of a Judge of the former Court, was *ultra vires*, and not binding on the Supreme Court: Clarkson v. Ryan, 17 S. C. R. 251, 4 Cart. 439. Matter in controversy: Toronto v. Toronto Electric Light, 11 O. L. R. 310. Matter in controversy in the appeal, 12 O. W. R. 1103, cf.

Supreme Court Act, sec. 48, Exchequer Court Act, sec. 72. Reduction of amount of damages to prevent appeal: Preston v. Toronto Ry., 8 O. W. R. 753, 13 O. L. R. 79; McKay v. Toronto Ry., 9 O. W. R. 832, 893. Appeals to Supreme Court: when appeal lies: H. & L. notes, pp. 1074, 1075. Questions not appealable: 1075, 1076. Questions appealable: 1076-1078. Leave to appeal, p. 1078. Security to be given: pp. 1078-1079. Leave to appeal when necessary: p. 1079. Time for appeal: p. 1079. Notice of appeal: p. 1080. Case to be settled: p. 1080. Stay of proceedings pending appeal: p. 1081. Factums: p. 1081. Notice of hearing: p. 1082. Setting down appeal for argument: p. 1082.

CHAPTER 56.

The Judicature Act.

Refer to: Holmested and Langton, Judicature Act (Ont.); Holmested and Langton, Forms; Annual Practice (White Book); The Yearly Supreme Court Practice; Seton's Judgments and Orders; Daniell's Practice of the Chancery Division; Daniell's Forms; Chitty's Archbold; Chitty's K. B. D. Forms.

2.—(*a*) "Action": Christie Brown v. Woodhouse, 4 O. W. N. 1265, 24 O. W. R. 619. Definition considered: R. v. Graves, 21 O. L. R. 329, at p. 353. Third party proceedings: Bucknall v. Mitchell, 13 O. W. R. 44; Kinnear v. Clyne, 18 O. L. R. 457.

2.—(*h*) "Defendant": Hazeltine v. Consolidated Mines, 13 O. W. R. 271. As to corporations and especially foreign corporations: see Rule 159; H. & L. notes, p. 291; 1913, Rule 23.

2.—(*r*) "Plaintiff": Bucknall v. Mitchell, 13 O. W. R. 44.

3. See the Judges' Act, R. S. C., ch. 138.

4. "High Court," "Court of Appeal": see Re Erb, 12 O. W. R. 108.

10. As to law before 1902: see Clarke v. Trask, 1 O. L. R. 207.

12. The civil jurisdiction of the Court of Appeal was purely statutory in its origin. The criminal jurisdiction of the Court of Appeal extended only to those cases where it was conferred by Dominion legislation or where an appeal was given by Statute of Ontario for breaches of law within the power of the province to enact. No appeal lay to the Court of Appeal from an order of a Divisional Court quashing a conviction of a Police Magistrate for breach of a municipal by-law: R. v. Cushing, 26 A. R. 248. Nor at the instance of the defendant by leave or not from an order of a Divisional Court respecting a Magistrate's conviction under an Ontario Statute: R. v. Pierce, 10 O. L. R. 297. (This latter case was under the 1904 amendment.) As to the authority of a Provincial Legislature in regard to offences under Provincial Acts: see Atty.-Gen. v. Hamilton S. Ry. So., 1903, A. C. 524. The Court had original jurisdiction under R. S. O. 1897, 84, and in election cases. Jurisdiction of the Court of Appeal and of a Judge thereof considered and compared with the jurisdiction of the English Court: see Embree v. McCurdy (No. 2), 14 O. L. R. 325.

13. For Imperial Statutes regulating the jurisdiction of the Court of Chancery in England and which became part of the law of Ontario: see R. S. O. 1897, Vol. III.; see as to criminal jurisdiction: B. N. A. Act, sec. 91 (27), and 93 (14). The High Court of Justice was a Superior Court of criminal jurisdiction within the meaning of the Criminal Code: see Code, R. S. C., ch. 146. As to power to make rules in criminal matters: see Code, sec. 576. Estreated bail bonds: see R. S. O. 1897, ch. 106; R. S. O. 1914, ch. 104. Powers of the High Court in matters testamentary considered: see R. S. O. 1914, ch. 62, sec. 32; Mutrie v. Alexander, 23 O. L. R. 396. The High Court has jurisdiction to try the validity of wills even after probate granted by the Surrogate Court (after a contest in which the plaintiff in the High Court action was not a party): Badenach v. Inglis, 4 O. W. N. 1495, 29 O. L. R. 165. On a motion to quash a conviction in a criminal

On a motion to quash a conviction in a criminal matter and not merely for a penalty imposed by or under provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate: Rex v. Bennett, 4 O. L. R. 205. Under the Judicature Act, as before it, the claim in an action on a foreign judgment may contain counts claiming to recover on the original consideration: Bugbee v. Clergue, 27 A. R. 96, 31 S. C. R. 66. Plaintiff owning land in U. S. got specific performance of contract to exchange for land in Ontario: Montgomery v. Ruppensburg, 31 O. R. 433. A receiver was appointed in respect of the rents and profits of lands out of the jurisdiction over which the plaintiff had an equitable claim: Duder v. Amsterdamsch Trustees Kantoor, 1902, 2 Ch. 132. The Court has jurisdiction to set aside an agreement in respect of lands some of which are out of the jurisdiction: Mackay v. Colonial Inv. Co., 4 O. L. R. 571; but will not entertain an action to enforce a lien on lands out of the jurisdiction by a judgment for sale or recovery of possession: G. N. W. Ry. v. Charlebois, 1899, A. C. 114. As to service of a writ of summons out of the jurisdiction: see Con. Rule 162, 1913, Rule 25. Proper parties: see Mackay v. Colonial Inv. and Loan Co., 4 O. L. R. 571. Since the Judicature Act, the compromise of an action will be enforced by an order of the Court: Pirung v. Dawson, 9 O. L. R. 248.

16.—(*a*) Equitable relief: see Cope v. Creighton, 30 O. R. 603. Court appointed a guardian for long unheard-of absentee and directed that he be served with office copy of order for partition and notice for the absentee: Re Hynes, 19 P. R. 217. The equitable jurisdiction of the High Court was expressed in the Judicature Act, R. S. O. 1897, sec. 51, to be "the like jurisdiction as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England in respect of the matters hereinafter enumerated, that is to say:

(1) In all cases of fraud and accident. Fraud: audit: see Teacher v. Calder, 1899, A. C. 451.

(2) In all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, lunatics and their estates. The re-marriage of mother, sole surviving guardian of an infant, is not in itself a reason for the Court appointing a co-guardian. The benefit of the infant is the sole ground for interference. Where second husband of different religion that also may be no ground if infant is left alone and brought up properly: Re X.; X. v. Y., 1899, 1 Ch. 526: (see provisions of the Infants' Act, R. S. O., 1914, ch. 153, and notes). Power of Judge to order committee of lunatic to exercise election to take under or against will: Re Earl Sefton, 1898, 2 Ch. 378; (see the Lunacy Act, R. S. O., 1914, ch. 68 and notes). See R. S. O., 1914, ch. 102, sec. 9; 29 Car. II., ch. 3, sec. 7, as to declarations or creations of trusts. Remuneration of trustees and executors, R. S. O., 1897, ch. 129, sec. 40; R. S. O., 1914, ch. 121, sec. 67. Proceedings on taking accounts: Con. Rule 667, *et seq.*; H. & L. notes, 1913, Rule 410, etc. See also The Annual Practice, Williams on Account, Seton's Judgments. As to accounts between principal and agent: Mackenzie v. Johnson, 4 Mad. 373; Lake v. Bell, 34 Ch. D. 462; Statute of Limitations no bar where there is express trust; Rochefoucauld v. Boustead, 1897, 1 Ch. 196; mutual accounts: Phillips v. Phillips, 9 Hare 471; accounts between patentee and infringer: Watson v. Holliday, 20 Ch. D. 780; where account is the proper remedy: Job v. Potton, L. R. 20 Eq. 84. Awards: see R. S. O., 1897, ch. 62; R. S. O., 1914, ch. 65. See also as to what may be the subject of an arbitration: Baker v. Townshend, 1 Moore 120, Hewitt v. Hewitt, 1 Q. B. 110; as to what is a submission, Re Hammond and Waterton, 62 L. T. Rep. 808; if the parties to a submission are to be deprived of any legal right, it must be clearly stated: Re Green and Balfour, 63 L. T. Rep. 97, 325; duty of arbitrator in hearing evidence: Nickalls v. Warren, 6 Q. B. 615, Johnstone v. Cheape, 5 Dow 247; arbitrators not liable for negligence: Tharsis Sulphur v. Loftus, L. R. 8 C. P. 1; certainty requisite in an award: Hawkins v. Colclough, 1 Burr. 275, Watson v. Watson, Styles' Reports, 28; reference to arbitrators and stay of action: Manchester Ship Canal v. Pearson, 1900, 2 Q. B. 606.

See also Russell on Arbitration, Redman on Arbitration, and The Annual Practice, where the Arbitration Act, 1889, is annotated. Appeals from awards of arbitrators under Dominion Ry. Act, R. S. C., ch. 37, sec. 209; Brirely v. H. & B. Ry., 25 O. R. 88. Infants: see R. S. O. 1897, ch. 168; R. S. O. 1914, ch. 153.

(3) To stay waste.

(4) To compel the specific performance of agreements: Specific performance of agreements of personal property: Cudder v. Rutter, 2 White and Tudor, 416; specific delivery up of chattels: Pusey v. Pusey, 2 White and Tudor, 454; acts of part performance enabling specific performance of parol agreement to be decreed notwithstanding the Statute of Frauds: Lester v. Foxcroft, 2 White and Tudor, 460; specific performance with compensation: Seton v. Slade, 2 White and Tudor, 475; difference as to admission of evidence where specific performance is sought and where it is resisted: Woollam v. Hearn, 2 White and Tudor, 513. Refer to: Fry on Specific Performance; Rawlins on Specific Performance; Seton's Judgments and The Annual Practice. Specific performace: when remedy applies, see note 1 D. L. R. 354; grounds for refusing, note, 7 D. L. R. 340; lands out of the jurisdiction, note 2 D. L. R. 215, and see Smith v. Ernst, 20 W. L. R. 772, 21 W. L. R. 483. Montgomery v. Ruppenberg, 31 O. R. 433. Contract for sale of reversionary interest will not be specifically enforced where a long delay has taken place and the reversion fallen into possession: Levy v. Stogdon, 1899, 1 Ch. 5. Lien for unpaid purchase money: default in last instalment was made by purchaser who thereupon went away for a time and the vendor entered and leased. Purchaser held not entitled to specific performance nor to recover instalments, but was entitled to damages as the contract on the facts was considered not abandoned or repudiated: Cornwall v. Henson, 1900, 2 Ch. 298. Specific performance of agreement to devise farm in return for care and services: see Smith v. Smith, 29 O. R. 309, 26 A. R. 397. The purchaser under a contract for sale of land who seeks specific performance, must have been prompt

in performing the duties devolving on him under the contract: Hesslein v. Wallace, 29 N. S. Rep. 424, 29 S. C. R. 171. Where time of essence of agreement: failure of purchaser to close in time: Snell v. Brickles, 28 O. L. R. 358. How provision as to time of essence may be waived: Dahl v. St. Pierre, 5 O. W. N. 230, 25 O. W. R. 261; Webb v. Hughes, L. R. 19 Eq. 281. Waiver of right of rescission: Foster v. Anderson, 15 O. L. R. 362, 16 O. L. R. 565; Norman v. McMurray, 4 O. W. N. 1256, 24 O. W. R. 532, 10 D. L. R. 757. Where there is a deficiency, specific performance in regard to what the vendor has may be decreed at the suit of the purchaser: Dixon v. Dunmore, 24 O. W. R. 774, 4 O. W. N. 1501; McLaughlin v. Mayhew, 6 O. L. R. 174; Kennedy v. Spence, 3 O. W. N. 76, 20 O. W. R. 61. A contract was made of land for sale by trustees to A. and A. entered into another contract to sell the same lands to one of the trustees. A. was held bound to complete his contract, and not entitled to specific performance of the sub-contract: Delves v. Gray, 1902, 2 Ch. 606. Equitable jurisdiction of County Court: see R. S. O. 1897, ch. 55, sec. 23, R. S. O. 1914, ch. 59, sec. 22. Damages in lieu of specific performance: see sec. 18, notes.

(5) To complete the discovery of concealed papers or evidence of such as may be wrongfully withheld from the party claiming the benefit of the same.

(6) To prevent multiplicity of suits: see sec. 16 (h).

(7) To decree the issue of Letters Patent from the Crown to rightful claimants.

(8) To repeal and avoid Letters Patent issued erroneously or by mistake or improvidently or by fraud. The mere fact that a patent has expired is not a sufficient reason why a petition for its revocation should not be presented: North Eastern Marine Engineering Co. v. Leeds Forge Co., 1906, 2 Ch. 498, 75 L. J. Ch. 720. Jurisdiction of the High Court to repeal patent: *scire facias*: fiat of Attorney-General: see Farah v. Bailey, 10 O. W. R. 252; Farah v. Glen Lake Mining Co., 17 O. L. R. 1; also Con. Rule

241, 1913; Rule 5 (2). The language of the Judicature Act is sufficiently wide to include the jurisdiction vested in the Court of Chancery by R. S. O. 1877 ch. 23, sec. 29, and includes the cancellation of patents at the suit of private persons. History of legislation and jurisdiction and review of authorities: see Farah v. Glen Lake Mining Co., 17 O. L. R. 1; Zock v. Clayton, 4 O. W. N. 1047, 28 O. L. R. 447, and notes to R. S. O. 1914, ch. 28, sec. 22.

16.—(*b*) The Court is sparing and cautious in its use of declaratory judgments: Prowd v. Spence, 4 O. W. N. 998, 24 O. W. R. 329. An action will not lie in Ontario for a declaration that under a transaction entered into outside Ontario, land situate beyond the limits of the province is held by the defendants as mortgagees: Gunn v. Harper, 30 O. R. 650, 2 O. L. R. 611. Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made in an action which the Court has no jurisdiction to entertain: Atty.-Gen. v. Cameron, 26 A. R. 103. The High Court will not usurp the functions of another tribunal, e.g., the Surrogate Court, under the guise of a declaratory judgment: Mutrie v. Alexander, 23 O. L. R. 396. Declaration: practical difficulties: Barton v. Hamilton, 13 O. W. R. 1118 at 1129. The Court, in the exercise of its discretion as to declaratory judgments, refused to allow a company, which deemed itself liable for infringement, to bring an action after the patent had expired for a declaration that the patent was void *ab initio*: North Eastern Marine Engineering Co. v. Leeds Forge Co., 1906, 2 Ch. 498. Plaintiff seeking equitable execution held to have no *locus standi* to claim a declaration as to the right of judgment debtor in lands: Thomson v. Cushing, 30 O. R. 123, 30 O. R. 388. The plaintiff erected a fence around a piece of land. The local authority pulled it down, claiming that the land formed part of the highway. The plaintiff claimed that this action prevented him from selling the land. Held, that the assertion of the defendants' claim to the land gave the plaintiff no cause of action, and, therefore, he could not be given a declaratory judgment. His only cause of action was for pulling down the fence: Offin v. Rochford Rural Council, 75 L. T. Ch.

348, 1906, 1 Ch. 342. "Direction": "Declaratory Judgment": see Stoddart v. Owen Sound, 27 O. L. R. 221; Burghes v. Atty.-Gen., 1911, 2 Ch. 139; Bunnell v. Gordon, 20 O. R. 281; Thomson v. Cushing, 30 O. R. 123; Stewart v. Guibord, 6 O. L. R. 262. A declaration will not be made where the question is a mere academic one: Patching v. Ruthven, 10 O. W. R. 620. Action to have the validity of a life insurance policy declared: when premature: Honour v. Equitable Life, 1900, 1 Ch. 852. The High Court has no jurisdiction to make a declaration of nullity of marriage on the ground that one party was of unsound mind: A. v. B., 23 O. L. R. 261; Caine v. Bernien, 18 O. W. R. 627, 2 O. W. N. 796. Declaratory judgment involving validity of marriage: see May v. May, 2 O. W. N. 68, 413, 16 O. W. R. 1006, 18 O. W. R. 515, 22 O. L. R. 559. Prowd v. Spence, 24 O. W. R. 329, 4 O. W. N. 998, 10 D. L. R. 215. Remarks on declaratory judgments: N. Y. & O. Ry. v. Cornwall, 5 O. W. N. 304. A declaratory judgment will not be made when resort may be had to available statutory provisions for determining the question: Ottawa Y. M. C. A. v. Ottawa, 5 O. W. N. 383. Declaratory judgments: see Armour, Titles, p. 186.

16.—(*d*) Counterclaim sounding in damages: Company Act provisions: Grills v. Farah, 21 O. L. R. 457. Relief against co-defendant: Cope v. Crichton, 18 P. R. 462. Third party procedure: see Rule 209, H. & L. notes, pp. 388-396: see 1913, Rule 165 *et seq.*, and see provisions of sec. 126 post.

16.—(*e*) Undisclosed equities: see note 1 D. L. R. 76.

16.—(*f*) Staying procedings: what cases within this section: see Cole v. Canadian Fire Ins. Co., 10 O. W. R. 906, 15 O. L. R. 336. Injunction to restrain enforcement of judgment. Attempt to raise new defences: Boeckh v. Gowganda Queen, 4 O. W. N. 27. New litigation after a settlement or compromise is carried out: McCollum v. Caston, 1 O. L. R. 240; Davidson v. Merritton Wood, etc., Co., 18 P. R. 139. Prior action pending: see Tilbury West v. Romney, 19 P. R. 242. Where the law is well settled and clear against the plaintiff: Lawry v. Tuckett-Lawry, 2

O. L. R. 162. Consolidation: Kunla v. Moose Mountain, 22 O. W. R. 64, 3 O. W. N. 1085, 1203. Where there is no reasonable probability of an action succeeding it ought to be dismissed as frivolous and vexatious: Birch v. Birch, 1902, P. 130. Stay of proceedings pending winding-up: see R. S. C., 1906, ch. 144, secs. 5, 46; see Canada Consolidated Mineral Co. v. Savoie, 11 O. W. R. 380. As to restraining frivolous and vexations actions: see (in addition to notes under section) H. & L. notes, Con. Rule 261, p. 469, 1913, Rule 124. Prohibition; general principles: see Martin v. Mackonochie, L. R. 3 Q. B. D. 730, 4 Q. B. D. 697, 6 App. Cas. 424; prohibition to a coroner: R. v. Herford, 3 E. & E. 115; prohibition lies to a pretended court as well as to a real one: Chambers v. Jennings, 2 Salk. 553. See also Seton's Judgments. See 1913 Rule 207 (11), 208 (9), 622-624, Con. Rule 1100, H. & L., pp. 1307-8.

16.—(*g*) Alimony and registration of judgments in alimony: see sec. 73, post.

16.—(*h*) See as to principle which should prevail to avoid multiplicity of action: McHenry v. Lewis, 1882, 22 Chy. D. 397. As applied to foreclosure actions to avoid separate redemption action: see Federal Life v. Siddall, 12 O. W. R. 529. (See also 22 O. L. R. 96.) Judgment against a syndicate and its members: Bigelow v. Powers, 1 O. W. N. 599. Staying one action to let matters in question be tried on another: Berry v. Hall, Hall v. Berry, 10 O. W. R. 496. A writ of summons was issued by mortgagees in the District Court for the district where the land was situated, a writ endorsed for a claim to recover possession of the land. The plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief, but this was held no ground for enjoining them from proceeding in the District Court: Central Trust Co. v. Algoma Steel Co., 6 O. L. R. 464. Where it can possibly be done without injustice or inconvenience, one action should be sufficient: see Morton v. Grand Trunk, 8 O. L. R. 381; Reid v. Goold, 8 O. W. R. 642. Proceedings under the Mechanics' Lien Act will not be interfered with

if the plaintiff also chooses to issue a writ for the same relief in a personal action: Hamilton Bridge v. General Contracting Co., 14 O. W. R. 646, 1 O. W. N. 34. Where plaintiff's claim can be disposed of in pending winding-up proceedings: see R. S. C. 1906, ch. 144, secs. 5, 46; Canada Consolidated Mineral Co. v. Savoie, 11 O. W. R. 380. Exercise of powers of Court in adding defendant: Strathy v. Stephens, 5 O. W. N. 119.

17. Mandamus: a prerogative writ of mandamus is *stricti juris*. The applicant must show strict compliance with the rules governing his right to the relief asked, and establish his legal right to the performance of the duty which he seeks to compel: Re Williams and Brampton, 12 O. W. R. 1235, 17 O. L. R. 398. Summary application for prerogative writ of mandamus to enforce statutory duty of a public body: Toronto Public Library Board v. Toronto, 19 P. R. 329. A writ of mandamus will not be granted when, if issued, it would be unavailing: Re Giles v. Wellington, 30 O. R. 610. Writ of mandamus discussed: Rich v. Melancthen, 3 O. W. N. 826, 21 O. W. R. 517. Mandamus to Council to submit local option by-law under the Liquor License Act, R. S. O. 1897, ch. 245, sec. 141 (3): requirements: Re Williams and Brampton, 17 O. L. R. 398; Re Carter and Clapp, 12 O. W. R. 1275. Mandamus to compel company to transfer shares on company's books: Nelles v. Windsor, Essex and Lake Shore Railway, 14 O. W. R. 463, 16 O. L. R. 359. Semble, a prerogative writ of mandamus cannot be granted in an action but only on motion: in any event, it will not be granted to enforce private rights arising under an agreement: Kingston v. Kingston, Portsmouth, etc., Ry., 25 A. R. 462. Mandamus in action granted where plaintiff shows that he will suffer injury by awaiting result of the action: Nelles v. Windsor, 11 O. W. R. 463, 16 O. L. R. 359. As to mandamus in cases of statutory duty: R. v. Payn, 6 A. & E. 392; position of servants of the Crown: R. v. Lords Commissioners to the Treasury, L. R. 7 Q. B. 387.

Injunction: this section does not extend the jurisdiction of the Court nor alter the principles on which the Court gives summary relief by

interlocutory injunction: Lawson v. Crawford, 10 O. W. R. 871. Injunction to prevent oral slander: Quirk v. Dudley, 4 O. L. R. 532. Injunction to restrain apprehended wrong: Bradley v. Barber, 30 O. R. 443. Injunction restraining landlord's distress: Neal v. Rogers, 2 O. W. N. 507, 17 O. W. R. 1070. Injunction to prevent publication of employer's stenographic notes: Laidlaw v. Lear, 30 O. R. 26. Motion to dissolve interim injunction: McCuaig v. Conmee, 18 P. R. 45. Where a plaintiff resides out of the jurisdiction and is required to give security for costs before prosecuting an action, he must also give the undertaking of a responsible person in the jurisdiction as one term of getting an interlocutory injunction: Delap v. Robinson, 18 P. R. 231. Where serious loss and public inconvenience would necessarily result from granting injunction and no irreparable loss from refusing it: see Dwyre v. Ottawa, 25 A. R. 121. Alteration of circumstances is not an answer to an action for an injunction to restrain breach of a covenant: Duke of Bedford v. Trustees British Museum, 2 My. & K. 552; Sayers v. Collyer, 28 Ch. D. 103; interlocutory injunctions: Griffith v. Blake, 27 Ch. D. 474, Newson v. Pender, 27 Ch. D. 43; mandatory injunctions: London Brewery v. Tennant, 9 Ch. D. 212, Isenberg v. East India House, etc., 3 De G. J. & S. 263. See Kerr on Injunctions, Seton's Judgments, The Annual Practice, Holmested & Langton, pp. 76 to 96, 1913 Rules 216, 211, 221. Injunctions in County Courts: see R. S. O. 1914, ch. 59, sec. 23. Power of Local Judge of High Court: see 1913 Rule 211, also Baldwin v. Chaplin, 4 O. W. N. 1574, 24 O. W. R. 860.

Equitable execution: Thomson v. Cushing, 30 O. R. 123, 388; Re McInnes v. McGaw, 30 O. R. 38. Equitable execution: voluntary payment by the Crown: Stewart v. Jones, 19 P. R. 227, 1 O. L. R. 34. Practice under order appointing receiver: see McLean v. Allen, 18 P. R. 255. Judgment debtors, a limited liability company incorporated and doing business abroad had no assets which could be got at by ordinary execution, nor could the judgment creditor make the affidavit under the rules to attach debts by garnishee proceedings, being ignorant of the particulars of the debts. In view of the facts and of the

likelihood of the debtors collecting the funds themselves, there were special circumstances which made it just and convenient to allow the judgment creditor equitable execution by way of a receiver: Goldschmidt v. Oberrheinische Metallwerke, 1906, 1 K. B. 373, 75 L. J. K. B. 300. See also as to rights of judgment creditors: Anglo-Italian Bank v. Davies, 9 Ch. D. 275. An assignee for value of a debt has priority over a person who subsequently obtains an order appointing him receiver by way of equitable execution over such debt, although the order was obtained before notice of the assignment was given by the assignee to the debtor: In re Bristow, 1906, 2 Ir. R. 215. Equitable execution for patent: see R. S. O. 1914, ch. 80, sec. 18, Edwards v. Picard, 1909, 2 K. B. 903. In order to justify the making of an order appointing a receiver at the instance of a judgment creditor, the circumstances must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act: O'Donnell v. Faulkner, 1 O. L. R. 21; Re Asselin and Cleghorn, 6 O. L. R. 170. Receiver by way of equitable execution: Manufacturers' Lumber Co. v. Pigeon, 22 O. L. R. 36, 378, 17 O. W. R. 9, 691, 19 O. W. R. 818; Kelly v. Ottawa Journal, 14 O. W. R. 934; Neal v. Rogers, 22 O. L. R. 588. Principles of equitable execution: see Thompson v. Gill, 1903, 1 K. B. at p. 795. Right of a mortgagee to a receiver: Re Prytherch, P. v. Williams, 61 L. T. Rep. 799; Truman v. Redgrave, 18 Ch. D. 547. The Court will not appoint a receiver against an executor unless good cause shown: Richmond v. White, 12 Ch. D. 361. Duties of managers appointed by the Court: Taylor v. Neale, 39 Ch. D. 538. See Kerr on Receivers, Cabalé on Attachment, Seton on Decrees, Holmested & Langton, pp. 99-103.

18. Damages in lieu of specific performance in sale of goods: different principle involved in considering title to lands: see Confederation Life v. Labatt, 27 A. R. 321. Specific performance and damages in lieu: McIntyre v. Stockdale, 23 O. W. R. 586, 4 O. W. N. 482, 27 O. L. R. 460.

19. The Court will not relieve against forfeiture of lease through breach of covenant not to assign or underlet: Eastern Telegraph Co. v. Dent, 1899, 1 Q. B.

835. Assignment for benefit of creditors as breach of covenant not to assign or sublet: Gentle v. Faulkner, 1900, 2 Q. B. 267. Forfeitures under stipulations in leases: see R. S. O. 1914, ch. 155, sec. 20. Requirement of notice and condition limiting time for proofs of loss under accident insurance policy; no power to relieve against consequences of non-compliance: Johnston v. Dominion Guarantee and Accident, 17 O. L. R. 462. Relief against forfeitures by insurance companies: (see R. S. O., 1914, ch. 183, sec. 164; Johnson v. Dominion of Canada G. & A. I. Co., 11 O. W. R. 363, at p. 374. "Double value" is not a penalty or forfeiture against which the Courts can relieve: Webb v. Box, 15 O. W. R. 205, 20 O. L. R. 220. Relief against forfeiture: Mortmain: see Armour, Real Property, p. 278. Relief against forfeiture in contract for sale of lands where instalment provided for: Kilmer v. B. C. Orchard Lands, 1913, A. C. 319. Default of payment of instalments of purchase money under a contract of sale where time is of the essence and there are provisions for cancellation and forfeiture on default, relief will be given the purchaser as from forfeiture and specific performance in a proper case: Boyd v. Richards, 29 O. L. R. 119. Relief from forfeiture; benefit of doubt given in favour of relief: North Bay v. Martin, 1 O. W. N. 1108.

20. Appeals to Supreme Court: see Union Colliery v. Atty.-Gen., B. C. 27 S. C. R. 637; see also R. S. O., 1897, ch. 84, R. S. O., 1914, ch. 85. The following cases, among others, have been put either under that Act, or this section: Re Local Option, 18 A. R. 572, 24 S. C. R. 145, 170; as to 53 Vict., ch. 56, sec. 18: Atty.-Gen. for Canada v. Atty.-Gen. for Ontario, 20 O. R. 222, 19 A. R. 31, 23 S. C. R. 458; as to 51 Vict., ch. 5: Re Assignments and Preferences Act, 20 A. R. 489, 1894, A. C. 189; Re Queen's Counsel, 23 A. R. 792, 1898, A. C. 247; Re Medical Act, 13 O. L. R. 501.

21. Where there are substantial reasons for double litigation, the Court will not stay proceedings in Ontario until after determination of same case in a foreign Court: First Natchez Bank v. Coleman, 2 O. L. R. 159.

22. Difference at law and in equity where possession taken under parol demise: Rogers v. National Drug and Chemical Co., 23 O. L. R. 234, 24 O. L. R. 486.

24. Appeal as to costs: Gates v. Seagram, 14 O. W. R. 182, at p. 188, 19 O. L. R. 216. Error in principle: Crawford v. Broddy, 18 P. R. 233. In District Court: Schaffer v. Armstrong, 13 O. L. R. 40. Third party costs: appeal: Russell v. Eddy, 5 O. L. R. 379. Appeal from consent order: Re Justin, 18 P. R. 125; Davis v. Winn, 22 O. L. R. 111. This section does not apply to an order made *in invitum* where jurisdiction is given by consent: Davis v. Winn, 22 O. L. R. 111. Order of Master in Chambers within this section: Davis v. Winn, 16 O. W. R. 945, 17 O. W. R. 105, 2 O. W. N. 47, 123, 22 O. L. R. 111. Leave to appeal: Gates v. Seagram, 17 O. L. R. 493.

26.—(1) To invoke the aid of the Court to quash proceedings where appeal does not lie or where taken against good faith the respondent should apply promptly: Federal Life v. Siddall, 22 O. L. R. 96. Jurisdiction of Divisional Court to hear appeal from order appointing new trustee: Re Jones Trusts, 15 O. W. R. 554, 20 O. W. R. 457. See Monro v. Toronto Ry., 5 O. L. R. 15 (prior to amendment of 1904); also Ross v. East Nissouri, 1 O. L. R. 353. Construction of section as enacted in 1904: see Rex v. Pierce, 10 O. L. R. 297. Practice on appeal: see Payne v. Caughell, 24 A. R. 556. Agreement of parties: Re Myles and G. T. R., 3 O. W. N. 259. Appeals from discretionary orders: see note 3 D. L. R. 778.

26.—(2), (*h*) Stated cases: Powers of Divisional Court under case stated by Police Magistrate: R. v. Dominion Bowling, 19 O. L. R. 107; see R. S. C., 1906, ch. 146, sec. 761; R. S. O., 1914, ch. 90, sec. 4.

26.—(2), (*i*) Powers of Divisional Court: application for second writ of habeas corpus: R. v. Miller, 14 O. W. R. 202, 19 O. L. R. 288.

26.—(2), (*o*) Surrogate Court appeals: H. & L. notes, p. 131.

26.—(2), (*p*) County Court appeals: see H. & L. notes, pp. 1036,1047. On appeal from District Court where amount was over $1,000: Drewry v. Percival, 20 O. L. R. 489, 15 O. W. R. 617, 1 O. W. N. 564.

26.—(2), (*q*) Division Court appeals: H. & L. notes, pp. 131-132.

27.—(1) The hearing of an appeal from a decision of a Judge without a jury, is a rehearing of the case, and it is the duty of the Court of Appeal to reconsider the evidence, and, if the circumstances warrant, to differ from the Judge, even on a question of fact turning on the credibility of witnesses: Coglan v. Cumberland, 1898, 1 Ch. 704. The onus is on the appellant to satisfy the Court that the Judge below was wrong: Colonial Securities Trusts Co. v. Massey, 1896, 1 Q. B. 38. The rule is generally followed by Appellate Courts not to reconsider concurrent findings of facts by the Court below: see G. T. R. v. Rainville, 29 S. C. R. 201; Matthews v. Bouchard, 28 S. C. R. 580, and the same idea governs when the decision of the Judge of first instance depends on the balance of testimony: Cook v. Patterson, 10 A. R. 645. The Supreme Court of Canada will take questions of fact into consideration on appeal: see Lefeunteum v. Beaudoin, 28 S. C. R. 89. Too liberal damages reduced: see McGarr v. Prescott, 4 O. L. R. 280. Excessive verdicts: see note 1 D. L. R. 386.

27.—(3) Effect of allowing appeal on non-appealing party: Challoner v. Lobo, 1 O. L. R. 292.

31. Interim order during vacation to prevent prejudice to the claims of any party pending an appeal: and what may be done by a Judge during vacation may be done by the Court at any other time: Embree v. McCurdy (No. 2), 14 O. L. R. 325, 10 O. W. R. 131. Power of single Judge of Court of Appeal to admit to bail: Re Watts, 3 O. L. R. 279. Appeals to Divisional Courts: see 1913, Rules 491 *et seq.* When matters are no longer pending: see Hargrove v. Royal Templars, 2 O. L. R. 126; Erle v. Burland, 8 O. L. R. 174, 176.

32. Rule to be followed where English Case Law and Ontario Case Law differ: see Trimble v. Hill, 1879,

5 App. Cas. 342; but see Toronto v. Toronto Ry., 4 O. W. R. 330. Decision of Court of co-ordinate jurisdiction: Mercier v. Campbell, 9 O. W. R. 101. Conflict of authority: following "known decision": Re Shafer, 10 O. W. R. 409, 865, 15 O. L. R. 266: Re Shafer, 15 O. L. R. 266, followed; Dom. Express v. Alliston, 14 O. W. R. 196; see also Ryckman v. Randolph, 20 O. L. R. 1, 15 O. W. R. 1013. Decision "deemed wrong": Re Dinnick & McCallum, 26 O. L. R. 551. Authority of previous decision: Pearson v. Adams, 22 O. W. R. 71, 909, 3 O. W. N. 1205, 1660; Stinson and Col. Physicians and Surgeons, 4 O. W. N. 627, 27 O. L. R. 565. Conflicting decision: Re Dinnick & McCallum, 3 O. W. N. 1061, 21 O. W. R. 897, 26 O. L. R. 551. The doctrine of *stare decisis* in County Court and Mechanics' Lien appeals: see 47 C. L. J. 443.

23. See R. S. O. 1914, ch. 85. Remarks on practice of notifying Attorney-General: Bartlett v. Delaney, 5 O. W. N. 200.

34. The effect of this enactment that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems fair and reasonable that the party in default should make compensation by payment of interest, it is incumbent on the Court to allow interest for such time and at such rate as the Court may think right: Toronto Railway v. Toronto, 1906, A. C. 117, 75 L. J. P. C. 36. Right to interest: Patterson v. Dart, 24 O. L. R. 609. When claim for interest a proper subject of special indorsement: see George v. Green, 13 O. L. R. 189, 14 O. L. R. 578; and see Sinclair v. Preston, 31 S. C. R. 408; Beam v. Beatty, 3 O. L. R. 345. Moneys retained by executors under irregular judgment: executors not chargeable with interest: Boys' Home v. Lewis, 3 O. L. R. 208. Foreign judgment: Humphrey v. Clergue, Bugbee v. Clergue, 27 A. R. 96, 31 S. C. R. 66; Swaizie v. Swaizie, 31 O. R. 324; Ritter v. Fairfield, 32 O. R. 350. Resident of one province sued in another: Deacon v. Chadwick, 1 O. L. R. 346.

35.—(1) Interest on arrears of annuity: Re Salvin, Worseley v. Marshall, 1912, 1 Ch. 332. Payment of interest: Re Dale, 3 O. W. N. 329, 20 O. W. R. 546.

35.—(4) Adding interest to amount of verdict: Milligan v. Toronto Ry., 42 S. C. R. 238. Damages: interest running from date of Referee's report: Astover Mines v. Jackson, 1911, 2 Ch. 355.

36. No rights are given by a certificate of lis pendens—the whole effect is that notice is given that rights are being claimed. The plaintiff has a right to give such notice and the defendant to get the certificate vacated must show that under no circumstances can the facts, as set out in the pleading, give any right to the plaintiff in respect of the land: Brock v. Crawford, 11 O. W. R. 143; Armour, Titles, pp. 189-195; Brock v. Crawford, 11 O. W. R. 143; Farah v. Glen Mining Co., 17 O. L. R. 1. In an action brought for a declaration of an inchoate right to dower a lis pendens registered was vacated as vexatious: King v. King, 13 O. W. R. 760. Where action was brought for a commission for sale of land and damages for failure to give option, the lis pendens registered was vacated with costs: Jenkins v. McWhinney, 23 O. W. R. 29, 4 O. W. N. 90. Where a lis pendens was said to interfere with the winding up of an estate, the Master refused to vacate it, but ordered the trial to be expedited: Salter v. McCaffrey, 4 O. W. N. 478, 23 O. W. R. 611. See also Kennedy v. Kennedy, 4 O. W. N. 1370, 24 O. W. R. 626.

37.—(3) The party registering the lis pendens may obtain ex parte an order vacating it: McGillivray v. Williams, 4 O. L. R. 454; see Rhum v. Pasternack, 9 O. W. R. 130.

37.—(5) Appeal: order dismissing motion to vacate lis pendens not appealable: Hodge v. Hallamore, 18 P. R. 447.

39.—(12) A Judge cannot sit as a member of a Divisional Court hearing an appeal from himself, and equally cannot, after the setting down of an appeal from his judgment, make an order that execution shall not be stayed: Mullin v. Provincial Construction Co., 16 O. L. R. 241.

43. Jurisdiction of single Judge to pronounce the opinion on special case stated by arbitrators pursuant to R. S. O., ch. 62, sec. 41, R. S. O., 1914, ch. 65, sec. 29:

Re Geddes and Cochrane, 2 O. L. R. 145. Order of a Judge presiding at jury sittings: see Bank of Toronto v. Keystone Fire Insurance Co., 18 P. R. 113.

45. See Potter v. Orillia Export Lumber Co., 8 O. W. R. 804.

50. History of sections 50-52, and application discussed: see Vezina v. Will H. Newsome Co., 10 O. W. R. 17, 14 O. L. R. 658.

53. In actions of libel it is not necessary to file and serve a jury notice: Puterbaugh v. Gold Medal Mfg. Co., 3 O. L. R. 259. Interlocutory judgment in action under Libel Act: Whitling v. Fleming, 16 O. L. R. 263, 11 O. W. R. 822.

54. Actions against municipal corporations for injuries through non-repair: see R. S. O. 1914, ch. 192, sec. 460. The present wording covers actions for the recovery of damages "occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance." The following cases refer to the distinction drawn between nonfeasance and misfeasance:—Non-repair: Burns v. Toronto, 13 O. L. R. 109; Armstrong v. Euphemia, 7 O. W. R. 552; Hobin v. Ottawa, 8 O. W. R. 589; Armour v. Peterborough, 10 O. L. R. 306. Non-repair and misfeasance: Clemens v. Berlin, 7 O. L. R. 33; Kirk v. Toronto, 7 O. L. R. 36; Ince v. Toronto, 27 A. R. 410, 31 S. C. R. 323. "Non-repair," defined: Armour v. Peterboro, 10 O. L. R. 306, at p. 308. "Non-repair," discussion of authorities and meaning of word: Brown v. Toronto, 21 O. L. R. 230. Non-repair: misfeasance and nonfeasance: see note, 46 C. L. J. 317; see also McGuire v. Burk's Falls, 14 O. W. R. 569; Jackson v. Toronto, 2 O. W. N. 24, 16 O. W. R. 931.

56.—(1) Since the Rules provide for separate jury and non-jury sittings, it is desirable, at any rate in Toronto, to have it settled at as early a date as possible whether the case is to be tried with or without a jury: Montgomery v. Ryan, 13 O. L. R. 297, 8 O. W. R. 855; Clisdell v. Lovell, 15 O. L. R. 397, 10 O. W. R. 609, 925. This rule may well be extended to

all cases: Bryans v. Moffatt, 15 O. L. R. 220, 10 O. W. R. 1027. Irregularity: see McKenzie v. Shoebotham, 10 O. W. R. 1055. Striking out jury notice: (Montgomery v. Ryan, 13 O. L. R. 297, and Clisdell v. Lovell, 10 O. W. R. 925; Bryans v. Moffatt, 15 O. L. R. 220, considered); Stavert v. McNaught, 13 O. W. R. 921, 1105, 18 O. L. R. 370. The jurisdiction to strike out a jury notice in Chambers should be confined to cases where it is obvious that no Judge would try the issues upon the record with a jury: Dyment v. Dyment, 13 O. W. R. 461; but see Stavert v. McNaught, 18 O. L. R. 370; Stavert v. McNaught, followed; Hurdman v. Gall Lumber Co., 14 O. W. R. 143; see Puterbaugh v. Gold Medal Mfg. Co., 3 O. L. R. 259; Hawke v. O'Neil, 18 P. R. 164. Common law action: Schantz v. Berlin, 4 O. L. R. 730. Malpractice actions: Town v. Archer, 4 O. L. R. 383. Striking out jury notice and duty of presiding Judge to transfer to non-jury list: Bank of Toronto v. Keystone Fire Ins. Co., 18 P. R. 113. Judge in Chambers can strike out jury notice: Peoples Loan v. Stanley, 4 O. L. R. 90; Schantz v. Berlin, 4 O. L. R. 730. Jurisdiction: Ferguson v. Eyre, 3 O. W. N. 505. Discretion: Miller v. Park, 2 O. W. N. 186, 17 O. W. R. 283. The exercise of the discretion of a Judge in Chambers as to striking out a jury notice is not properly reviewable by an Appellate Court: Cornish v. Boles, 4 O. W. N. 1551, 24 O. W. R. 877. Leave to file jury notice: delay a reason for refusal: Gillies v. McCamus, 1 O. W. N. 1020.

56.—(4) Exclusive jurisdiction of Chancery before 1873: Hall v. McPherson, 13 O. W. R. 929. An action to enforce a mechanics' lien being a new statutory right which, like this section, had no existence before the 29th March, 1873, cannot come strictly within it: Trussed Concrete Steel Co. v. Wilson, 9 O. W. R. 238. Equitable issue: Bryans v. Moffatt, 15 O. L. R. 220; Clisdell v. Lovell, 15 O. L. R. 397; Sawyer v. Robertson, 19 P. R. 172. Action to restrain nuisance a Common Law action: Discretion: Schantz v. Berlin, 4 O. L. R. 730. Action for declaration of trust in respect of land in exclusive jurisdiction of Chancery: Roscoe v. McConnell, 4 O. W. N. 126, 23 O. W. R. 108. An action to establish a will transferred from the Surrogate Court is within the former exclusive jurisdiction of the Court of Chancery:

Jarrett v. Campbell, 26 O. L. R. 83. Where both legal and equitable issues: see Con. Rule 551, 1913, Rule 259.

58. Agreement of ten jurors but not the same ten on each of several questions: Zufelt v. C. P. R., 23 O. L. R. 602.

61. What amounts to a direction to give a general verdict: Ede v. Canada Foundry Co., 12 O. W. R. 809; Still v. Hastings, 13 O. L. R. 322 (where section as it then read discussed, and amendment suggested). Oral questions submitted to jury: Herron v. Toronto Ry., 4 O. W. N. 12, 22 O. W. R. 933.

63. Consideration of practice under the procedure substituted for certiorari. The right to take the new procedure which is substituted for certiorari is confined to cases in which, prior to this enactment, the defendant would have been entitled to a writ of certiorari: R. v. Cook, 12 O. W. R. 829, 18 O. L. R. 415. Cf. R. S. O., 1897, ch. 90, sec. 7 (2), as amended 1902 and 1904; see also Martin v. Garlow, 14 O. W. R. 969. The Attorney-General is entitled to certiorari of absolute right and absolutely in all cases. The new procedure does not affect that right: R. v. Nelson, 18 O. L. R. 484. Infant defendant: recognizance: R. v. Reid, 12 O. W. R. 1037. This section is explicit as to what return the magistrate shall make upon a motion to quash a conviction. Within these lines his return cannot be questioned. Outside these limits his statements are extra-judicial and irrelevant: R. v. Davey, 5 O. W. N. 464. See provisions of Liquor License Act, R. S. O. 1914, ch. 215, secs. 94, 110 and 113. Appeal certificate of Atty.-General: see R. v. Leach, 21 O. W. R. 919. See also as to appeal: R. v. Miller, 19 O. L. R. 125; R. v. Teasdale, 20 O. L. R. 382; R. v. Graves, 21 O. L. R. 329; R. v. Major, 1 O. W. N. 223, and provisions of R. S. O. 1914, ch. 90, sec. 10.

65. Where an action was referred to a District Court Judge and he, instead of making a report, directed judgment to be entered, his direction was treated as a report: Mazza v. Port Arthur, 1 O. W. N. 223.

69. Companies whose bonds may be taken, see R. S. O. 1914, ch. 190, sec. 8, note.

72. As regards infants, the Court may order some person to execute a conveyance instead of the infants: R. S. O. 1897, ch. 168, sec. 5, R. S. O. 1914, ch. 153, sec. 14. As to persons committed for contempt in refusing to execute: see R. S. O., 1897, ch. 324, sec. 18, post, sec. 137: see also Trustee Relief Act, R. S. O., 1897, ch. 336, secs. 5-19; Trustee Act, 1914, ch. 121, secs. 6-16. Vesting orders: see Armour on Titles, pp. 387-389; see also R. S. O., 1897, ch. 119, sec. 15; R. S. O. 1914, ch. 109, secs. 21, 56.

73. A wife has no right, without cause, to impose unreasonable restrictions on marital rights as a condition of co-habitation. Under such circumstances a husband is not guilty of desertion in separating himself from his wife: Synge v. Synge, 1900, P. 180, 1901, P. 317. A husband willing to live with his wife, but refusing to give up adulterous intercourse, is held to have deserted his wife: Koch v. Koch, 1899, P. 221. Legal cruelty does not necessarily depend on physical acts or threats of violence: as to what constitutes matrimonial cruelty: see Lovell v. Lovell, 13 O. L. R. 569. The Court must be satisfied that the husband's offer to take back his wife is bona fide: Rae v. Rae, 31 O. R. 321. Commital of a lunatic wife to an asylum is not cruelty or desertion: Hill v. Hill, 2 O. L. R. 289, 541, 3 O. L. R. 202. Injunction to restrain husband from parting with leasehold property not granted: Carter v. Carter, 1896, P. 35. Amount of alimony: Sykes v. Sykes, 1897, P. 306; Kettlewell v. Kettlewell, 1898, P. 138; Bonson v. Bonsor, 1897, P. 77; Stanley v. Stanley, 1898, P. 227; Kirk v. Kirk, 1902, P. 145; Ashcroft v. Ashcroft, 1902, P. 270. Remedy of wife living in house of husband who refuses to supply her clothing is not alimony, but to pledge her husband's credit for necessaries: Price v. Price, 21 O. L. R. 454. Wife entitled to alimony even where she had deliberately deserted her husband and children where she had been guilty of no other misconduct and offered to return but the defendant refused to receive her: Ney v. Ney, 4 O. W. N. 1536, 24 O. W. R. 873. Registered judgment for alimony: Abbott v. Abbott, 3 O. W. N. 683, 21 O. W. R. 281. An order for payment of interim alimony may be registered: see Con. Rules 370, 371, H. & L. notes, 576-579, 1913 Rules,

386-388. Registration of a judgment for alimony: see R. S. O., 1897, ch. 136, secs. 52, 29; R. S. O. 1914, ch. 124, secs. 23 (8), 43; H. & L. Forms, 842. As to effect of registered judgment under R. S. O., 1897, ch. 147, sec. 11: see Armour, Titles, p. 174. R. S. O. 1914, ch. 134, sec. 14. Arrest of defendant in alimony action: see R. S. O. 1914, ch. 83, sec. 6.

74. The Court has jurisdiction to award costs of a motion to quash a conviction under an Ontario Statute against either the Justice of the Peace or the informant: Rex v. Mancion, 8 O. L. R. 24; see Rex v. Bennett, 4 O. L. R. 205. The costs of proceedings by habeas corpus are within this section: Re Weatherall, 1 O. L. R. 542. Court has jurisdiction to award costs against applicant for discharge under habeas corpus of prisoner convicted under provincial statute: R. v. Leach, 17 O. L. R. 643. Real litigant ordered to pay: Re Sturmer and Beaverton, 25 O. L. R. 190, 566. Where by an interlocutory order costs are made "costs in the cause" it merely leaves these costs to be dealt with in the discretion of the trial Judge, and is not a final disposition of them: Dickerson v. Radcliffe, 19 P. R. 223. Execution for costs of application for leave to appeal to Court of Appeal: Peoples Loan v. Stanley, 4 O. L. R. 247.

76.—(1), (*h*) A Local Registrar is not one of the "taxing officers" mentioned in R. S. O., 1897, ch. 121, sec. 30: Re Drinkwater and Kerr, 10 O. W. R. 511, 15 O. L. R. 76; R. S. O. 1914, ch. 112, sec. 30 (4).

76.—(1), (*q*) Deputy Registrar and Deputy Clerk of the Crown: see Re Solicitor, 10 O. L. R. 393.

78. See H. & L. note, p. 652.

82. Place for Court offices: Rodd v. Essex, 19 O. L. R. 659.

86. A Drainage Referee is not an Official Referee. Provisions of R. S. O. 1897, chs. 51, 62 and 226, discussed: see McClure v. Brooke, 4 O. L. R. 97, 5 O. L. R. 59. Cf. R. S. O. 1914, chs. 56, 65, 198.

89. Procedure in case of pending resignation of local Master: see Re Glen, 27 A. R. 144.

107. See Allstadt v. Gartner, 31 O. R. 495.

111. See Smerling v. Kennedy, 5 O. L. R. 430, where the result of legislation in R. S. O., 1897, ch. 51, sec. 28, being special provision for saving existing procedure, is summarized.

114. Jurisdiction of Deputy County Court Judge as local Judge of the High Court: Keyes v. McKeon, 23 O. L. R. 529. Powers of local Judges when exercised by deputies: Keyes v. McKeown, 2 O. W. N. 997, 1014, 19 O. W. R. 21. Judges of District Courts who were Local Judges of the High Court had no jurisdiction to deal with applications under the Vendor and Purchaser Act, or under the Land Titles Act: In re Michell, 31 O. R. 542.

122. See 4 Geo. II., ch. 26, sec. 1; 6 Geo. II., ch. 14, sec. 5.

123. See 1 Edw. VII., ch. 7, sec. 1, and 1 Anne, ch. 2, sec. 4.

124. Rent may lawfully be made to fall due on Sunday, and if not paid, distress can be made on the following day: Child v. Edwards, 1909, 2 K. B. 753. This section taken from 29 Car. 2, ch. 7, sec. 6.

125. See 8 & 9 Wm. III., ch. 11, sec. 8. Practice and procedure in an action on a bond subject to this section and in an ordinary action: see Star Life v. Southgate, 18 P. R. 151; see Con. Rule 585; H. & L. notes, p. 775; 1913 Rule, 43. As to replevin bonds: see 1913 Rules, 359 et seq.

126. 2 Geo. II., ch. 22, sec. 13: see Judicature Act, 1897, sec. 57 (7), and ante sec. 16 (*d*); H. & L. notes, pp. 445, et seq., especially pp. 446-7, and 1913, Rule 115; see also Dig. Ont. Case Law, cols. 6349-6373. For history of this and two following sections: see Gates v. Seagram, 14 O. W. R. 182, at p. 185, 17 O. L. R. 493, where the law of set-off and counterclaim is discussed.

127. 8 Geo. II., ch. 24, sec. 5.

128. See C. S. U. C., ch. 22, sec. 104. History of section: nature of set-off and counterclaim: proper judgment where set-off exceeds plaintiff's claim: set-off

pleaded as counterclaim: Gates v. Seagram, 19 O. L. R. 216.

129. See 4 & 5 Anne, ch. 3 (or 16 in Ruffhead's Ed.), sec. 22.

130. See 4 & 5 Anne (or ch. 16 in Ruffhead's Ed.), sec. 13.

131. See 4 & 5 Anne, ch. 3 (or 16 in Ruffhead's Ed.), sec. 27.

132. See 46 Ed. III., part (*a*). "Affected by any record:" see Re Chantler and the Clerk of the Peace of the County of Middlesex, 8 O. L. R. 111.

133. See Imp. Act, 5 & 6 Vic. ch. 69, sec. 1.

134. Imp. Act, 5 & 6 Vic. ch. 69, sec. 2.

135. Special case: see Con. Rule 372; H. & L. notes, p. 33 and pp. 579 et seq; 1913 Rule 126.

136. See Imp. Act, 13 & 14 Vic. ch. 35, sec. 17. Lis Pendens: see Judicature Act, 1897, secs. 97-100, H. & L. notes, pp. 147-9; ante, sec. 37; also R. S. O. 1897 ch. 136, sec. 52; R. S. O. 1914, ch. 124, sec. 43, note.

137. See Imp. Act, 11 Geo. IV. and 1 Wm. IV., ch. 36, sec. 15, sub-sec. 15. See Judicature Act, 1897, sec. 36; H. & L. notes, pp. 31, 32 (ante, sec. 72); also Con. Rule 861; H. & L. notes, p. 1119; 1913 Rule 551. Costs: see Con. Rule 1130; H. & L. notes, p. 1139; ante, sec. 74. See also provisions of R. S. O. 1897, ch. 336, secs. 5 to 19; see now R. S. O. 1914 (Lunacy Act), ch. 68, secs. 24 et seq., and R. S. O. 1914, ch. 121, sec. 6 et seq. (The Trustee Act.)

138. See Imp. Act, 11 Geo. IV. and 1 Wm. IV., ch. 36, sec. 15, sub-sec. 16. Sequestration: see Con. Rules 857-861; H. & L. notes, p. 1113 et seq., especially pp. 1114-1116, as to documents in custody of contemnor; see also 1913 Rules 547 et seq.

139. See Imp. Act, 11 Geo. IV. & 1 Wm. IV., ch. 36, sec. 15, sub-sec. 18. See Con. Rule 861, H. & L. notes,

p. 1119, and Con. Rule 856, H. & L. notes, pp. 1112-3, 1913 Rule 551.

140. See Imp. Act. 1 & 2 Vict. ch. 110, sec. 14. Holding shares "in his own right." These words have not the same meaning for the purpose of a charging order as they have for purposes of qualification under the Companies Act. In the former case beneficial interest is required: Sutton v. English and Colonial Produce Co., 1902, 2 Ch. 502. This section does not apply where stocks have been fraudulently assigned to avoid execution: Caffrey v. Phelps, 24 Gr. 344. Charging order is a matter of discretion: Re Cockrell's Estate, 1911, 2 Ch. 318; 1912, 1 Ch. 23. "Stocks or shares" in a public company does not include the debentures of a company: 1904, Sellar v. Bright, 2 K. B. 446. A settlement of equitable reversionary personalty may be a settlement within the scope of 13 Eliz. ch. 5, R. S. O. 1914, ch. 105, sec. 3, since a creditor may reach such property by a charging order (under this section), or by appointment of a receiver by way of equitable execution: Ideal Bedding Co. v. Holland, 1907, 2 Ch. 157, and cases cited. Contingent interest of judgment debtor: see Bolland v. Young, 1904, 2 K. B. 824. Service out of jurisdiction: see Kolchmann v. Meurice, 1913, 1 K. B. 534. As to charging order in favour of solicitor on property recovered or preserved: see Rule 1129 H. & L. notes, p. 1333-7.

141. See Imp. Act, 1 & 2 Vict. ch. 110, sec. 15. Where an order has been made charging a judgment debtor's interest in shares with the amount due on the judgment, that order cannot be enforced by an order made in the original action: Kolchmann v. Meurice, 1903, 1 K. B. 534; Leggott v. Western, 12 Q. B. D. 287. See Con. Rule 911, H. & L. notes, p. 1157, 1913 Rule 590. As to costs: Con. Rule 1130, H. & L. notes, p. 1339. *Ante* sec. 74.

142. See Imp. Act, 3 & 4 Anne, ch. 82, sec. 1.

143. See 4 Henry VII. ch. 20.

144. See 18 Eliz. ch. 5. Such an action cannot be brought by an infant by his next friend: Garrett v. Roberts,

10 A. R. 650; see Rule 436, H. L. notes, pp. 643-4; 1913, Rule 396.

145. See 18 Eliz. ch. 5. This Province has power to enact that any person who, having violated the provisions of the Liquor License Act, compromises such offence, should be imprisoned: see R. v. Boardman, 30 U. C. R. 553. Where a plaintiff agreed to discontinue a *qui tam* action on being paid his costs, and in a subsequent action for those costs recovered much less than he thought the jury should have given him, the Court from the nature of the transaction in view of this statute refused any relief: Bleeker v. Myers, 6 U. C. R. 134. See Rules 436-438, H. & L. notes, pp. 643-4, 1913, Rules 393-396.

146. See 2 Edw. VII. ch. 1, sec. 11. The jurisdiction of the Master in Chambers in quo warranto proceedings is confined to such proceedings under the Municipal Act, and does not extend to applications, provided for in sections 146-9 of this chapter. As to writ of summons in quo warranto: see Con. Rule 120, H. & L. note, p. 257, 1913, Rule 5. As to costs: see Con. Rule 1130, H. & L. note, p. 1339, ante, sec. 74.

150. As to jurisdiction of Master in Chambers in proceedings under the Municipal Act in the nature of quo warranto: see R. S. O. 1914, ch. 192, sec. 160, *et seq.*, and as to appeals, see sec. 179. H. & L. notes, p. 218.

151. An application on habeas corpus to discharge a prisoner convicted under an Ontario statute is not a criminal matter so as to exclude the jurisdiction of the H. C. J. to award costs: R. v. Leach, 13 O. W. R. 86, 17 O. L. R. 643. See R. v. Bennett, note to sec. 13. As to power of High Court to award costs in quasi-criminal proceedings: see Rex v. Mancion, 8 O. L. R. 24. What is a "criminal matter": see Copeland-Chatterson v. Business Systems, 11 O. W. R. 762.

CHAPTER 57.

THE EXTRA JUDICIAL SERVICES ACT.

CHAPTER 58.

THE COUNTY JUDGES ACT.

3. See Bicknell v. Seager, D. C. Act, p. 15.

10. A Deputy County Court Judge in case of illness of the County Judge, has jurisdiction to hold a recount of ballots in an election for the Provincial Legislature: Re Prince Edward, 9 O. L. R. 463. Appointment under this section: Keyes v. McKeon, 2 O. W. N. 997, 1014, 19 O. W. R. 21, 23 O. L. R. 529. Jurisdiction of Deputy County Judge as Local Judge of High Court: Keyes v. McKeon, 23 O. L. R. 529.

14. Signature of requisition to call out troops to quell riot: R. v. Sault Ste. Marie, 1 O. W. N. 1144.

15. The Judge of another County Court has jurisdiction upon the request of the Judge of the County Court of the County where the land lies to hear a petition to amend a plan by closing part of the street allowances. To hear such a petition is one of the judicial duties to be performed by a Judge of a County Court where application is made to him: Re McDonald & Listowel, 6 O. L. R. 556. A provision of the Ontario Legislature that the County Judge of one county might preside at the sessions in a county other than that of which he was Judge was not within the competence of the Legislature: Gibson v. McDonald, 7 O. R. 401, 3 Cart. 319.

CHAPTER 59.

THE COUNTY COURTS ACT.

Refer to: Gorman, County Court Manual (Can.) 1914, 3rd Ed.; Robertson, Law of County Courts in Ontario, 1898; Wickham and Saunders' Handy Guide to the County Court (Eng.); Holmested and Langton, Judicature Act; The Annual Practice; The Yearly Practice. Bicknell and Kappele, Practical Statutes, pp. 234-237.

3. As to Judges being Local Judges of the High Court Division: see Judicature Act, R. S. O. 1914, ch. 56, sec. 114. As to concurrent jurisdiction with Master in Chambers: see 1913, Rules 209, 210, 211, 212.

4. No jurisdiction even by consent to appoint deputy without statutory requirements: McMally v. Blackledge, 1911, 2 K. B. 432. Jurisdiction and appointment of deputy: Keyes v. McKeown, 2 O. W. N. 997, 1014, 19 O. W. R. 21, 23 O. L. R. 530.

5. Place for Court offices: Rodd v. Essex, 19 O. L. R. 659.

19. Application—Convenience: Ferguson v. Anderson, 4 O. W. N. 830, 24 O. W. R. 68.

22. Effect of passing of the Act, 10 Edw. VII., ch. 30, on pending actions in regard to costs of matters within increased jurisdiction: Johnson v. Birkett, 21 O. L. R. 319, at p. 328, 1 O. W. N. 917; Noble v. Gunn Limited, 1 O. W. N. 884.

22.—(1*a*). When a sum up to the limit of jurisdiction is agreed on by the parties as remuneration for services to be performed or the price of an article sold, if the service be performed or the article delivered in pursuance of the bargain, the amount can be recovered in the County Court denial of contract and price not availing to oust jurisdiction: Ostrom v. Benjamin, 21 A. R. 467. The pleadings should be looked to to ascertain what was in dispute: Brown v. Hose, 14 P. R. 3. No jurisdiction to entertain suit on Division Court judgment: Crowe v. Grahame, 17 O. W.

R. 143, 2 O. W. N. 158, 22 O. L. R. 145. Amount of claim within limit and claim for interest making the total over the limit: Malcolm v. Leys, 15 P. R. 485. By sec. 119 of the Judicature Act the provisions of sec. 34 of that Act as to interest apply to County Courts. Actions where the amount of the debt or damages claimed is above a certain amount: see H. & L. notes, p. 1363.

22.—(1*b*) The term "personal actions" means common law actions. The County Courts had common law jurisdiction only: McGugan v. McGugan, 21 O. R. 289, 19 A. R. 56, 21 S. C. R. 267. Action for delivery up of a promissory note held to sound in tort: Plummer v. Coldwell, 15 P. R. 144. As to jurisdiction in action for more than stated limit on a general guarantee for payment of the price of goods: see Thomson v. Eede, 22 A. R. 105. The test as to the quantum of costs is the amount recovered: Moffatt v. Link, 2 O. W. N. 56, 16 O. W. R. 984. Scale of costs: Ramsay v. Luck, 3 O. W. N. 1053; Striker v. Rosebush, 17 O. W. R. 205, 2 O. W. N. 160. By sec. 119 of the Judicature Act, the provisions of sec. 71 of that Act regarding tender of amends in cases of tort, and the provisions of secs. 58-62, providing for jury trials and the duty of the Judge in cases of malicious prosecution apply to County Courts. Jurisdiction ousted in particular classes of actions: see H. & L. notes, p. 1362.

22.—(1*c*) In an action for injury to land the value of the property and not the amount of damages sustained was formerly the factor in determining jurisdiction: Moffatt v. Carmichael, 14 O. L. R. 595; Ross v. Vokes, 14 O. W. R. 1142, 1 O. W. N. 260; Fortier v. Chenier, 12 O. W. R. 5. Value of property—lessee's interest and freehold value: Angel v. Jay, 1911, 1 K. B. 666.

Title to land does not on mere suggestion necessarily come into question under a plea of not guilty by statute: Ball v. G. T. R., 16 C. P. 252. Nor where the question is whether a right to impound arises out of a right of pasturage: Graham v. Spettigue, 12 A. R. 261. Nor where the question is

if a township is liable to repair a highway: Re Knight v. Medora, 14 A. R. 112. Nor where the dispute is as to the terms of the tenancy: Re English & Mulholland, 9 P. R. 145, or as to breach of covenant in a lease: Talbot v. Poole, 15 P. R. 99. Nor where the question was the ownership of rails put by mistake on another's land for a line fence: Bradshaw v. Duffy, 4 P. R. 50; Nor where a conveyance of land was given as security for a promissory note where the note was sued on: McGolrick v. Ryall, 26 O. R. 435. The bare assertion of the defendant that the right on title to a corporeal or incorporeal hereditament is in question will not oust the jurisdiction. The Judge has authority to enquire into so much of the case as will satisfy him on the point, and if the facts lead to only one conclusion, and that against the defendant, there is no such bona fide dispute as will oust the jurisdiction of the Court: Moberly v. Collingwood, 25 O. R. 625. (This was a case of surrender of lease). See also Crawford v. Seney, 17 O. R. 74, where the question was a claim for use and occupation, and the defendant set up a contract for sale. And where title was denied after attornment, the Court had jurisdiction because the title was not open to question by the defendant: Bank of Montreal v. Gilchrist, 6 A. R. 659.

There is no jurisdiction in matters of tort relating to personal chattels if the title to land is brought in incidentally: Trainor v. Holcombe, 7 U. C. R. 548. Nor in an action by remaindermen against tenant for selling timber where the life tenant's defence was that payments had been made on an existing mortgage, and claiming to be subrogated to the mortgagee's rights: Whitesell v. Reece, 9 O. L. R. 182. Nor in an action for conversion where the question was whether the house was part of the freehold: Portman v. Patterson, 21 U. C. R. 237. Prima facie proof of title being given and that such title must come into question, and no cause being shown to the contrary, jurisdiction is ousted: Bradshaw v. Duffy, 4 P. R. 50. The title to corporeal hereditaments is in question whether the existence thereof or the right of the claimant is denied: Adey v. Trinity House, 22 L. J. Q. B. 3. Where the plaintiff would require to prove his title in a claim for damages for cutting

timber, jurisdiction was ousted: Danaker v. Little, 13 P. R. 361, but not where the action was simply one of trespass to land: Bailey v. Bleecker, 5 C. L. J. 99. Where upon pleadings the title to land is brought in question: see Seabrook v. Young, 14 A. R. 97: Flett v. Way, 14 P. R. 123; Worman v. Brady, 12 P. R. 618; Brown v. Hose, 14 P. R. 3; Neely v. Parry Sound, 8 O. L. R. 128. When title to land is "in question": Dobner v. Hodgins, 14 O. W. R. 265, 593, 1 O. W. N. 12. Jurisdiction in action for possession by landlord: Walters v. Wylie, 20 O. W. R. 994, 3 O. W. N. 567. See H. & L. notes, p. 1362.

22.—(1*e*) The County Court's authority to make vesting orders: see R .S. O. 1914, ch. 56, secs. 119 and 72. As to lis pendens: see ch. 56, secs. 119 and 36. And see sec. 28 infra. Note on this provision and the next following sub-section, 47 C. L. J. 205.

22.—(1*g*) Partnership accounts: Allen v. Fairfax, 21 O. R. 598.

22.—(1*h*) Legacy charged on land: see Rustin v. Bradley, 28 O. R. 119. Action against executor for specific legacy: venue: see sec. 30 infra; Curlette v. Vermilyea, 1 O. W. N. 693, 15 O. W. R. 863.

22.—(1*i*) An action for a legacy charged on land is a matter involving equitable relief. The subject matter involved in such an action is the amount of the legacy, not the value of the land: Rustin v. Bradley, 28 O. R. 119: see now sub-sec. (h). When a cause of action is within the jurisdiction, an injunction may be granted to restrain an apprehended wrong, and a declaration of right may be had whether substantive relief is sought or not in as full and ample a manner as in the Supreme Court: Bradley v. Barber, 30 O. R. 443. A County Court has jurisdiction, whatever the amount of the mortgagee's claim may have been when power of sale exercised, to entertain an action for the recovery of surplus from the sale not exceeding the money limit, although the existence of the surplus is denied: Reddick v. Traders Bank, 22 O. R. 449. A County Court can give a judgment for nominal damages and grant an injunction in an action for trespass where the limit

of jurisdiction is not exceeded. A counterclaim on which no relief can be given makes no difference as to the jurisdiction: Fitchett v. Mellow, 18 P. R. 161; see Neely v. Parry Sound, &c., Co., 8 O. L. R. 128. Plaintiff had a Division Court judgment for $92, and costs, and brought an action to set aside a chattel mortgage for $520, made by the defendant as fraudulent. The subject-matter involved was the amount of the judgment and the Court had jurisdiction: Thomson v. Stone, 4 O. L. R. 333. Equitable Relief: see H. & L. notes, on various matters of equitable jurisdiction, pp. 13-25. Specific performance: H. & L. notes, p. 23 ad fin. Relief against forfeiture: H. & L. p. 48. Declaratory judgments: H. & L. note, p. 51. Actions for equitable relief not falling within section: see H. & L. notes, p. 1364-5. How far equitable jurisdiction of the County Courts restored: see Halliday v. Rutherford, 23 Occ. N. 200. By secs. 119 and 23 of the Judicature Act, R. S. O. 1914, ch. 56, the provisions of secs. 16 to 22 of that Act have effect in all Courts so far as the matters to which they relate are cognizable by such Courts. This includes the giving of equitable relief (sec. 16 (a)), making declaratory judgments and orders (sec. 16 (b)), giving effect to equitable defences: (sec. 16 (c), (d). Giving effect to equitable rights and enforcing equitable duties (sec. 16 (e)). Injunction, mandamus (but see Rich v. Melancthon Board of Health, 26 O. L. R. 48); receiver (sec. 16 (f), 17); relief against forfeiture (sec. 20). And it also includes sec. 22, by which the rules of equity are made to prevail.

22.—(1*j*) Jurisdiction of Division Court: see R. S. O. 1914, ch. 63, sec. 62 (1e). Right to rank on insolvent estate: see Whidden v. Jackson, 18 A. R. 439.

22.—(1) By the provisions of R. S. O. 1914, ch. 56, sec. 119, and 50-52, the County Court have power similar to the Supreme Court in the case of Quebec judgments, have the same powers as to costs (sec. 74), interest (sec. 34), sheriffs (sec. 115), gaols (sec. 116), and are bound by decision in the same way (sec. 32). The jurisdiction of the County Court is also limited, in addition to matters referred to in this section, in interpleader, see Con. Rules 1123-8; H. & L. notes, pp. 1329-1332; 1913 Rules 644, 645. No jurisdiction

in County Court to entertain action against a benevolent order for sick benefits in absence of corrupt motive of domestic tribunal: Thompson v. Court Harmony, A. O. F., 1 O. W. N. 870. The County Courts have jurisdiction to any amount named in the statement of claim when the defendant does not dispute liability, either by his appearance or statement of defence: Pearce v. Toronto, 25 O. W. R. 321.

22.—(3) Removal of action to Supreme Court: Emmons v. Dymond, 4 O. W. N. 1363, 1405; 24 O. W. R. 657, 735; Farrow v. McPherson, 2 O. W. N. 70, 16 O W. R. 1009; see also H. & L. notes, pp. 192-3.

22.—(7) Discretion as to costs on removal from County to High Court: Donkin v. Pearson, 1911, 2 K. B. 412.

23.—(1) Plaintiff's claim in excess of jurisdiction, but defendants' set-off reduced it below the County Court maximum. The Court had jurisdiction: Finn v. Gosnel, 14 O. W. R. 830. A County Court has not jurisdiction merely by reason of the existence of a set-off: Caldwell v. Hughes, 4 O. W. N. 1192, 24 O. W. R. 498. Counterclaim beyond jurisdiction: Wallace v. Peoples' Life, 30 O. R. 438. A plaintiff having a claim against which the defendant may if he pleases set up a set-off, must sue in the Supreme Court, for he cannot compel the defendant to set up his claim by way of set-off and he cannot by voluntarily admitting it, confer jurisdiction upon the inferior Court: Caldwell v. Hughes, 24 O. W. R. 498; Everly v. Dunkly, 5 O. W. N. 65, 25 O. W. R. 29.

23.—(2) Transferring causes from County Court to High Court where the defence or counterclaim involves matter beyond the jurisdiction of the Court: see H. & L. notes, pp. 192-193.

24. Appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred to the High Court: Young v. Tucker, 26 A. R. 162, 30 S. C. R. 185.

28. See Judicature Act, R. S. O. 1914, ch. 56, sec. 23, which makes the provisions of secs. 16 to 22 applicable to County Courts. (See note to sec. 22 (1i)

ante). See also R. S. O. 1914, ch. 56, sec. 119, which makes the following sections of the Judicature Act applicable to County Courts, viz.: sec. 32 (stare decisis), sec. 34 (interest), sec. 36 (lis pendens), secs. 50-52 (Quebec judgments), secs. 58-62 (jury trials, malicious prosecution), sec. 71 (tender of amends in tort), sec. 72 (vesting orders), sec. 74 (costs), sec. 115 (sheriffs), and sec. 116 (gaols), as well as sec. 24 (orders subject to appeal). This section was held to give the County Court no jurisdiction to issue a peremptory writ of mandamus: Rich v. Melancthon Board of Health, 26 O. L. R. 48.

29. Where the action itself should not be removed it is impossible to remove a part of it or a proceeding in it: Re Hill and Telford, 12 O. W. R. 1056. An action cannot be removed after verdict or judgment in favour of the plaintiff leaving that judgment in force with right to either party to move against it in the High Court: Sherk v. Evans, 22 A. R. 242. When action removable: see Martin v. Mitchell, 1 Ch. Ch. 384; Re McGugan v. McGugan, 21 O. R. 289; Re McKay & Martin, 21 O. R. 104; Struthers v. Green, 14 P. R. 486. The High Court cannot remove an action from the County Court after trial and judgment: Roche v. Allan, 23 O. L. R. 478. "Fit to be tried in the High Court:" Emmons v. Dymond, 4 O. W. N. 1363, 1405, 24 O. W. R. 657, 735.

30. Venue in County Court action. Convenience: Empire Cream Separator v. Pettypiece, 13 O. W. R. 704, 902; Baughart Bros. v. Miller, 4 O. W. N. 1368, 24 O. W. R. 629. Adequate reason for change of venue: McReedie v. Dalton, 15 O. W. R. 875. An action against an executor for a specific legacy or in default of damages is within this provision: Curlette v. Vermilyea, 1 O. W. N. 693, 15 O. W. R. 863. The fact that judgment has been signed against one defendant does not deprive the other defendants of the right to have the trial at the place which is most convenient: Martin v. McLeod, 5 O. W. N. 79, 25 O. W. R. 66. Venue: see H. & L. notes, pp. 1449, 218; Con Rule 529 b; H. & L. notes, pp. 734, 736; 1913 Rule 245. "Brought and tried:" see H. & L. notes, p. 259.

32. See in particular: 1913 Rules 764-771. Rules considered: notice required of contention to be raised that legislation *ultra vires*: garnishment of bank with head office in Ontario in respect of a deposit in Calgary: McMulkin v. Traders Bank, 3 O. W. N. 787, 21 O. W. R. 640, 26 O. L. R. 1; see R. v. Lovitt, 1912, A. C. 212.

36. See H. & L. notes, p. 1254.

39. See Judicature Act, R. S. O. 1914, ch. 56, sec. 26 (2 p.) as to appeals to Divisional Court, and see 1913 Rules 491 *et seq.*; see H. & L. notes, pp. 1036-1047. Surrogate Court appeals are upon the like practice and procedure: R. S. O. 1914, ch. 62, sec. 34 (3). Appeal where the Judge at the conclusion of the plaintiff's evidence withdraws the case from the jury and dismisses the action: Hagen v. C. P. R., 30 O. R. 138. Former practice of moving against verdict before County Court Judge at quarterly sittings; Norton v. McCabe, 12 P. R. 506, and see H. & L., pp. 1038, 1039. Discovery of new evidence: Butler v. McMicken, 32 O. R. 422. Where findings of jury reversed in term: Booth v. C. P. R., 13 O. L. R. 91, and see also Leishman v. Garland, 3 O. L. R. 241; Irvine v. Sparks, 31 O. R. 603; Donaldson v. Wherry, 29 O. R. 552.

40.—(1) See provision of Judicature Act, R. S. O. 1914, ch. 56, secs. 119 and 24, and notes to that section. Section considered and construed: Forbes v. Forbes, 2 O. W. N. 976, 19 O. W. R. 47. Right of appeal from orders. Section considered: Gibson v. Hawes, 24 O. L. R. 543. Where the Master in Chambers directed an interpleader issue to be tried in the County Court without jurisdiction, which was apparent on the face of the order, all proceedings under it were *coram non judice*, and there was no right of appeal from the judgment of the County Court on the issue: Teskey v. Neil, 15 P. R. 244. An appeal lies from the order of a County Court disposing of an issue upon a garnishing application and the claimant, plaintiff in the issue but not an original party, may be appellant: Henderson v. Rogers, 15 P. R. 241. There was no appeal from an order dismissing an application made by a claimant under sec. 30 of the Assignments Act, R. S. O. 1897, ch. 147; R. S. O. 1914, ch. 134, sec. 34; Simpson v. Clafferty, 18 P. R. 402.

40.—(1c) After judgment dismissing action with costs and notice of appeal therefrom given by plaintiffs, an order was made requiring the plaintiffs to give additional security or have their action dismissed. This was interlocutory and not appealable: Arnold v. Van Tuyl, 30 O. R. 663. On a motion to set aside as irregular a judgment by default, the Judge held the judgment regular but set it aside on terms as to costs. This order was not in its nature final and the appeal did not lie: O'Donnell v. Guinane, 28 O. R. 389; see also Fisken v. Stewart, 17 C. L. T. Occ. N. 82; Slater v. Trader, 17 C. L. T. Occ. N. 83. "Final order:" see Johnson v. Refuge Assurance Co. 1913, K. B. 259. An appeal lies from an order committing the defendant to gaol as a judgment debtor for making away with his property to defraud creditors, it being in its nature final: Baby v. Ross, 14 P. R. 440. The defendant paid into Court $95 in full which the plaintiff accepted. The County Court Judge made an order allowing the defendant to set off the amount of his County Court costs in excess of what he would have incurred in a Divisional Court, and to issue execution for the excess if any. This order was, in its nature, final, and therefore appealable under this section. Babcock v. Standish, 19 P. R. 195. An order of a County Judge discharging the defendant from arrest under *ca. sa.* is not final within the meaning of this section, and an appeal does not lie: Gallagher v. Gallagher, 31 O. R. 172. An order approving sale and making disposition of the funds of a company which was being voluntarily wound up, was in its nature final and appealable and held a nullity: Re D. A. Jones Co., 19 A. R. 63. On order for summary judgment, unless money paid into Court is in its nature final: Castle v. Kouri, 14 O. W. R. 125, 18 O. L. R. 462. An order of a County Court Judge under Con. Rule 261 (1913, Rule 124) is in its nature final, and an appeal will lie: Smith v. Traders Bank, 11 O. L. R. 24. A County Court Judge's order dismissing an appeal from a ruling as to the scale of costs awarded the plaintiff by his judgment, is interlocutory and not final, and no appeal lies to a Divisional Court: Leonard v. Burrows, 7 O. L. R. 316. So also is an order dismissing an application to vary minutes under Con. Rule 625

(2), (1913, Rule 527): Re Taggart and Bennett, 6 O. L. R. 74. Appeal from order made by a County Court Judge under Con. Rule 907: see H. & L. notes, p. 1144 (see 1913, Rule 587), and see also H. & L. notes, pp. 1040-3. Final or interlocutory order, pp. 1040-1. Judgments and orders appealable, pp. 1041-2. Judgments and orders not appealable, p. 1042. Appeal from order of Surrogate Judge that security for costs be given: see R. S. O. 1914, ch. 62, sec. 34: Forbes v. Forbes, 23 O. L. R. 518. There is no appeal from an interlocutory order under any clause of the section: Gibson v. Hawes, 20 O. W. R. 109, 3 O. W. N. 91, 24 O. L. R. 543.

40.—(2) Where Judge is *persona designata*: see 9 Edw. VII., ch. 46, sec. 4; R. S. O. 1914, ch. 79; H. & L., p. 1043.

41. See H. & L. notes, p. 1043.

42. See H. & L. notes, pp. 1043-5. It is not a valid objection to an appeal that the C. C. Judge has not, in certifying the proceedings, expressed that they are certified "to the Court:" Baby v. Ross, 14 P. R. 440. The provisions of sections limiting time to set down appeals were peremptory, and there was no power to dispense with such provisions or enlarge the time (Reekie v. McNeil, 31 O. R. 444), until the enactment in 1904 of sub-section 2 of section 44: see Paul v. Rutledge, 16 P. R. 140. The Court can always extend time on application where the appeal has been lodged and will do so as a matter of course where there has been no wanton delay in giving security within the time allowed by the County Judge: Gilmour v. McPhail, 16 P. R. 151.

43. This section was Con. Rule 794.

44. Power to extend time for appealing after time expired: Hunter v. Patterson, 2 O. W. N. 61, 16 O. W. R. 993; see 1913, Rule 176. As to appeals: see H. & L. p. 1044; see 1913, Rules 491 *et seq.* "Thirty days from the judgment" (sec. 44 (1)). One month from the date of judgment (1913, Rule 491): see also under former wording: Fawkes v. Swayzie, 31

O. R. 256; Maxon v. Irwin, 15 O. L. R. 81, at p. 89, 10 O. W. R. 537; Allan v. Place, 15 O. L. R. 148, 10 O. W. R. 603.

45. Former Con. Rule 498.

46. Where an appeal from a County Court decision was dismissed by a Divisional Court with costs, as of a motion to quash on the ground that no appeal lay, the costs are taxable on the High Court scale, and recoverable by execution in the High Court: Francis v. Huff, 11 O. W. R. 343. Case remitted to County Judge under this section to enable the defendants to develop their defence fully: Farmers Bank v. Big Cities Realty, 1 O. W. N. 397: see H. & L., p. 1043; see Former Con. Rule 818.

CHAPTER 60.

The General Sessions Act.

3. Statute 53 Vic., ch. 18, sec. 2 (*o*), which authorizes police magistrates to try and convict persons charged with forgery, was considered *ultra vires* under B. N. A. Act, sec. 91, sub-sec. 27, in Reg. v. Toland, 22 O. R. 505; but in Reg. v. Levinger, 22 O. R. 690, it was held within the powers of a Provincial Legislature as being in relation to the constitution of a Provincial Court of criminal jurisdiction and not a matter of criminal law or procedure. Appeals to Sessions under R. S. O. 1914, ch. 90, sec. 10 (The Summary Convictions Act) now lie on the complaint of any person who thinks himself aggrieved, whether complainant or defendant. The Appeal is to Sessions where the conviction adjudges imprisonment. In all other cases to the Division Court.

CHAPTER 61.

The County Judges' Criminal Courts Act.

CHAPTER 62.

The Surrogate Courts Act.

Refer to: Howell, Probate Practice; Weir, Law of Probate; Tristram and Coote, Probate Practice (with Canadian Cases); Williams, Executors and Administrators; Powles and Oakley, Law and Practice relating to Probate and Administration (Browne on Probate).

4. Evidence: as to proof of wills by certified copy where registered: see Armour, Titles, pp. 124, 115, 348; R. S. O. 1897, ch. 136, sec. 28; R. S. O. 1914, ch. 124, sec. 22, ch. 76, secs. 46, 47.

8. A Junior County Judge who has heard the evidence and tried the issue in a Surrogate Court while the office of Senior Judge is vacant, has the right to deliver judgment in such case after the new Senior Judge has been appointed: Speers v. Speers, 28 O. R. 188.

14. Place for Court offices: Rodd v. Essex, 19 O. L. R. 659.

19. The Surrogate Courts are not statutory Courts, having only those powers which are conferred upon them by this Act. They are invested with the authority and jurisdiction over executors and administrators, the committing of letters of administration and the grant of letters probate as were in use in the Ecclesiastical Courts of England, except in so far as the same have been revoked by subsequent legislation or rules: Grant v. Great Western, 7 C. P. 438; Cunningham v. Cunningham, 2 O. L. R. 511, at p. 518; Re Wilson and Toronto General Trusts, 13 O. L. R. 82; but see as to inherent jurisdiction: Re Mercer, 26 O. L. R. 427. For historical review of origin and general jurisdiction of Surrogate Courts in Ontario: see judgment of Draper, C.J.: Grant v. G. W. Ry., 7 C. P. 438. For review of powers of the Court as to accounting: see Cunnington v. Cunnington, 2 O. L. R. 511; Re Russell, 8 O. L. R. 481; Union Trust v. Beasley, 12 O. W. R. 336; and see notes to sec. 71 *infra*. The Surrogate

Court alone has jurisdiction to determine whether an absentee be dead and whether he died intestate: Re Coots, 1 O. W. N. 807, 17 O. W. R. 727 (but see provisions of Insurance Act, R. S. O. 1914, ch. 183, sec. 165). The Supreme Court of Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration: McPherson v. Irvine, 26 O. R. 438. Supreme Court will not interfere to revoke grant of letters: Belanger v. Belanger, 2 O. W. N. 543, 1360, 24 O. L. R. 441. Jurisdiction of Supreme Court to set aside a will as having been executed under improper influence or without sufficient capacity without waiting for a revocation of probate: Wilson v. Wilson, 24 Gr. 377. Where a probate has been granted in common form and a subsequent will is adduced; jurisdiction to try the validity of the probate: Perrin v. Perrin, 19 Gr. 259. The Supreme Court has no jurisdiction to deal with a retractation or renunciation of probate: Foxwell v. Kennedy, 2 O. W. N. 821, 1299, 18 O. W. R. 782, 24 O. L. R. 189. The Supreme Court has no power to interfere with the particular jurisdiction of the Surrogate Court: Belanger v. Belanger, 2 O. W. N. 543, 1360, 19 O. W. R. 695, 24 O. L. R. 441; Murtrie v. Alexander, 18 O. W. R. 836, 23 O. L. R. 396. Effect of change in wording from R. S. O. 1897, ch. 59, sec. 17: Badenach v. Inglis, 4 O. W. N. 1495, 29 O. L. R., 165. The Supreme Court has jurisdiction to entertain an action for a declaration of the invalidity of a will, notwithstanding a decision of the Surrogate Court admitting the will to probate after a contest to which the plaintiff in the Supreme Court action was not a party. The validity of the will was not *res adjudicata* by the decision of the Surrogate Court: Badenach v. Inglis, 29 O. L. R. 165; see Judicature Act, R. S. O. 1897, ch. 51, sec. 38; R. S. O. 1914, ch. 56, sec. 12, and see notes to sec. 32 *infra*.

20. Insolvent executor: Johnson v. Mackenzie, 20 O. R. 131; Gladdon v. Stoneman, 1 Mad. 143 (n); Langley v. Hawten, 5 Mad. 46; Dowd v. Hawten, 19 Ch. D. 61. Grant of probate to infant: see Cumming v. Landed Banking, 20 O. R. 382; Toll v. C. P. R., 8

W. L. R. 795; and see provisions of R. S. O. 1897, ch. 337, secs. 3 and 4. As to grant of administration *durante minore aetate*: *post*, secs. 50 and 51.

24. If the Court had jurisdiction, the grant of administration is valid though obtained irregularly and issued improvidently: London and Western Trusts v. Traders Bank, 11 O. W. R. 977, 16 O. L. R. 382. To what Court grant shall belong: Book v. Book, 15 O. R. 119; McPherson v. Irvine, 26 O. R. 438; London and Western Trusts Co. v. Traders Bank, 11 O. W. R. 977, 16 O. L. R. 382. The existence of real or personal estate at the time of death is not essential to give jurisdiction: Jennings v. G. T. R., 15 A. R. 477. Foreign domicile: Re Medbury, Lothrop v. Medbury, 11 O. L. R. 429. Foreign domicile of family on whose behalf action under R. S. O. 1914, ch. 151, is brought: Gyorgy v. Dawson, 13 O. L. R. 381. Where there was a supposed intestacy and the administrator sold lands: action by devisees of lands against purchasers where will subsequently discovered: Hewson v. Shelley, 1913, 2 Ch. 384. Will discovered after sale by administrator: Article, 49 C. L. J. 608. Effect of revocation of erroneous grant: see R. S. O. 1914, ch. 121, sec. 50 and notes; see *infra*, sec. 27 and notes.

27. A grant of administration is a judgment *in rem* which is unquestionable while it stands, unless it is shewn that the person whose estate is in question is not dead, or that the Court had no jurisdiction: London and Western Trusts v. Traders Bank, 16 O. L. R. 382; Jennings v. G. T. R., 15 A. R. 477. Letters of administration issued after action and before trial are sufficient to support the action even where the plaintiff has no interest in the estate: Dini v. Fauquier, 8 O. L. R. 712. But where the person entitled to obtain administration is not the one who begins the action: see Chard v. Rae, 18 O. R. 371. Letters of administration rightly granted to plaintiff as widow support the action: Doyle v. Diamond Flint Glass, 8 O. L. R. 499. A grant of administration to an infant widow not a nullity: Belanger v. Belanger, 2 O. W. N. 543. The High Court has no jurisdiction to revoke a grant of administration: McPherson v. Irvine, 26 O. R. 438; and

see notes to sec. 19 *ante*; and see Jennings v. Grand Trunk, 15 A. R. 477; London and Western Trusts Co. v. Traders Bank, 11 O. W. R. 977, 16 O. L. R. 382. Letters of administration as evidence of title in intestacy: Armour, Titles, pp. 339, 340. Revocation of erroneous grant: see *ante*, sec. 26 and notes; see also R. S. O. 1914, ch. 121, sec. 50 and notes.

28. Right of trial by jury in question of testamentary capacity: Jarret v. Campbell, 21 O. W. R. 447, 2 O. W. N. 872, 21 O. W. R. 770, 3 O. W. N. 905, 26 O. L. R. 83.

29. Time of sittings: Eyers v. Rhora, 3 O. W. N. 1130.

31. Production of testamentary writings: Re Shepherd, 1891, P. 323.

32. The powers of the High Court in matters testamentary considered: Mutrie v. Alexander, 23 O. L. R. 396. Jurisdiction to remove an executor is also given to the High Court: see R. S. O. 1897, ch. 51, sec. 39; R. S. O. 1914, ch. 56, sec. 12. The High Court cannot revoke a grant of letters of administration: McPherson v. Irvine, 26 O. R. 438. The validity of a will is not *res adjudicata* by the judgment of the Surrogate Court: Badenach v. Inglis, 29 O. L. R. 165, and notes to secs. 19-27, *ante*. See also R. S. O. 1914, ch. 56, sec. 13, notes.

33.—(1) Application to remove cause into High Court: Re Wilcox v. Setter, 7 O. W. R. 65; Re Graham v. Graham, 11 O. W. R. 700; Re Reith v. Reith, 11 O. W. R. 883, 16 O. L. R. 168. Immediately an order is made removing a matter to the High Court, it ceases to be a Surrogate Court matter: Justin v. Goodwin, 18 P. R. 174. Where there was a contention between the widow and the next of kin as to grant of administration it was held that the jurisdiction to award grant being of a discretionary kind could be better exercised by the Surrogate Judge and the cause not removed: Re McLeod, 16 P. R. 261. Where a matter was transferred and the order contained terms as to costs: see Re Forster, 18 P. R. 65. Time for filing jury notice where cause removed into the High Court: see McKenzie v.

Shoebotham, 10 O. W. R. 1055. Reference or removal to the Supreme Court: see Judicature Act, 1897, ch. 51, sec. 40 (1). The Supreme Court has original jurisdiction to appoint an administrator *ad litem*: see Con. Rule 195; see now 1913, Rule 90. As to jurisdiction of Supreme Court in probate and administration: see H. & L. notes, p. 36, and notes to sec. 19 *ante*.

33.—(3) In an application under this section the importance of the case and its nature are not to be tried on counter affidavits—it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum: Re Reith v. Reith, 11 O. W. R. 883, 16 O. L. R. 168. Difficulty of question and amount of estate as affecting removal of cause to High Court: Pattison v. Elliott, 3 O. W. N. 1327, 22 O. W. R. 232.

34.—(1) Immediately an order is made removing a matter from a Surrogate Court to the Supreme Court it ceases to be a matter in the Surrogate Court and an appeal from the order under this section cannot be entertained. The Supreme Court Practice is to be followed: Justin v. Goodwin, 18 P. R. 174. Where Surrogate Judge adjudicated by consent on claim as to whether certain money in a savings bank passed as *donatio mortis causa*, a right of appeal was held to exist as from an award to a Judge in Single Court, under the Arbitration Act: Re Graham, 3 O. W. N. 202, 20 O. W. R. 297, 25 O. L. R. 5. Appeals to Divisional Court: see Judicature Act, 1897, ch. 51, sec. 75 (4); H. & L. notes, p. 131; R. S. O. 1914, ch. 26, sec. 2 (o).

34.—(2) The $200 refers to property belonging to the estate itself: Forbes v. Forbes, 2 O. W. N. 976, 19 O. W. R. 47, 23 O. L. R. 518. An appeal lies from an order for security for costs though less than $200 in amount: Forbes v. Forbes, 23 O. L. R. 518.

34.—(3) See R. S. O. 1914, ch. 59, secs. 39, 40. No security for costs is required on motion or appeal to Divisional Court: see as to application of (1892) Surrogate Court, Rule 57: Re Nichol, 1 O. L. R. 213; Re Wilson, 17 P. R. 407. Irregularities: see Taylor v.

Delaney, 3 O. L. R. 380. Extension of time for appealing: Union Trust v. Bensley, 12 O. W. R. 336, 1069.

34.—(5) Appeal from order allowing an executor compensation: Re Alexander, 31 O. R. 167; and see 1913, Rules 502 *et seq.*

35. Presumption of death: Doe d. Hagerman v. Strong, 8 U. C. R. 291; Re Benham's Trusts, L. R. 4 Eq. 416; Re Alston, 1892, P. 142; Re Matthews, 1898, P. 17; Re Robertson, 1896, P. 8. Cf. provisions of Insurance Act as to when death may be presumed: R. S. O. 1914, ch. 183, sec. 165 and notes. Proof of will where witnesses could not be found: Re Young, 27 O. R. 698. Where witnesses dead: see Trott v. Skedmore, 2 Sw. & Tr. 12. Contents of lost will: Stewart v. Walker, 6 O. L. R. 495; Sugden v. Lord St. Leonard, 1 P. D. 154, 252; Re Pearson, 1896, P. 289; Woodward v. Goulstone, 11 A. C. 469.

38. Where there is a contention between the widow and the next of kin and the assets are separable, administration may be granted *quoad, i.e.*, to the widow as to one part and to the next of kin as to the other part; or there may be a joint grant: Re McLeod, 16 P. R. 261. Where all the next of kin resident in Ontario consented to the appointment of the husband of the daughter of the sister of the deceased as administrator, and a brother, resident in a foreign jurisdiction brought an action to revoke the grant, it was held that the Surrogate Judge had exercised his discretion properly, considering the illiteracy, age, etc., of certain parties, and that even if he had not, the grant would not have been revoked: Carr v. O'Rourke, 3 O. L. R. 632.

39. Administration *durante absentia*: see Chambers v. Bicknell, 2 Hare, 536; Re Cassidy, 4 Hogg, 360.

44. Where applications for administration are made in more than one Surrogate Court, preference will be given to the party nearest in the order in which administration is usually granted. Re Tougher, 3 O. L. R. 144.

45. Lodging a caveat in the Surrogate Court is not "instituting proceedings to set aside a will:" Re McDevitt, 5 O. W. N. 333.

48. This is the statute, 21 Henry VIII., ch. 5, sec. 6; R. S. O. 1897, ch. 337, sec. 1.

49. This is the statute, 21-22 Vict., ch. 95, sec. 16; R. S. O. 1897, ch. 337, sec. 2.

50. This is the statute, 38 Geo. III., ch. 87, sec. 6; R. S. O. 1897, ch. 337, sec. 3; see Re Stewart, 3 P. & D. 244; Merchants Bank v. Monteith, 10 P. R. 334; Cummings v. Landed Banking & Loan, 20 O. R. 382.

51. This is the statute 38 Geo. III., ch. 87, sec. 7; R. S. O. 1897, ch. 337, sec. 4.

52. Copy of will as appearing in Probate omitting important word bearing on construction: see Re Cooper, 5 O. W. N. 151.

53. The powers of an administrator *pendente lite* cease when final judgment has been given: Wieland v. Bird, 1894, P. 262. A testator, A., died, leaving B. his executrix. She died, leaving a will, the validity of which was disputed. It being required to pay money to A.'s estate, the Court appointed an administrator *pendente lite*: In Goods of Fawcett, 14 P. D. 152. As to authority of the High Court to appoint administrator *pendente lite*, which is only when an action is pending in it touching the validity of the will of a deceased person: see Beatty v. Haldan, 4 A. R. 239, and, perhaps, under secs. 33 to 35, where a cause is removed into the High Court: Re Gooderham, 8 O. W. R. 685. The Supreme Court has jurisdiction to appoint an administrator *ad litem* when an action is pending in it: see Con. Rules 194, 195; 1913, Rule 90; H. & L. notes, pp. 340-347. Judgment against an administrator *ad litem* binds the general administrator: see cases collected, H. & L. notes, p. 345. The High Court may also appoint a receiver in a proper case to act in the place of an executor: see H. & L. notes, p. 991. Where the Court of Chancery had appointed a receiver, administration *pendente lite* was made to him: Tichborne v. Tichborne, 1 P. & D. 730; Re Evans, 15 P.

D. 215; see also Beatty v. Haldan, 4 A. R., at p. 245.

54.—(1) This section is based on the common law, 31 Edw. III., St. 1, ch. 11, and 21; Henry VIII., ch. 5, sec. 2; see R. S. O. 1897, ch. 337, sec. 5. Where party entitled in priority is missing: see Re Chapman, 1903, P. 192. A husband or wife surviving after dissolution of marriage is not entitled to grant of administration: Re Wallas, 1905, P. 326. Passing over husband or wife whose adultery has been established though marriage not dissolved: Re Frost, 1905, P. 140; or where there has been a separation order: Re Elizabeth Jones, 74 L. J., P. 27, 164. Where a husband has renounced his marital right to share in his wife's estate before marriage, and in order to it, he is not entitled to administration: for administration follows interest: Dorsey v. Dorsey, 29 O. R. 475, 30 O. R. 183. In cases where some one is not named as executor and no duties are indicated in the will which would constitute him executor according to its tenour, but who has such an interest that in spite of his not being named executor he might be looked on to act as such, the practice as indicated is to grant, not probate, but letters of administration with will annexed: Re Coleman, 9 O. W. R. 985. Appointment of universal devisee and legatee administrator with will annexed: see Re Pryse, 1904, P. 301. An administrator c.t.a. has no authority as such to compromise a dower claim by assigning the claimant some of the decedent's real estate: Irwin v. T. G. T. Co., 24 A. R. 484. Where a will bequeathed property to A., disposed of no other property, appointed no executor and contained no other bequests or directions, the Court granted administration with will annexed to A., limited to the property described in the will, without requiring the next of kin to be cited: Re Baldwin, 1903, P. 61. In granting administration the Court will not direct, control or suggest anything with regard to the administration of the property beyond granting administration in due course of law: Re Cory, 1903, P. 62. Grant of administration to an infant: Belanger v. Belanger, 24 O. L. R. 441. Where a sole executrix and universal legatee was incapable of taking probate owing to ill health, the Court allowed

a joint grant to her nominees: Re Davis, 1906, P. 330. Where doubts arose as to the legitimacy of the next of kin, administration was granted to one of their number chosen by the persons interested in the estate: Re Minshull, 14 P. D. 151. This section is applied under Ontario Practice more liberally than the corresponding English section, 20 and 21 Vict., ch. 77, sec. 73 has been applied: Carr v. O'Rourke, 3 O. L. R. 632; Re Keho, 7 O. W. R. 825. Executors' accounts: for review of the jurisdiction of the Ecclesiastical Court, the administrative powers of the High Court: see Re Russell, 8 O. L. R. 481. Authority and jurisdiction of Courts over executors and administrators: see Cunnington v. Cunnington, 2 O. L. R. 511; see sec. 70 *et seq.*, *post*, and notes.

54.—(3) "Special circumstances," murder of wife by husband: Re Crippen, 1911, P. 108.

56. This in the statute 31 Edw. III., St. 1, ch. 11; R. S. O. 337, sec. 6.

57. The Surrogate Courts have the same authority as the English Probate Courts in respect of limited grants of administration: Re Thorpe, 15 Gr. 76. Probate of a lost will is limited until original will is proved: Sugden v. Lord St. Leonards, 1 P. D. 154.

58. See statute 21 Henry VII., ch. 5, sec. 4, and R. S. O. 1897, ch. 337, sec. 9. Remarks on practice as to inventories: see Re Russell, 8 O. L. R. 481, at p. 491 *et seq*; see Surrogate Court Rule 19 (1892).

59. A power of sale having been given to executors *qua* executors, and not by name, they could not, after having once renounced, execute the power: Travers v. Gustin, 20 Gr. 106. Liability notwithstanding renunciation: Vannatto v. Mitchell, 13 Gr. 665. Executor who has renounced is not a proper defendant: Stinson v. Stinson, 2 Gr. 508. The renunciation of an executor cannot be recalled on the death of the acting executor: : Allen v. Parke, 17 C. P. 105. Executor who is also trustee: see Doe d. Berringer v. Hiscott, 6 O. S. 23. A renunciation

operates, although the executor's name was expunged from the will: Re Noddings, 2 Sw. & Fr. 15. In a proper case, where circumstances have altered one of several executors may be allowed to retract his renunciation and carry on his executorship: Re Phipps, 9 O. W. R. 982. Retraction of renunciation: Re Gill, 3 P. & D. 113; Re Stiles, 1898, P. 12; Re Wheelwright, 3 P. D. 71. Effect of renunciation: Foxwell v. Kennedy, 2 O. W. N. 821, 1299, 18 O. W. R. 782, 19 O. W. R. 595, 24 O. L. R. 189. This section has not changed the law: Re Phipps, 9 O. W. R. 982. Effect on renunciation of previous intermeddling: Harcourt v. Burns, 10 O. W. R. 786.

60. When an executor is appointed under a will the executorship is transmitted: see R. S. O. 1897, ch. 337, sec. 13; R. S. O. 1914, ch. 121, sec. 59. Payments under administration afterwards revoked: Belanger v. Belanger, 2 O. W. N. 543. Removal of executor: see Johnson v. Mackenzie, 20 O. R. 131; Harrold v. Wallis, 9 Gr. 443; Aikins v. Blain, 11 Gr. 212. Appointment of trustee to perform duties of executor: Re Bush, 19 O. R. 1.

64. The costs of an application for assignment of bond are not taxable as costs in the action on the bond, but should be recovered as damages consequent on the breach of condition sued for: Closson v. Post, 6 L. J. 141: see also Re Hilts, 1 Ch. Ch. 386; Stapf v. McCarron, 35 U. C. R. 22.

68. As to bonds of guarantee companies: see R. S. O. 1914, ch. 190.

69.—(1) " Claim or demand " refers to claim of creditor: Re Graham, 25 O. L. R. 5; see also Re McIntyre, 11 O. L. R. 136.

69.—(6) Amount involved: Re Graham, 25 O. L. R. 5.

69.—(10) Right of appeal: Re Graham, 25 O. L. R. 5.

70. Appointment of receiver where executor out of jurisdiction and refuses to account: Re Beaird, 4 O. W. N. 720, 23 O. W. R. 955.

71. In Cunnington v. Cunnington, 2 O. L. R. 511, it was held that the Surrogate Courts are invested with the authority and jurisdiction over executors and administrators, and the rendering of inventories and accounts conferred in England on the Ordinary under 2 Henry VIII., ch. 5. In Re Russell, 8 O. L. R. 481, it was held that this accounting was of a very restricted character and that for full enquiry and investigation resort must be had to the administrative powers of the High Court. The legislature then enacted sub-sections (3) and (4). Subsequently, in 1911, (5) was added. On passing an executor's accounts under this section (as amended in 1905), the Judge has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If the executor has, in good faith, paid the claim before bringing in his accounts, the Judge has jurisdiction to consider the propriety of the payment and to allow or disallow the item: Re McIntyre, 11 O. L. R. 136. Retainer of his own claim by an executor is on the same basis: Shaw v. Tackaberry, 5 O. W. N. 255. The amendment of 1905 was a result of the narrow construction placed on the statute in Re Russell, 1904, 8 O. L. R. 481. The acts of a Surrogate Judge in passing accounts of executors, are those of the Court, and not of the Judge as *persona designata*. He has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the applicant, and to set aside or vary an order which he has made by mistake though not to correct errors made in the judicial determination of any question: Re Wilson and Toronto General Trusts, 13 O. L. R. 82, 8 O. W. R. 677, 15 O. L. R. 596. For review of powers of Court prior to amendment of 1905 as to accounting: see Cunnington v. Cunnington, 2 O. L. R. 511; Re Russell, 8 O. L. R. 481; and see now Union Trust v. Beasley, 12 O. W. R. 336, 1069; and Re Wilson and T. G. T. Co., 13 O. L. R. 82, 15 O. L. R. 596. Where order made on consent for removal of executor and passing his accounts in High Court, the account passed by the Surrogate Court Judge in the absence of fraud or mistake is binding: Gibson v. Gardner, 13 O. L. R. 521, 8 O. W. R. 526. Binding adjudication: see Cunnington v. Cunnington, 2 O. L. R. 511;

Re Wilson and T. G. T. Co., 15 O. L. R. 596; Re Daly, 39 S. C. R. 122. It is only *so far as* mistake or fraud is shewn and not *where* mistake or fraud is shewn that the binding effect of the approval is taken away: Re Wilson and Toronto General Trusts, 11 O. W. R. 214, 15 O. L. R. 596. The Court can set aside order obtained by fraud, but has no jurisdiction to correct errors in judicial determination: Re Wilson and T. G. T. Co., 13 O. L. R. 82, 15 O. L. R. 596. An executor who is a minor is not liable to account: Nash v. McKay, 15 Gr. 247; see also Young v. Purves, 11 O. R. 597. Audit of executor's accounts—discretion: Re Corkett, 4 O. W. N. 632; see Smith v. Clarkson, 7 O. L. R. 460. Jurisdiction over accounts of trustees under will: Grant v. Maclaren, 23 S. C. R. 310. As to compensation which may be allowed executors, etc.: see R. S. O. 1914, ch. 121, sec. 67, and notes.

72. See statute 1 Jac. II., ch. 17, sec. 6; R. S. O. 1897, ch. 337, sec. 7.

74. Where a person resident abroad dies possessed of mortgages in Ontario, the Surrogate Court of the county where the land lies alone has jurisdiction: Re Thorpe, 15 Gr. 76. Where a note was made by A., a resident of Ontario, payable to B., who died in New York, having the note in his possession, it was held that B.'s administrators appointed in that State could endorse the note to enable it to be sued on here without taking out administration here: Hard v. Palmer, 21 U. C. R. 49. Powers and obligations of a foreign administrator dealing in Canada with foreign assets and settling claims of Canadian creditors, considered: Grant v. McDonald, 8 Gr. 468. See notes to Succession Duty Act, R. S. O. 1914, ch. 24, sec. 7. A foreign administrator cannot discharge a mortgage on land in this province: : In re Thorpe, 15 Gr. 76. A will executed by a person domiciled in the Province of Quebec before two notaries there, in accordance with the law of that province not acted on or proved in any Court there, is not within the statute regarding Ancillary Probates: Re McLaren, 22 A. R. 18. Where money in Court is the property of a person domiciled out of the province, on his death payment out will be ordered only to a personal

representative appointed by the Courts of Ontario: Stewart v. Whitney, 14 P. R. 147; see Con. Rule 72; H. & L. notes, p. 232; 1913 Rule 725. Re-sealing colonial probate: see Re Saunders, 1900, P. 292. Proclamation bringing 51 Vict. ch. 9, Ontario, into full force published in Gazette, May 27th, 1893. For Imperial O. C. applying "The Colonial Probates Act, 1892" to the Province of Ontario and for rules under that Act: see Statutes of Ontario, 1895, p. x.

79. The right to costs is wholly statutory. All items taxed must be allowed in the tariff: Re Morrison, 13 O. W. R. 767.

In Schedule A, part 2, strike out of this heading the words "or in section 175 of the Ontario Insurance Act": 4 Geo. V. ch. 2, Schedule 18.

Schedule A to the Act covers fees payable to the Crown and Schedule B fees payable to the Judge. As to fees and costs to solicitors and counsel the following tariff came in force March 16th, 1914:

The following shall be the tariff of fees and costs to be allowed in respect of proceedings in the Surrogate Courts in non-contentious cases to solicitors and counsel, viz.:

1. Drawing all necessary papers and proofs to lead grant and obtaining order for probate or letters of administration, in ordinary cases, and taking out same.	
(*a*) When the value of the property devolving is $1,000 or under	$ 10.00
(*b*) Over $1,000 and not exceeding $5,000	15.00
(*c*) Over $5,000 and not exceeding $10,000	20.00
(*d*) Over $10,000 and not exceeding $20,000	30.00
(*e*) Over $20,000 and not exceeding $50,000	50.00
(*f*) Over $50,000 and not exceeding $100,000	75.00
(*g*) Over $100,000	100.00
2. In cases of temporary administration ..	10.00
(*a*) On application to revoke any grant	10.00

(To be increased in the discretion of the Judge in cases of a special or important nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge).

3. For obtaining Letters of Guardianship.. $10.00

(To be increased in the discretion of the Judge in cases of a special or important nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge).

4. Drawing the necessary affidavits, inventories and schedules under the Succession Duty Act:—

(*a*) Short form, where the aggregate value of the property does not exceed $5,000 ..... 5.00

(*b*) Above $5,000, where no duty is payable 10.00

(To be increased in the discretion of the Judge in cases of a special nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge).

(*c*) Where duty is payable, in addition to the foregoing fees for preparing proofs for succession duty, for all services settling with the Solicitor to the Treasury the amount of duty payable and attending to payment or to securing payment (by bond or otherwise) of same 20.00

(To be increased in the discretion of the Judge in cases of a special nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge).

5. On preparing petition, affidavits, accounts and all other necessary papers and services in auditing and passing of accounts of an executor, administrator, guardian or trustee, and including the fixing of the remuneration of such executor, administrator, guardian or trustee.

(*a*) Where the receipts do not exceed $2,000 ..... 25.00

(*b*) Where the receipts exceed $2,000, but do not exceed $5,000 ..... 30.00

(*c*) Where the receipts exceed $5,000, but do not exceed $10,000 ..... $40.00

(*d*) Where the receipts exceed $10,000, but do not exceed $20,000 ..... 50.00

(*e*) Where the receipts exceed $20,000, but do not exceed $50,000 ..... 75.00

(*f*) Where the receipts exceed $50,000, but do not exceed $100,000 ..... 100.00

(Any of the preceding fees, in cases of an important nature, may be increased by the Judge, but such increase shall be subject to approval by a Judge of the Supreme Court upon a report from the Judge).

(Where the receipts exceed $100,000, the fees shall be such as the Judge deems fair and proper. His order allowing the same shall be subject to approval by a Judge of the Supreme Court upon a report from the Judge).

6. To solicitors for other parties (including the official guardian) properly attending on audit of accounts a fee may be allowed in the discretion of the Judge not exceeding in the whole one-half of the above amounts and subject to increase with approval of a Judge of the Supreme Court upon report from the Judge.

7. In all contentious cases and proceedings not hereinbefore provided for, the same fees and disbursements as are provided for proceedings in the County Court, so far as the same may be applicable may be charged and allowed on taxation.

8. In addition to the foregoing fees and costs, there shall be allowed all proper disbursements made by the solicitor in connection with the foregoing matters.

9. Where it has been proved to the satisfaction of the Judge that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions or disputes, a fee may be allowed therefor in the discretion of the Judge.

CHAPTER 63.

The Division Courts Act.

Refer to: Bicknell and Seager, Division Courts Acts; Higgins, Division Court Law; Holmested and Langton, Judicature Act and Rules; The Annual County Courts Practice; The Yearly County Court Practice.

8. This does not enable Division Court judgments to be sued on in the higher Courts: Crowe v. Graham, 22 O. L. R. 145.

10. Jurisdiction of deputy: R. v. Fee, 3 O. R. 107; Keyes v. McKeon, 23 O. L. R. 530.

20. Jurisdiction of deputy: Keyes v. McKeon, 19 O. W. R. 21, 2 O. W. N. 997, 1014, 23 O. L. R. 530.

34. Where a clerk issues a summons with a blank for the name of the party, afterwards filled in by the bailiff pursuant to the clerk's instructions, though in breach of this section, it does not affect the jurisdiction of the Court nor is it a ground for prohibition, but is a matter of practice to be dealt with by the D. C. Judge: Re Gerow v. Hogle, 28 O. R. 405. Except in the few special cases provided for in the Act the bailiffs have the right to serve summonses and the plaintiff is not entitled as of right to effect service himself: In re Wilson v. McGinnis, 10 O. L. R. 98.

46. Except in a few special cases (*e.g.*, secs. 75, 37, 91 and 115), the bailiffs of the Court have the right to serve summonses, and a plaintiff is not entitled as of right to effect service himself: Re Wilson v. McGinnis, 10 O. L. R. 98.

47. New sub-sec. (4) inserted: 4 Geo. V. ch. 2, Schedule (19). Applies where emoluments of clerk or bailiff are under $500.

61. A Division Court Judge has power to allow a plaintiff to amend his particulars at the trial so as to bring within the jurisdiction a case which, from

the nature of the cause of action, was originally outside it. Where in such a case the defendant answered the claim, the Judge proceeded with the trial and found facts showing jurisdiction, prohibition was refused: Re Sebert v. Hodgson, 32 O. R. 157. Where the Judge at trial found that the evidence showed that the case was beyond the jurisdiction of the Court and ruled that no further evidence should be given, the plaintiff having submitted to this and judgment for non-suit entered and a motion to set this aside and for a new trial refused, it was held that a mandamus would not lie. In such a case the plaintiff has no right of appeal under this Act: Re Ratcliffe and Crescent Mill, 1 O. L. R. 331. As to jurisdiction of Division Courts: see Bicknell and Seager D. C. Act, pp. 53 et seq.; H. & L. notes, p. 1365; see also Con. Rule 1132 (1913, Rule 649), as to inferior Court actions brought in the High Court and H. & L. notes, especially pp. 1362 et seq.

61.—(*a*) The bare assertion by the defendant that the right or title to any corporeal or incorporeal hereditament comes in question is not sufficient to oust the jurisdiction of the Court. The Judge has authority to inquire into so much of the case as is necessary to satisfy himself on the point: Re Moberly and Collingwood, 25 O. R. 625; Re Hamilton v. Garner, 12 O. W. R. 758. Where an action is brought in the Division Court and it appears that the title to land is involved, the action formerly could not be transferred to the County Court, no matter how little might be involved or how small the value of the land: Thurston v. Brandon, 12 O. W. R. 1228; see R. S. O. 1897, ch. 51, sec. 186; but see now R. S. O. 1914, ch. 59, sec. 22 (1), (c). When title as to land is in question: see R. S. O. 1914, ch. 59, sec. 22 (1), (c), notes. Rent under a lease of land is an incorporeal hereditament and the Division Court has no jurisdiction when the right or title to it comes in question: Kennedy v. MacDonell, 1 O. L. R. 251. Jurisdiction considered: Re McGolrick and Ryall, 26 O. R. 435.

61.—(*e*) A Division Court judgment cannot be sued on in the Supreme Court nor in the County Court: Crowe v. Graham, 22 O. L. R. 145 (sec. 196 note). As

to actions on High Court judgments before 61 Vict., ch. 15: see Aldrich v. Aldrich, 23 O. R. 374, 24 O. R. 124; see H. & L. notes, p. 1095; also Rule 853, H. & L. notes, p. 1107 (1913, Rule 545); see also R. S. O. 1897, ch. 60, sec. 113; Bicknell and Seager notes, p. 187, now sec. 98 post.

62.—(1) When action within competence of Division Court and brought in High or County Court: see as to costs, Con. Rules 1132; 1913, Rule 649, and see application of this: Osterhout v. Fox, 10 O. W. R. 157, 14 O. L. R. 599.

62.—(1*c*) Where the instrument sued on is in the form of a promissory note with additional terms giving right to resell goods in certain event, the Division Court has no jurisdiction beyond $100: Bisnett v. Schrader, 12 O. W. R. 656. Where plaintiff sued on promissory note which formed an item of an account covered by a mortgage, the Court had jurisdiction: Green v. Crawford, 15 O. W. R. 822, 1 O. W. N. 688, 21 O. L. R. 36. Within sixty days before making an assignment, an insolvent transferred goods to a third person, which being sold, the proceeds were divided among certain creditors who thereby obtained a preference. The Division Court had jurisdiction to try a claim by the assignee against each of the creditors so preferred, the transfer being divisible into parts: Beattie v. Holmes, 29 O. R. 264. Annual payments under covenant: see Osterhout v. Fox, 10 O. W. R. 157, 14 O. L. R. 599.

62.—(1*d*) This section (passed 1904) was declaratory and applied to actions pending: Re Thom and McQuitty, 8 O. L. R. 705. Where other extrinsic evidence beyond the mere production of the document and the proof of the signature is required to establish the plaintiff's claim, the Division Court has no jurisdiction in cases over $100: Re Thom and McQuitty, 8 O. L. R. 705. The extrinsic evidence referred to has reference to the defendants' liability, not to the plaintiff's title: Renaud v. Thibert, 3 O. W. N. 1649, 22 O. W. R. 923, 27 O. L. R. 57. Production of promissory note, proof of signature of defendant as endorser and production of protest

make a *prima facie* case within the jurisdiction of the Division Court: Slater v. Laberee, 9 O. L. R. 545. The plaintiff sued on a promissory note. The question whether it had become merged in a mortgage was matter of defence and did not oust the jurisdiction: Re Green and Crawford, 1 O. W. N. 688, 15 O. W. R. 822, 21 O. L. R. 36. Actions depending entirely on documentary evidence: McIlhargey v. Queen, 2 O. W. N. 364, 17 O. W. R. 872. The signature of the defendant to an agreement containing terms of purchase is not an ascertainment of the amount within the meaning of section 62 (1*d*), as amended, 1904: Re Thom and McQuitty, 8 O. L. R. 705. And see where note contained undertaking on default to give further security: McCormack v. Warner, 3 O. L. R. 427 (before amendment of 1904). "Document" may be read "documents," and the increased jurisdiction exercised where the claim can be established by the production of one or more documents and proof of signatures: Slater v. Laberee, 9 O. L. R. 545. Extrinsic evidence required to show performance of contract: see Kreutzer v. Brox, 32 O. R. 418; Petrie v. Machan, 28 O. R. 642; Re Sawyer-Massey Co. v. Parkin, 28 O. R. 662. Agency of husband for wife: Davidson v. McClelland, 32 O. R. 382. Ascertained by signature of defendant: In re Wallace and Virtue, 24 O. R. 558; McDermid v. McDermid, 15 A. R. 287; Robb v. Murray, 16 A. R. 503. "Ascertained": see Amyot v. Sugarman, 13 O. W. R. 429, 924; Evans v. Chandler, 19 P. R. 160; Thompson v. Pearson, 18 P. R. 308, 420. Amendment of claim under D. C. Rule 4, to bring it within this section: Matthews & Co. v. Marsh, 5 O. L. R. 540. Abandonment of notarial fees. Substitution of plaintiff: Pegg v. Howlett, 28 O. R. 473. An executor *de son tort* is not within the meaning of the word executor in this sub-section: In re Dey v. McGill, 10 O. L. R. 408. Claim for $262.50 recovered by plaintiff, less set-off of $69: Held properly within jurisdiction of County Court: Osterhout v. Fox, 14 O. L. R. 599. A foreign judgment against the maker of a promissory note is a simple contract debt and not one ascertained by the signature of the defendant: Re McMillan and Fortier, 2 O. L. R. 231.

62.—(1e) As to jurisdiction in County Court: see R. S. O. 1914, ch. 59, sec. 22 (1j). An action for a declaration to rank against an insolvent estate under R. S. O. 1914, ch. 134, was not, until this amendment, within the jurisdiction of the Division Court: Re Bergman v. Armstrong, 4 O. L. R. 717.

62.—(5) Appeal from magistrate's conviction—Mandamus: Re McLeod v. Amiro, 27 O. L. R. 232. As to actions between teachers and school boards: see R. S. O. 1914, ch. 266, sec. 87, ch. 268, sec. 50, ch. 270, sec. 54.

65. See Judicature Act, R. S. O. 1897, ch. 51, sec. 57 (3); H. & L. notes, p. 48, also sec. 186, H. & L. notes, p. 194, R. S. O. 1914, ch. 56, sec. 19. See Judicature Act, R. S. O. 1914, ch. 56, sec. 23, which makes the provisions of that Act in secs. 16 to 22 effective in all Courts so far as they relate to matters cognizable by such Courts. As to matters within the purview of this section, see H. & L. notes, p. 194. If it is necessary to interpret a statute in order to find out whether the Division Court should decide the rights of the parties at all, prohibition will lie if the Judge misinterprets the statute so as to give himself jurisdiction—but if it be necessary to interpret the statute in order to determine what the rights of the parties are, prohibition will not lie: Re Long Point v. Anderson, 18 A. R. 405; Re Ameliasburg and Pitcher, 8 O. W. R. 915, 13 O. L. R. 417. Where the question to be decided is not "in what Court the action should be brought," but "can such an action succeed in law," a Supreme Court Judge has no right to dictate to a Division Court Judge: Re Errington v. Court Douglas, 9 O. W. R. 675, 14 O. L. R. 75. In determining whether a certain state of facts gives a cause of action at law the Judge below may misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other Judge: Re Long Point v. Anderson, 18 A. R. 401, 408; Re Boyd v. Sergeant, 10 O. W. R. 377, 521. As to appeals: see sec. 125 *post* and notes. Plaintiff seeking purely equitable relief, e.g., specific performance in the Division Court: see Foster v. Reeves, 1892, 2 Q. B. 255. Jurisdiction of Division Court to give judgment

against married woman dates from 1897: Re Hamilton v. Perry, 24 O. L. R. 38.

66. Where a minor enters into a contract of hiring, the wages he earns belong to himself and not to his parent: Delesdernier v. Burton, 12 Gr. 569. Where an infant hires himself to his parent: see Perlet v. Perlet, 15 U. C. R. 165. This section does not restrict infants from suing in the Division Court for anything but wages: Ferris v. Fox, 11 U. C. R. 612.

67.—(1) Where a promissory note was included in a larger claim against an insolvent estate, and a dividend paid and accepted, the remedy on the promissory note was not extinguished but the plaintiff could sue in a Division Court, giving credit for the proportionate amount of dividend received: Harvey v. McPherson, 6 O. L. R. 60. A mortgagee cannot sue in the Division Court for one gale of interest when several are due which bring the whole amount beyond the jurisdiction: Re Real Estate Loan v. Guardhouse, 29 O. R. 602. Money payable by instalments with interest: see Re Clark v. Barber, 26 O. R. 47; see also Gordon v. O'Brien, 11 P. R. 287; Public School Trustees of Nottawasaga, 15 A. R. 310. Unsettled account—Interest: see Re Lott v. Cameron, 29 O. R. 70. Splitting demand—Interest: Re McDonald v. Dowdall, 28 O. R. 212. Splitting cause of action; money lent—Separate loans: Re McKay v. Clare, 1 O. W. N. 432, 15 O. W. R. 334, 20 O. L. R. 344.

67.—(2) Suing for interest on past due mortgage: see Re Ball v. Bell, 28 O. R. 123, 601. Interest *post diem* as to which there is no covenant in the mortgage to pay is due *qua* damages and not *qua* interest and not within this sub-section: Re Phillips v. Hanna, 3 O. L. R. 558. This sub-section applies only where the action is brought by the person to whom the money is payable and does not apply to an action brought by the assignee of the mortgagor upon a covenant by his vendee to indemnify him against the mortgagee: Re Real Estate v. Guardhouse, 29 O. R. 602.

70. An application under this section will not lie after judgment in the Division Court: Re Brodericht v. Merner, 17 P. R. 264. See R. S. O. 1914, ch. 59, sec. 29, and ch. 62, sec. 33 and notes.

71. As to applicability of High Court Rules to Division Court matters and effect of non-suit: see sec. 226, *infra,* and notes; H. & L. notes, pp. 194 and 1018.

72. Where the cause of action arises without the province, but the parties are within, an action under sec. 155 may be entered in the Court nearest the garnishee's residence: Hopper v. Wollison, 11 O. W. R. 980, 16 O. L. R. 452. Where garnishee proceedings to be entered: see sec. 155, notes. Territorial jurisdiction of Division Court: Canadian Oil Co. v. McConnell, 27 O. L. R. 549; Mitchell v. Doyle, 4 O. W. N. 725, 23 O. W. R. 926, 10 D. L. R. 297. A cause of action for damages for flooding lands by the erection of a dam does not altogether arise where the lands are but in part where the dam is erected: Doolittle v. Electrical Maintenance Co., 3 O. L. R. 460. Non-shipment of goods contracted to be sent gives rise to the cause of action; not the subsequent refusal by correspondence: Re Diamond v. Waldron, 28 O. R. 478. Cause of action in tort against bailiff of Court: see Re Hill v. Hicks and Thompson, 28 O. R. 390. Cause of action: acceptance of goods ordered by mail and sent by express: Re Taylor v. Reid, 8 O. W. R. 623, 13 O. L. R. 205. Cause of action: contract by correspondence: Re McNaughton v. Hay, 12 O. W. R. 858, 1033. Court nearest defendant's residence: see Re Sinclair v. Bell, 28 O. R. 483.

74. Effect of agreement as to place of trial: Formerly 6 Edw. VII., ch. 19, sec. 22; St. Charles v. Caldwell, 12 O. W. R. 1185; Re Shupe v. Young, 10 O. W. R. 185, 262; Re Taylor v. Reid, 8 O. W. R. 623, 763, 13 O. L. R. 205. A provision in a contract waiving the protection of this section is illegal: Re Shupe and Young, 10 O. W. R. 185. Provision for the determination of the forum for possible actions: retroactivity: Re Sylvester Mfg. Co. v. Brown, 8 O. W. R. 984, 9 O. W. R. 89; Bell v. Goodison Thresher Co., 8 O. W. R. 567, 618, 12 O. L. R. 611. See, as to actions in Division Courts on premium notes under the Insurance Act, R. S. O. 1914, ch. 183, sec. 150.

75. This section applies to foreigners as well as to British subjects. Under sec. 226 the practice of the Supreme Court Rules, 1913, 26 and 28 applies: Re Coy v. Arndt, 8 O. L. R. 101.

77. Where judgment was obtained in an action on a promissory note dated at one place but made at another in a suit entered in the Court at the place where the note was dated and in spite of a dispute of jurisdiction filed, the defendant moved for a new trial, paid the money into Court as a condition, and then moved for an order for transference, it was held that he had not waived his right to an order for transference under this section: In re Brazil v. Johns, 24 O. R. 209. Where an order was made under this section for the transfer of an action and the order should have been made under sec. 79, prohibition was granted without prejudice to the right to apply for an order under sec. 79: In re Frost v. McMillen, 2 O. L. R. 303; McDonald Thresher Co. v. Stevenson, 4 O. W. N. 732, 23 O. W. R. 957.

78. A Division Court Judge has no power after the expiry of the time limited for giving notice of intention to dispute the jurisdiction of the Court, to grant leave to file a notice disputing it: Re McLean v. Osgoode, 30 O. R. 430. Affidavit not now required to support objection to jurisdiction: Mitchell v. Doyle, 4 O. W. N. 725, 23 O. W. R. 926, 10 D. L. R. 297.

79. If the jurisdiction be disputed and no application for a transfer be made, and if in fact there be jurisdiction prohibition will not lie merely because the Judge may assume that as no application for a transfer is made he has jurisdiction. But if in fact there be no jurisdiction, the objection still holds good and prohibition will be granted: Re Thompson v. Hay, 22 O. R. 583, 20 A. R. 379. The Court is not given any jurisdiction because objection is not properly taken: Re Gibbons v. Cannell, 4 O. W. N. 270, 23 O. W. R. 401, 8 D. L. R. 232.

80. Action against bailiff and another: see Re Hill v. Hicks and Thompson, 28 O. R. 390.

91. Except in the few special cases provided for in the Act, the bailiffs of the Court have the right to serve summonses and a plaintiff is not entitled as of right to effect service himself: In re Wilson v. McGinnis, 10 O. L. R. 98.

93. The High Court Rules as to service of partnership firms did not apply to the Division Court: H. & L. notes, p. 194, but now these rules are mostly incorporated as sections of the Act: see secs. 93 (6), (7), (8), 94 (2), 95, 96.

94. Effect of Division Court judgment against a firm considered: Re Reid v. Graham Bros., 26 O. R. 126.

98. An action in the Division Court for "money received by the defendants for the use of the plaintiff, being money obtained by the defendants from the plaintiff by false representations," is an action for a money demand within this section: Re Mager v. The Canadian Tin Plate Decorating Co., 7 O. L. R. 25.

100. There is nothing in this section which requires that before notice of motion for immediate judgment is given the time for filing of a dispute notice should have first expired: Re McKay v. Talbot, 3 O. L. R. 256. See High Court Con. Rule 603; H. & L. notes, pp. 795 *et seq.*; 1913 Rule 57. "Four clear days," the provisions of Con. Rule 343, 1913 Rule 172, do not apply: see Re McKay v. Talbot, 3 O. L. R. 256; Re Stoddard v. Eastman, 12 O. W. R. 226, 674; and sec. 227, notes. This section prevails over a jury notice. The defendant must shew that he has some right to dispute and intends to dispute the plaintiff's claim: Re Talham and Atkinson, 1 O. W. N. 183.

102. A withdrawal of defence under this section is not a confession of judgment or *cognovit actionem*: Bank of Hamilton v. Shepherd, 21 A. R. 156.

105. Effect of non-suit in Supreme Court and in Division Court: see Building & Loan v. Heimrod, 3 C. L. T. 254; Bank of Ottawa v. McLaughlin, 8 A. R. 543. Division Court Judge's power as to non-suit: Re Johnson v. Kayler, 12 O. W. R. 770, 837, 18 O. L. R. 248; and see sec. 144 *infra*.

106. A verbal agreement is not sufficient: the consent must be in writing and filed: Davidson v. Head, 18 C. L. T. 260, 34 C. L. J. 415. Evidence not taken down: Smith v. Boothman, 4 O. W. N. 801, 24 O. W. R. 106.

113. Effect of provision requiring defendant to give notice where he desires to avail himself of a statute as bearing on a note stipulating for an excessive rate of interest in violation of the Money Lender's Act, R. S. C. 1906, ch. 122: Bellamy v. Porter, 28 O. L. R. 572.

121. Judge's decision: reserving judgment till a day named under former wording of section: see Re Wilson v. Hutton, 23 O. R. 29; Re Tipling v. Cole, 21 O. R. 276. "Notify:" see Re Forbes v. M. C. Ry., 20 A. R. 584; and see cases Dig. Ont. Cas. Law, col. 2074-2076.

122. Order for payment by instalments as a basis for committal in default: see In re Kay v. Storry, 8 O. L. R. 45; and see sec. 191 notes.

123. The provision is for a retrial of the action. There is no provision for a retrial or a new trial where the defendant has been summoned under sec. 190, and an order made under sec. 191: Re Wilson and Durham, 13 O. W. R. 762, 18 O. L. R. 328. The practice under High Court Con. Rule 778 (1913 Rule 499), as to setting aside judgment obtained by default of appearance is not applicable to the Division Court, being inconsistent with this section: see Foley v. Moran, 11 P. R. 316.

123. (1) "Within 14 days:" see Thompson v. McCrae, 31 O. R. 674. The provisions of this section as to applying for a new trial within 14 days do not apply to a garnishee: Hobson v. Shannon, 27 O. R. 115; Re McLean v. McLeod, 5 P. R. 467; see Tipling v. Cole, 21 O. R. 276. As the Act enables any person to represent a suitor in an action in the Division Court a strict and literal compliance with the statute is not contemplated in matters of form. E.g., an application erroneously worded as a motion for judgment may be treated as an application for a new trial: Follett v. Sacco, 11 O. W. R. 377.

123. (3) Apart from the jurisdiction conferred by this section a Judge under this Act has no inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial: Re Nilick v. Marks, 31 O. R. 677.

124. These powers make a Division Court judgment not in its nature final, and it cannot be sued on in the higher Courts: Crowe v. Graham, 17 O. W. R. 143, 2 O. W. N. 158, 22 O. L. R. 145.

125. Subsequently accrued interest on a judgment cannot be used to make the sum in dispute exceed $100: Foster v. Emory, 14 P. R. 1. The amount in dispute is the amount claimed; not the sum recovered at the trial: Petrie v. Machan, 28 O. R. 504. Where a defendant appealed the sum in dispute was held to be the sum which, if his appeal succeeded, he would be relieved from paying: Lambert v. Clarke, 7 O. L. R. 130. The "ordinary right of appeal" given by the Public Schools Act is the right under this Act, Norton v. Bertie, 17 O. L. R. 413. Appeals to Divisional Court: see Judicature Act, R. S. O. 1897, ch. 51, sec. 74(4) H. & L. notes, p. 131; R. S. O. 1914, ch. 56, sec. 26 (2) (q). Application for new trial was formerly necessary preliminary to appeal: Coté v. Halliday, 17 C. L. T. Occ. N. 53; also in proceedings under the Public Schools Act, R. S. O. 1914, ch. 266: Norton v. Bertie P. S. Trustees, 12 O. W. R. 1249, 17 O. L. R. 413. As to prohibition, see *ante* sec. 65, notes.

127. As to consent to dispense with taking down evidence in cases over $100: see secs. 106, 107. As to retaking evidence: see Davidson v. Head, 18 C. L. T. 26; Omission to take down evidence: see Sullivan v. Francis, 18 A. R. 121. Evidence not taken down: Smith v. Boothman, 4 O. W. N. 801, 24 O. W. R. 106. Certified copy of proceedings: Norton v. Bertie P. S. Trustees, 12 O. W. R. 1249, 17 O. L. R. 413.

128. A Division Court appeal which might have been brought on at the first sittings of the Divisional Court was held over. In the absence of a satisfactory explanation the appeal was quashed: Heise v. Shanks, 1 O. L. R. 48. When a certified copy of the proceedings is filed, if filed within the proper time, and the case set down, if set down within the proper time and for the proper Court the appeal is properly lodged: as to which the Court may have power of amendment or enlargement of the time: Smith v. Port Colborne Baptist Church, 1 O. L. R. 195. The giving of the notice of setting down for

argument and of the appeal and the grounds thereof is a condition precedent to the right of appeal from a Division Court to a Divisional Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal: Bradley v. Wilson, 8 O. L. R. 184; see also Maxon v. Irwin, 15 O. L. R. 81 at p. 89, 10 O. W. R. 537. See R. S. O. 1914, ch. 56, sec. 26 (2) (q), notes, and R. S. O. 1914, ch. 59, sec. 39 notes, H. & L. notes, pp. 131-132.

128. (2) The Divisional Court has no power to extend time until it is seized of the appeal which is "if and when the said appeal case is filed:" Whalen v. Wattie, 11 O. W. R. 917, 16 O. L. R. 249. This subsection dates from 1904.

129. "Of and incidental to an appeal:" see Whalen v. Wattie, 12 O. W. R. 155, where the costs of this case in 11 O. W. R. 97 (see note to sec. 128), were disposed of.

130. A claim by an insurance company to recover the sum of $30 loss under a policy payment of which was procured by false and fraudulent representations arises *ex delicto* and can be tried by a jury: London Mutual v. McFarlane, 26 O. R. 15. Where a claim is under $20, the fact that a counterclaim is filed for $40 does not enable the plaintiff to have his claim tried by a jury, but the defendant has that right in respect of his counterclaim: Re Fraser v. Ham, 7 O. L. R. 449.

144. Powers of Division Court Judge as to non-suit: Re Johnson v. Kayler, 12 O. W. R. 770, 837, 18 O. L. R. 248.

146. A garnishee order should not be made to attach a debt where payment under the order will not be a valid discharge to the garnishee of the amount paid: Martin v. Nadel, 1906, 2 K. B. 26. Garnishee proceedings are part of the *lex fori*. A garnishee order should not be made to attach a debt due from a foreign corporation: Martin v. Nadel, 1906, 2 K. B. 26. The interest of a residuary legatee in the estate of a testator who had died within a year of the attachment was held not attachable under this section:

Hunsberry v. Kratz, 5 O. L. R. 635. A garnishee order does not amount to an assignment either absolute or by way of security of the garnished debt. The effect is to pay not the debt itself, but a sum equivalent to it to the garnishor: Norton v. Yates, 1906, 1 K. B. 112. Rent accruing due, but not yet payable cannot be attached in the Division Court: Christie v. Casey, 31 C. L. J. 35; Birmingham v. Malone, 32 C. L. J. 717; see Apportionment Act: R. S. O. 1914, ch. 156 notes. "Could the primary debtor at the date of the garnishee summons have successfully maintained an action against the garnishee for the money in question?" If not the garnishee summons must be dismissed: McLeod v. Clark, 8 O. W. R. 403. A claim under an insurance policy for a loss adjusted and settled is not a debt which can be attached at any rate so long as the company's right to have the money applied in rebuilding is open: Simpson v. Chase, 14 P. R. 280. Prohibition where claim was for damages and garnishee proceedings before judgment taken: Re McCreary v. Brennan, 3 O. W. N. 1052. See Con. Rules 911-921, H. & L. notes, p. 1146, *et seq.* (1913 Rules 590-599). These High Court rules do not apply to the Division Court: see Re Clark v. McDonald, 4 O. R. 310; Simpson v. Chase, 14 P. R. 280. As to attachment of wages: see R. S. O. 1914, ch. 143.

147.—(2) Evidence of repute to shew that the primary debtor was married: see Re Rochon v. Wellington, 5 O. L. R. 102.

155. Garnishee proceedings may be in the division of the garnishee's residence though the cause of action does not arise there nor the primary debtor live there: Re McCabe v. Middleton, 27 O. R. 170. Even if the primary debtor resides in another division and disputes the jurisdiction, judgment may be given against him although the action be dismissed as as against the garnishee: Re Lented v. Congdon, 1 O. L. R. 1, 5. Jurisdiction does not obtain under this section where the garnishee resides without the Province: Wilson v. Postle, 2 O. L. R. 203. Where all parties are within the jurisdiction and the cause of action arose without the Province, the action may properly be entered in the Court nearest the garnishee's residence: Hopper v. Wollison, 11 O. W. R.

980, 16 O. L. R. 452. A claim under this section is not removeable under sec. 69 into the High Court where judgment has been given against the primary debtor although the garnishee's position remains undetermined and the object of the proposed removal is to determine it. Re Brodericht v. Merner, 17 P. R. 264. Where an action was brought in the wrong Court as against garnishees and at trial, the primary creditor abandoned as against the garnishees, it was held that the primary debtor could not object to this amendment and there was nothing to prevent the Court from having or, if the word be preferred, acquiring jurisdiction: Re Boyd v. Sergeant, 10 O. W. R. 377, 521. Garnishee living outside the Province "carrying on business" within: see Nelson v. Lenz, 9 O. L. R. 50. Acceptance of service on behalf of a garnishee residing out of the Province by a solicitor in the Province and his appearance at the hearing do not confer jurisdiction on the Division Court under this section. Wilton v. Postle, 2 O. L. R. 203.

155.—(4) Service of garnishee summons on local agent of foreign insurance company whose powers were limited to receiving and transmitting applications held effective: Simpson v. Chase, 14 P. R. 280.

156. See Lented v. Congdon, 1 O. L. R. 1, esp. at p. 5; see note, *ante* sec. 155.

157. "Person interested in the proceedings." As to position of intervener and his right to set up defence of want of jurisdiction where garnishee has submitted to jurisdiction: see Nelson v. Lenz, 9 O. L. R. 50. Defence of garnishee put in after 8 days, but in time for creditor to give notice rejecting it and to transmit such notice to the garnishee, held sufficient; a garnishee is not bound to appear at the trial if such last mentioned notice is not given: Simpson v. Chase, 14 P. R. 280.

160. Where debtor makes assignment for benefit of creditors after recovery of Division Court judgment against debtor and garnishee but before payment: see Re Dyer and Evans, 30 O. R. 637. This section only protects a garnishee against being called on by the primary debtor to pay over again and does

not protect him against any third person: see Andrew v. Canadian Mutual, 29 O. R. 365; see R. S. O. 1914, ch. 134, sec. 14, notes.

162. The judgment of the Judge who tries the case is an effective judgment from the day on which it is pronounced: where damages are awarded thereby they are attachable without the formal entry of judgment: Davidson v. Taylor, 14 P. R. 78. Transfer of claim by insolvent debtor: attacking: time: Morphy v. Colwell, 3 O. L. R. 314. Assignment of debt attached: trial of question of validity of assignment: Perras v. Keefer, 22 O. R. 672.

170. Costs in action brought in another Division Court in respect of judgment of first Court: McPherson v. Forrester, 11 U. C. R. 362; Crowe v. Graham, 22 O. L. R. 145.

173. Money deposited in bank to credit of an unenfranchised Indian is " personal property outside of the reserve " and attachable under a Division Court judgment: Avery v. Cayuga, 28 O. L. R. 517.

182. Return of *nulla bona*: Turner v. Tourangeau, 8 O. L. R. 221. A creditor for less than $40 cannot attach a conveyance of lands as fraudulent: Zilliax v. Deans 20 O. R. 539.

188. Effect of transcript on pending judgment summons proceedings: Ryan v. McCartney, 19 A. R. 423.

188.—(2) Where the provisions of this action are contravened, all proceedings under execution issued to the Sheriff of the county may be set aside: Shepphard v. Shepphard, 12 O. W. R. 186 at 191. The issue of execution and return of *nulla bona* in a foreign Division Court to which a transcript has previously been sent as foundation for proceedings under section 182: see Jones v. Paxton, 19 A. R. 163.

190.—(2) If the affidavit required by the section were not filed before the issue of the summons, it would not be open to the defendant after appearing in obedience to the summons to raise an objection to the jurisdiction on that ground. The defect not appearing on the face of the proceedings, prohibition would

not be granted: Re Hawkins v. Batzold, 2 O. L. R. 704. An affidavit stating a sum remains unsatisfied, "as I am informed and believe," is not the affidavit required by the plain terms of the section. Prohibition will lie to restrain proceedings on a judgment summons issued pursuant to such an affidavit: Re Barr v. McMillan, 7 O. L. R. 70, 7 O. L. R. 672.

191. A Division Court Judge has no power to commit a garnishee for default in making payments pursuant to an order after judgment. Before a garnishee can be examined, the affidavit required by section 190 must be filed: Re Dowler v. Duffy, 29 O. R. 40. As to law before 57 Vic. ch. 23, sec. 18: see Re Hanna v. Coulson, 21 A. R. 692. There is no provision for a rehearing where an order made under this section. Section 123 does not apply: Re Wilson and Durham, 31 O. W. R. 762, 18 O. L. R. 328. An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of committal for contempt, but is granted as a punishment for the fraudulent conduct of the debtor. The judgment itself is sufficient foundation for the order to commit: Re Kay v. Storry, 8 O. L. R. 45. An order for committal under this Act is not process of contempt but is in the nature of execution: Re Reid v. Graham Bros., 25 O. R. 573, 26 O. R. 126. The committal is in the nature of process to coerce payment rather than of a punitive character as for contempt. There is no jurisdiction to make an order for committal of a married woman judgment debtor who refuses to attend for examination even though her non-attendance amounts to wilful misconduct: Re Stewart v. Edwards, 11 O. L. R. 378; see also Teasdall v. Brady, 18 P. R. 104; Re McLeod v. Enrigh, 12 P. R. 450. The proceedings by judgment summons and its consequences are of a strictly local character. The warrant must be directed to a bailiff of the county and gaoler of the county in which the proceedings are taken. The warrant is not effective beyond the county limits and "backing" by a Magistrate of another county will not give it validity there: Re Hendry, 27 O. R. 297. Where it appears that a judgment debtor was examined before the Judge his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to

warrant the making of an order under this section: Re Hawkins v. Batzold, 2 O. L. R. 704. A member of a partnership against which a judgment has been recovered under this Act in the firm name, who has not been personally served with the summons and has not admitted himself to be or been adjudged a partner, cannot be proceeded against for non-attendance on a judgment summons: Re Reid v. Graham Bros., 26 O. R. 126. Committal for fraud: warrant is " process " within sec. 2 of the Habeas Corpus Act, R. S. O. 1914, ch. 84: Re Steckney, 13 O. W. R. 1203. " Ability to pay," sub-sec. (e), covers the case of a dishonest debtor who can by working earn the means to pay the debt and contumaciously refuses to do anything: Re Kay v. Storrey, 8 O. L. R. 45. There is jurisdiction to commit a judgment debtor, who is a government official, in default of payment, although he has no other source of income than his official salary: Re Hyde v. Cavan, 31 O. R. 189. See also Church's Trustee v. Hibbard (1902), 2 Ch. 784.

195. See Stewart v. Edwards, 11 O. L. R. 378 at 381.

196. The power to rescind or alter order formerly extended merely to order for payment, not to order for commitment: Re Wilson and Durham, 13 O. W. R. 762, 18 O. L. R. 328. The judgment of a Division Court is not in the nature of a final judgment and therefore cannot be sued on in the High Court: Crowe v. Graham, 22 O. L. R. 145.

210. A Judge may set aside an attachment which has been improperly issued: Re Mitchell v. Scribner, 20 O. R. 17.

213. Form of bond: see Kenni v. Macdonald, 22 O. R. 484.

214.—(*a*) In the last line of the sub-sec. for " revision " read " reversion ": 4 Geo. V. ch. 2, Schedule (20).

216. See R. S. O. 1897, ch. 342, sec. 19; R. S. O. 1914, ch. 155, sec. 55.

221. Damages for neglect to levy execution: Watson v. White, 1896, 2 Q. B. 9. Action for not executing

warrant: Partridge v. Elkington, L. R. 6 Q. B. 82. See also Smith v. Pritchard, 8 C. B. 565; Reg. v. Co. Judge, Shropshire, 20 Q. B. D. 242.

226. See Judicature Act, R. S. O. 1914, ch. 56, sec. 23, by which the provisions of that Act, in secs. 16 to 22, are made applicable to all Courts. Formers secs. 58 and 59 of the Judicature Act, R. S. O. 1897, ch. 51, did not purport to apply to Division Courts the rules of procedure of administration of justice: see H. & L. notes, pp. 194, 195. Con Rule 343, 1913 Rule 172, whereby holidays are excluded from the computation of time in a period of less than six days does not apply to the Division Court: Re McKay v. Talbot, 3 O. L. R. 256. The High Court Rules as to garnishment do not apply to the Division Court. Garnishment in the Division Court is governed by the Act itself: Re Clark v. McDonald, 4 O. R. 310; Simpson v. Chase, 14 P. R. 280. As to proceedings against defendants out of the Province, under sec. 75 and application High Court Rules: see Re Coy v. Arndt, 8 O. L. R. 101. Distinction between this section and corresponding section (164) of the English County Courts Act: see Re Stoddard v. Eastman, 12 O. W. R. 226, 674. High Court Rule as to effect of non-suit does not apply to Division Court: see secs. 105, 144, *ante*; see also H. & L. notes, p. 1018. The practice in the High Court for setting aside judgments in default of appearance is not applicable to the Division Court, being inconsistent with sec. 123: see note to that sec.

227. The following tariff of fees went into effect on the 1st April, 1914:

DIVISION COURT TARIFF.

Form I.

1.—Clerk's Fees.

1. Receiving claim, numbering and entering in procedure book ..... (This item to apply to entering in the precedure book a transcript of judgment from another Court, but not an entry made for the issue of a judgment summons.)	$0.25
2. Issuing summons, with necessary notices and warnings thereon, or judgment summons (as provided in forms) in all.	
Where claim exceeds $10 and does not exceed $20	.50
Where claim exceeds $20 and does not exceed $60	.60
Where claim exceeds $60 and does not exceed $100	.80
Where claim exceeds $100 ..... (N.B.—In replevin and interpleader suits the value of goods to regulate the fee.)	1.50
3. Copy of summons, including all notices and warnings thereon	.25
4. Copy of claim (including particulars), when not furnished by plaintiff	.25
5. Copy of set-off or counterclaim or notice of defence (including particulars), when not furnished by defendant ... (Note.—In either of the last two preceding items the fee may be taxed against the party ordered to pay costs.)	.25
6. Receiving and entering bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons or paper from another division)	.15

7. Taking confession in judgment $0.10
(This does not include affidavit and oath, chargeable under item 8.)
8. Every necessary affidavit, if actually prepared by the clerk, and administering oath to the deponent ..... .25
9. Furnishing duly certified copies of the summons and notices and papers with all proceedings, for purposes of appeal, as required by either party, folio of 100 words ..... .05
10. Certificate therewith ..... .25
11. Certifying under seal of the Court and delivering to a judgment creditor a memorandum of the amount of judgment and costs against a judgment debtor, or garnishee, under The Creditor's Relief Act, or for any other purpose ..... .25
12. Copies of papers, for which no fee is otherwise provided, necessarily required for service or transmission to the Judge, each ..... .10
If exceeding two folios, per folio .... .05
13. Every notice of defence or admission entered, or other notice required to be given by the Clerk to any party to a cause or proceeding, including mailing, but not postage ..... .15
14. Entering final judgment by Clerk, on special summons, where claim not disputed.
Where claim does not exceed $60 .. .50
Where claim exceeds $60 ..... .75
15. Entering every judgment rendered at the hearing, or final order made by the Judge.
Where claim does not exceed $60 .. .. .50
Where claim exceeds $60 ..... .75
(Note.—This fee does not apply to any proceeding on judgment summons.)
(These fees will include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and

order in its entirety, rendered or made at the trial. If a garnishee proceeding before judgment, these fees will be allowed for the judgment in respect to the primary debtor and like fees for the adjudication, whenever made, in respect to the garnishee.)

16. Subpœna to witness $0.25
(The subpœna may include any number of names therein and only one original subpœna shall be taxed, unless the Judge otherwise orders.)

17. For every copy of subpœna required for service ..... .10

18. Summons for jury (including copy for each juryman), when required by parties 1.25

19. Calling and returning jury ordered by the Judge ..... .25

20. Every order of reference, or order for adjournment, made at hearing, and every order requiring the signature of the Judge, and entering the same, including final order on judgment debtor's examination ..... .25
(Any warning necessary with order forms part of the order.)

21. Transcript of judgment to another Division Court ..... .50

22. Every writ of execution, warrant of attachment, or warrant of commitment, and delivering same to bailiff.
Where claim does not exceed $60 .... .50
Where claim exceeds $60 and does not exceed $100 ..... .75
Where claim exceeds $100 ..... 1.00

23. Renewal of every summons or writ of execution, when ordered by the judgment creditor, or warrant of commitment, when ordered by Judge ..... .25

24. Every bond, when necessary, and prepared by the Clerk (including affidavits of justification and of execution) 1.00

25. Transmitting transcript of judgment; or transmitting papers for service to another division; or to the Judge, on application to him, including necessary entries and mailing, but not including postage $0 25

26. Receiving papers from another division for service, entering the same, handing to bailiff, receiving and entering his return and transmitting the same (if return made promptly, not otherwise) ..... .30

27. Search by a person not a party to the suit or proceeding to be paid by the applicant ..... .10

Search by a party to the suit or proceeding, where the suit or proceeding is over one year old ..... .10

(No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)

28. Taxing costs, in defended suits, after judgment pronounced ..... .25

29. Making out statement of costs in detail (including bailiff's fees) at the request of any party ..... .10

(Neither item 28 nor 29 applies to statement of costs endorsed on summons or copy to be served.)

30. Taxing bailiff's costs, under under section 178 of the Division Courts Act. .25

31. Every necessary letter written to any party to any cause, matter or proceeding in the Court ..... .15

(A letter shall not be considered necessary when a notice contains the same information.)

2.—Bailiff's Fees.

1. Service of summons issued under the seal of the Court, or Judge's summons or order on each person, except summons to witness and summons to juryman:

Where claim exceeds $10 and does not exceed $20 ..... .40

Where claim exceeds $20 and does not exceed $60	$0.50
Where claim exceeds $60 and does not exceed $100	.75
Where claim exceeds $100	1.00
(In interpleader suits the value of the goods to regulate the fee.)	
2. For every return as to service under item 1; attending at the clerk's office and making the necessary affidavit	.15
3. Service of summons on witness or juryman, or service of notice	.25
4. Taking confession of judgment and attending to prove	.10
5. For calling parties and their witnesses at the sitting of the Court in every defended case, and at the hearing of every judgment summons	.15
6. Enforcing every writ of execution or summons of replevin, or warrant of attachment or warrant against the body, each:	
Where claim does not exceed $20	.65
Where claim exceeds $20 and does not exceed $60	1.00
Where claim exceeds $60	1.50
(Where goods replevied, the value of goods to regulate the amount of the fee. This fee does not include service of summons in replevin on defendant.)	
Fees under Creditor's Relief Act (see section 189 *ante* and R. S. O. 1914, ch. 81, sec. 26), shall be taxed according to the tariff.	
7. Every mile or fraction of a mile necessarily travelled to serve summons, or process, or other necessary papers, or in going to seize on a writ of execution, where money, paid on demand, or made on execution, or case settled after seizure	.15
8. Mileage going to arrest under warrant, when arrest made, per mile or fraction of a mile	.15

9. Mileage carrying delinquent to prison, including all expenses and assistance, per mile, or fraction of a mile $0.25
10. Every schedule of property seized, attached, or replevied, including affidavit of appraisal, when necessary:
    Exceeding $10 and not exceeding $20 .. .30
    Exceeding $20 and not exceeding $60 .. .50
    Exceeding $60 ..... .75
11. Every bond, when necessary, when prepared by the bailiff, including affidavit of justification and execution. 1 00
12. Every notice of sale, not exceeding three, under execution, or under attachment, each ..... .25
13. Reasonable allowance and disbursements, necessarily incurred in the care and removal of property:
    (*a*) If a bailiff removes property seized, he is entitled to the necessary disbursements, in addition to the fees for seizure and mileage.
    (*b*) If he takes a bond, then to $1.00 instead of disbursements for removal of property.
    (*c*) If assistance is necessary in the seizure, or securing, or retaining of property, the bailiff is entitled to the disbursements for such assistance.
    (*d*) All charges for disbursements are to be submitted to the clerk for taxation, subject to appeal to the Judge.
    (*e*) The bailiff must in all cases endorse a memorandum of all his charges on the back of the execution, or state them on a separate slip of paper, so that the clerk may conveniently tax the bailiff's charges for fees and disbursements.
    (*f*) The Clerk in all cases to sign the memorandum of his taxation and preserve it among the papers in the cause, together with the execution, for future reference, and thereby enable the clerk to certify the bailiff's returns properly.

14. If execution or process in attachment in the nature of execution be satisfied in whole or in part, after seizure and before sale, whether by action of the parties or otherwise, the bailiff shall be entitled to charge and receive 3 per cent. on the amount directed to be levied; or on the amount of the value of the property seized, whichever shall be the lesser amount.
15. Poundage on executions, and on attachments in the nature of executions, 5 per cent., exclusive of mileage for going to seize and sell, upon the amount realized from property necessarily sold.

3.—Fees to Witnesses and Appraisers.

Allowance to Witnesses.

Attendance, per diem, to witnesses within three miles of the place where the Court is held, if within the county..	$0.75
And if without the county	1.00
Attendance, if witness resides over three miles from the place of sittings and within the county, per diem	1.00
Attendance, if witness resides without the county and more than three miles of the place of sittings, per diem	1.25
Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, per diem	4.00

(Note.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees, by statute, are to be taxed, as authorized by such statute.

If witnesses attend in one case only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportional part in each case only.)

The travelling expenses of witnesses, over three miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 20 cents per mile, one way.

FEES OF APPRAISERS.

Fees to Appraisers of Goods, etc., seized under Warrant of Attachment.

To each appraiser, $1.00 per day, during the time actually employed in appraising goods—to be paid in the first instance by plaintiff and allowed as costs in cause.

FEES IN SUITS NOT EXCEEDING $10.

(Ante, sec. 48.)

Clerk.

For all services, from entering action, or suing out a judgment or interpleader summons, up to and including the entering of final judgment, or final order on any such judgment or summons, in case the action proceeds to judgment or final order $1.25

In case the action does not proceed to judgment or final order, the fees heretofore, or that may hereafter be payable, but not exceeding in the whole the said sum.

For issuing writ of execution, warrant of attachment, or warrant for arrest of delinquent and entering the return thereto ..... .50

Bailiff.

For all services rendered in serving summons and making return, and any

other service that may be necessary before the judgment is entered by the clerk or pronounced by the Judge, mileage excepted $0.50

For enforcing execution, schedule of property seized, or attached, bond where necessary, and all other necessary acts done by him, after seizure, mileage excepted, if money made or case settled, after levy 1.00

(Necessary disbursements incurred in the care and removal of property shall be allowed to be first allowed by the clerk, subject to the approval of the Judge.)

CHAPTER 64.

THE JURORS ACT.

10. The Court House is the reasonable location for offices connected with the Courts and the administration of justice other than Division Courts: Rodd v. Essex, 14 O. W. R. 953, 19 O. L. R. 659.

45. A provincial legislature has power to determine the number of grand jurors to serve at Courts of *oyer* and *terminer* and general sessions, this being a matter relating to the constitution of the Courts: but the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom the bill may be found relate to procedure in criminal matters in respect of which the Dominion alone has power to legislate. The Dominion Parliament can exercise its power by adopting the provincial law, and has done so by the Criminal Code: R. v. Walton, 12 O. L. R. 1.

61. The restriction imposed by this section upon the disclosure of the names of the jurors and the inspection of the panel applies in criminal proceedings: Re Chantler, 9 O. L. R. 529.

63. Jury case not set down: change of venue: Taylor v. Toronto Construction Co., 3 O. W. N. 930, 21 O. W. R. 508; Brown v. G. T. R., 23 O. W. R. 74, 4 O. W. N. 113.

67. See R. v. Walton, 12 O. L. R. 1, note to sec. 45: see also R. v. O'Rourke, 32 C. P. 388, 1 O. R. 464; R. v. Cox, 2 Can. C. C. p. 207; R. v. Noel, 2 O. W. R. 488.

75. The defendants having delivered separate defences and being separately represented claimed to be entitled to four peremptory challenges each, and between them challenged six jurors. The trial resulted in a verdict for defendants. Held, that there had been a mistrial and that the plaintiff was entitled to a new trial. The defendants were entitled to only four peremptory challenges between them, and the plaintiff, having taken objection at the time, had not waived his right by proceeding with the trial: Empey v. Carscallen, 24 O. R. 658. See Con. Rule 785 as to mistrial as grounds for new trial, and now see Judicature Act, R. S. O. 1914, ch. 56, sec. 28.

84. "Immediately after the verdict:" what is sufficient compliance: Barker v. Lewis (1913), 3 K. B. 34.

CHAPTER 65.

THE ARBITRATION ACT.

Refer to: The Annual Practice, where "The Arbitration Act, 1889," is annotated; Russell on Arbitration; Redman on Arbitrations; Stephens' New Commentaries, Vol. III., Bk. V., ch. 1; Rudall, Conduct of a Reference.

2.—(*d*) Change in law made by amendment of 1906: Garside v. Webb, 10 O. W. R. 235, 11 O. W. R. 43. Applicability of the provisions of the amendment of 1906: Cole v. London Mutual Fire Ins. Co., 10 O. W. R. 930, 15 O. L. R. 619. What may be made the subject of an arbitration: Hewitt v. Hewitt, 1 Q. B. 110; Baker v. Townshend, 1 Moo. 120. What is a submission: Re Hammond and Waterton, 62 L. T. Rep. 808. If the parties to a submission are to be deprived of any legal right, the submission must plainly so state: Re Green and Balfour, 63 L. T. Rep. 97, 325.

4. There is nothing in the Public Schools Act, R. S. O. 1914, ch. 266, to bring an award of arbitrators, appointed under section 21 of that Act, within the exception of this section: Re Churchill and Hullett, 11 O. L. R. 284. Applies to awards under Dominion Railway Act: Re Horse Shoe Quarry Co., 17 O. W. R. 757. As to arbitration of claims for lands injuriously affected by work done by a municipal corporation: see R. S. O. 1914, ch. 192, sec. 332, *et seq*, also ch. 199.

5. See Judicature Act, 1897, ch. 51, sec. 26 (2), as to jurisdiction of the High Court in regard to awards. See now R. S. O. 1914, ch. 56, secs. 12, 13, and see also ch. 56, sec. 16 (a) notes. For former practice of Courts of Chancery and Law, see cases collected: Holmested & Langton, pp. 17-18. The discretion to give leave to revoke a submission is to be exercised only under exceptional circumstances: Rathbun v. Standard Chemical Co., 5 O. L. R. 286. In what cases leave given to

revoke submission: see *e.g.*, James v. Attwood, 1 Scott 841; Re Woodcraft, 5 Jur. 771; Scott v. Vandansan, 1 Q. B. 102; Hart v. Duke, 32 L. J. Q. B. 55; James v. James, 23 Q. B. D. 12; West India Docks v. Kirk, 12 App. Cas. 738. Section 5, which makes submissions of the same effect as an order of the Court, applies by virtue of section 2 to submissions in writing: see also section 6: Ryan v. Patriarche, 8 O. W. R. 811, 13 O. L. R. 94. The section only applies to admitted submissions: Re Little Sturgeon and Mackie, 4 O. W. N. 262, 23 O. W. R. 273. Submission providing for making of awards from time to time: Quebec v. Ontario, 42 S. C. R. 161. Revocation of submission after award doubtful even of fraud or mistake established: Re Zuber & Hollinger, 20 O. W. R. 724, 3 O. W. N. 416, 25 O. L. R. 252.

7. The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee: McClure v. Brooke, 4 O. L. R. 97, 5 O. L. R. 59. Reference to experts: see H. & L. notes, p. 264.

8. The jurisdiction of the Court cannot be ousted as to a cause of action which has arisen, but where no cause of action has arisen there is no jurisdiction. Where an action was brought on an accident insurance policy which contained an agreement to submit to arbitration as a condition precedent to action, the Court had no power to compel payment before reference and award contrary to the contract upon which the obligation to pay did not arise until after reference and award: Nolan v. Ocean Accident, 5 O. L. R. 544. "The question is not, whether, where a contract creates an obligation to pay a sum of money, it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such differences to arbitration, but whether, where the only obligation created is to pay a sum ascertained in particular manner; where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment. If they could do so, they would not be enforcing the contract made by the parties, but one of a different

nature." Per the Lord Chancellor: Caledonian Ins. Co. v. Gilmour, 1893, A. C. 85; see also Spurrier v. La Cloche, 1902 A. C. 446; Austrian Lloyd v. Gresham Life, 1 K. B. 249, 88 L. T. 6; Scott v. Avery, 5 H. L. C. 811. See also, in U. S. Courts: Reed v. Washington Fire, 138 Mass. 572; Badenfield v. Massachusetts Mutual Accident, 154 Mass. 77; Whitney v. National Masonic Accident, 52 Minn. 378. Where a policy of insurance contains a clause making arbitration a condition precedent to action, the person claiming under the policy is bound by the terms of it though not having signed it: Baker v. Yorkshire Fire, 92 L. T. 111; also Nolan v. Ocean Accident, 5 O. L. R. 544. Where a matter in dispute as to an alleged usage was referred to an engineer, although the engineer had publicly and privately expressed himself that no such usage existed, yet as he swore that he would give the contention fair consideration should the matter come before him as arbitrator, the action must be stayed: Sherewood v. Balch, 30 O. R. 1. The principle that a tenant who holds over after the expiration of a lease and pays or agrees to pay rent and becomes tenant from year to year, is deemed to hold on all the terms of a yearly tenancy, so far as they are applicable to a yearly tenancy, applies where an express tenancy at will is created. An arbitration clause is not inconsistent with such a tenancy at will and applies during the continuance of the tenancy: Morgan v. Harrison, 1907, 2 Ch. 137. Reference of dispute as condition precedent to right to sue: see Hodson v. Railway Passengers' Assurance, 1904, 2 K. B. 833. Party to a submission: Insurers or insured under a policy subject to: R. S. O. 1914, ch. 185, sec. 194, Stat. Cond., 21, are parties to a submission within the meaning of this section: Hughes v. Hand-in-Hand Ins. Co., 7 O. R. 615. As to effect of a variation in the condition: see Cole v. London Mutual, 10 O. W. R. 930, 15 O. L. R. 619. Disputes between partners involving questions of law, or where a *prima facie* case of fraud is set up, should not, as a rule, be referred to arbitration: Barnes v. Young, 1898, 1 Ch. 414. A submission to arbitration does not *per se* exclude the right to raise the defence of the Statute of Limitations, but if it intended to exclude such a defence an express term to that effect must be imported into the submission:

Re Astley and Tydlesley Coal Co., 68 L. J. Q. B. 252. Submission means written submission only (see sec. 2): Ryan v. Patriarche, 13 O. L. R. 94; 8 O. W. R. 81,

An application for stay of proceedings after delivery of statement of defence will be refused: West London Ins. Co. v. Abbott, 29 W. R. 584; Cole v. Canadian Fire Ins. Co., 10 O. W. R. 906, 15 O. L. R. 336. Defence of arbitration pending: see Ryan v. Patriarche, 8 O. W. R. 811, 13 O. L. R. 94. Staying proceedings: Davis v. Starr, 41 Ch. D. 242; Renshaw v. Queen Anne Mansions, 1897, 1 Q. B. 662; Parry v. Liverpool Malt Co., 1900, 1 Q. B., 339; Manchester Ship Canal v. Pearson, 1900, 2 Q. B. 606; Ford's Hotel v. Bartlett, 1896, A. C. 1; Austrian Lloyd v. Gresham Life Assurance, 1903, 1 K. B. 249. Stay of proceedings because of partisan arbitrators: Bonnin v. Neame, 1910, 1 Ch. 732. Stay of action—claim for rectification of lease: Printing Machinery Co. v. Linotype, 1912, 1 Ch. 566. Award made *pendente lite*: Doleman v. Ossett, 1912, 3 K. B. 257. Staying action on building contract which provided for reference of disputes to an engineer: Bristol Corporation v. Aird (1913), A. C. 241.

Step in the proceedings: Ford's Hotel v. Bartlett, 1896, A. C. 1; Chappell v. North, 1891, 2 Q. B. 252; County Theatres v. Knowles, 1902, 1 K. B. 480; Richardson v. Le Maitre, 1903, 2 Ch. 222. Filing affidavits in opposition to motion for receiver is not; Zalinoff v. Hammond, 1898, 2 Ch. 92. An undertaking by one party to an action,—*e.g.*, to deliver an account —constitutes a step in proceedings: Ochs v. Ochs Brothers, 1909, 2 Ch. 121; see also County Theatres v. Knowles, 1902, 1 K. B. 480; Richardson v. Le Maitre, 1903, 2 Ch. 222.

9.—(1) A submission to two arbitrators with power to appoint an umpire is different from an arbitration of three arbitrators whether the three are appointed when the reference begins or after two have failed to agree. The former is the statutory tribunal. In the other, the parties provide, as they are at liberty to do, for an award by two arbitrators and exclude the contingencies which may arise and are provided for in the simpler form of submission.

See as to attempt by one of the parties to a reference of the latter sort to defeat it by refusing to appoint an arbitrator, and effect of former section, R. S. O. 62, sec. 8: Excelsior Life v. Employers' Liability, 2 O. L. R. 301, 3 O. L. R. 93, 5 O. L. R. 609. Where a sole arbitrator has been appointed after the other side has made default as specified, notice after appointment of sole arbitrator should be given to the party in default who, if not notified, is not called on to move against the appointment. Where the agreement imputed that three arbitrators should act from the outset, it was not within the Act, R. S. O. 1897, ch. 62, and section 8 of that Act did not apply: Sturgeon Falls Power Co. v. Sturgeon Falls, 2 O. L. R. 585. See also Gumm v. Hallett, L. R. 14 Eq. 555.

9.—(2) Arbitrator made party to application to appoint umpire: Denny v. Standard Export Lumber Co., 1912, 2 K. B. 542. Appointment of arbitrators by Court: Re Wilson and Eastern Counties Navigation Co., 1892, 1 Q. B. 81; Eyre and Leicester Corporation, 1892, 1 Q. B. 136. Where two arbitrators had power to appoint an umpire but refused to do so, the Court on application appointed one. Practice considered: Taylor v. Denny (1912), A. C. 666.

10.—(*b*) "Stating a case." Appeal will not lie to Court of Appeal from order of Judge in Chambers directing arbitrator to state a case: Re Frere and Staneley, 1905, 1 K. B. 366. Arbitrator after he has made his award cannot state a case nor be ordered to do so: Re Palmer and Hosken, 1898, 1 Q. B. 131. Jurisdiction of Court to order: Re Spillers and Baker, 1897, 1 Q. B. 312. Costs of stated case: Re Gonty and Manchester, 1896, 2 Q. B. 439. See *post*, sec. 29, notes.

10.—(*c*) On a motion for an order referring back to arbitrators to enable them to correct a clerical error an award made under the Dominion Railway Act: Held, that if provincial legislation applied the motion was needless as the arbitrators had power, under this section, to correct their mistake. If that legislation was not applicable there was no power under the Dominion Railway Act or otherwise to remit the award nor to correct the error on motion: Re McAlpine, 3 O. L. R. 230.

11. The assent of parties to the arbitration being proceeded with after the time had expired is equivalent to a parol submission only: Ryan v. Patriarche, 13 O. L. R. 94. It is good cause for enlarging the time for making the award that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge but were unable to get the original submission whereon to make the endorsement as to enlargement: Re Clement and Dixon, 17 P. R. 455. Death of one of the parties and the absence of right of appeal would not warrant Court in refusing to enlarge the time: Re Curry, 12 P. R. 437; see Digest p. 100. Power of Court to extend time: Re Russell and Baldwin, 11 O. W. R. 408; Knowles v. Bolton Corporation, 1900, 2 Q. B. 253. Award made out of time: Garside v. Webb, 11 O. W. R. 43.

12. There are but four grounds on which a matter can be remitted to an arbitrator for reconsideration under sec. 10 of the English Act, 52 and 53 Vic., ch. 49, which corresponds with sec. 12 of our Act, viz. (1) where the award is bad on the face of it, (2) where there has been misconduct on the part of the arbitrator, (3) where there has been an admitted mistake and the arbitrator himself asks that the matter be remitted, (4) where there has been additional evidence discovered after the making of the award: Re Montgomery and Lilienthal, 1898, 78 L. T. N. S. 406; In re Keighley and Bryan, 1893, 1 Q. B. 405; In re Palmer and Hosken, 1898, 1 Q. B. 131; Re Nuttall and Lynton and Barnstaple, 1900, 82 L. T. N. S. 17. The Court will not remit the matter to the arbitrators for reconsideration on the ground of mistake unless the mistake appears on the face of the award or is admitted by the arbitrators: Re G. T. R. and Petrie, 2 O. L. R. 284. Where after an award was made, two of the arbitrators certified that they had admitted evidence the admissibility of which they considered doubtful, the Court refused to remit, under this section, the matters in question in the arbitration: Re G. T. R. and Petrie, 2 O. L. R. 284; see also Re McAlpine, 3 O. L. R. 230 (*ante* sec. 10 (*c*). There is nothing in the Public Schools Act to bring an award of arbitrators appointed under former sec.

46 of that Act (R. S. O. 1914, ch. 266, sec. 21) within the exception contained in sec. 4 of this Act, and there is power in the Court or Judge to remit the matters referred or any of them for reconsideration: Re Churchill and Hullett, 11 O. L. R. 284. An application to remit a case to arbitrators for reconsideration need not be made within the time limited for moving to set aside an award, but it must be made within a reasonable time and the delay satisfactorily accounted for: Re Citizens Ins. Co. and Henderson, 13 P. R. 70. An award may be remitted to arbitrators under this section although the result of the reconsideration may be to have the award virtually set aside by a different or even contrary decision of the arbitrators. The Court is justified in remitting an award if fraud or fraudulent concealment on the part of the persons in whose favour the award is, is established, or new evidence is forthcoming which by the exercise of reasonable diligence could not have been forthcoming before the award was made: Green v. Citizens Ins. Co. 18 S. C. R. 338. Misconduct of arbitrator as ground for remittance: Re Powell and Lake Superior Power Co., 9 O. L. R. 236, and see sec. 13 notes. Mistake in principle of award: Lemay v. McRae, 16 A. R. 348, 18 S. C. R. 280. An arbitrator who has made an award is at once *functus officio*, and if his award does not really embrace the matters in dispute between the parties, he cannot of his own motion treat it as no award and make another: Stringer v. Riley, 1901, 1 K. B. 105. A *bona fide* application having been made to an arbitrator before the award was signed, to state certain questions of law in a special case for the opinion of the Court or to adjourn the matter until an application to the Court to direct him to state a special case had been disposed of, his refusal to do so was a ground for remittance for further consideration: Powell v. Lake Superior Power Co., 9 O. L. R. 236; see also In re Palmer and Hosken, 1898, 1 Q. B. 131. Where an arbitrator exceeds his authority: see Powell v. Lake Superior Power Co., 9 O. L. R. 236. See *post*, sec. 29, notes.

13. Con. Rule 652 (1913 Rule 401) does not apply to the case of a submission ordered by consent in

Court to an arbitrator selected and agreed on between the parties, and the whole award was set aside when the arbitrator improperly heard evidence behind the back of one of the parties which affected a portion of the award: Kennedy v. Beal, 29 O. R. 599. Misconduct: disqualification: Bright v. River Plate, 1900, 2 Ch. 835; Re Palmer and Hosken, 1898, 1 Q. B. 131; Re Haigh and London N. W. Ry., 1896, 1 Q. B. 649. Misconduct of arbitrator: Re Enoch and Zaretzky, 1910, 1 K. B. 327; Freeman v. Chester (1911), 1 K. B. 783; Powell v. Lake Superior Power Co., 9 O. L. R. 236. Arbitration by the servant of one of the parties: see Eckersley v. The Mersey Docks, etc. (1894), 2 Q. B. 667. A member of a school board is not a member or officer of a corporation so as to be disqualified as arbitrator: Re Sarnia and Sarnia Gas, 3 O. W. N. 117, 20 O. W. R. 204. Arbitrators are not liable for negligence or want of care: Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1.

14. It is no longer necessary to make either the submission or the award a rule of Court before proceeding to enforce it: see sec. 5 *ante* and notes. Moving against awards: see sec. 33 *infra*. Appeals: see sec. 17 *infra*. Jurisdiction of High Court as to awards: Judicature Act, R. S. O. 1914, ch. 56, sec. 16a. H. & L. notes, pp. 17, 18. An application for an order giving leave to enforce an award need not be made within 6 weeks after the publication of the award. An order under sec. 14 is necessary when the reference has been out of Court. Objections properly the subject of a motion to set aside the award were not given effect to upon appeal from an order under this section: Re Lloyd and Pegg, 5 O. L. R. 389. The order to enforce an award is in the discretion of the Court and will be made only where the Court deems proper that it should be enforced, and may be withheld: Re Baker and Kelly, 9 O. W. R. 136, 14 O. L. R. 623. A Local Judge has jurisdiction to make an order for leave to issue execution to enforce an award: Re Baker and Kelly, 9 O. W. R. 136, 14 O. L. R. 623; and see also as to enforcing award: Aitken v. Fernando, 1903, A. C. 200; Re Horseshoe Quarry Co. and St. Marys, etc. Ry., 22 O. L. R. 429. A summons to

enforce an award under sec. 12 of the Arbitration Act, 1889 (Imp.), cannot be served on a foreigner resident out of the jurisdiction: Rasch v. Wulfert, 1904, 1 K. B. 118. Action to enforce award: accord and satisfaction as to part of amount awarded: Warrell v. Nipissing Trading Co., 12 O. W. R. 933. An award must be certain: Hawkins v. Colclough, 1 Burr. 275, Watson v. Watson, Style's Reports, 28. Where the alleged award is not made in respect of all the matters referred, see: Garside v. Webb, 11 O. W. R. 43.

15. Duty of an arbitrator in hearing evidence: Johnstone v. Cheape, 5 Dow 247.

16. See Re McPherson and Toronto, 16 O. R. 230.

17. Arbitrators were appointed under the Municipal Act, and afterwards the submission was enlarged to include a claim for damages for breach of contract. They did not provide in the submission for an appeal under this section. The arbitrators awarded one sum for the claim " under the Acts, and in respect of the matters referred to in the submission." Held that the award was indivisible, and as the agreement, as to the submission did not provide for an appeal under the Arbitration Act, no appeal on the merits lay or was possible: Re Field Marshall and Beamsville, 11 O. L. R. 472. Where Judge of Surrogate Court adjudicated by consent a claim beyond jurisdiction, and right of appeal was reserved, an appeal lay as from an award: Re Graham, 20 O. W. R. 295, 25 O. L. R. 5. Period from which time for appeal runs: Re Burnett v. Durham, 31 O. R. 262. As to appeals against awards for claims for lands injuriously affected by work of a municipal corporation: see R. S. O. 1914, ch. 192, sec. 345, Re McLellan, 18 P. R. 246. As to matters on appeal from award of arbitrators under Railway Act: see R. S. O. 1914, ch. 15, sec. 92 (15), (16), and notes.

17.—(3) Arbitrators proceedings on view of the property: Meyerscough v. Lake Erie, etc., Ry. 4 O. W. N. 1249, 24 O. W. R. 535.

19. Upon a proper construction of the Schedules, arbitrators are not entitled to charge as fees for a day's

sitting, which extends beyond 6 hours, more than the maximum amount fixed by the Schedules for a single day's sitting: Re Thornbury and Grey, 15 P. R. 192. Claim for excessive fees: see Jones v. Godson, 25 O. R. 444, 23 A. R. 34; see note to sec. 26.

24. As to costs of arbitrations under the Railway Act: see notes to R. S. O. 1914, ch. 185, sec. 90 (10).

26. An arbitrator is not brought within the punitive provisions of sec. 26, when the payment of the alleged excessive fees is made by cheque to an agent who has power to receive money only, and the arbitrator refuses to take the cheque. In order to fix the arbitrator with the penalty, there must, after the expiration of the time named, be either a demand upon him to make, execute and deliver the award, and a refusal to do so, unless excessive fees are paid or actual payment of such larger sum. The person desiring to take up the award may either have the fees taxed and tender the amount or pay the amount demanded and sue for the penalty, which is a sum equal to treble the excess demanded, and not equal to treble the whole amount of fees demanded: Jones v. Godson, 25 O. R. 444, 23 A. R. 34.

29. "The right thus conferred (to have a special case stated) must be respected by the arbitrator, and if a party to an arbitration action, *bona fide* requests an arbitrator either to state a special case raising a question of law arising in the course of the reference and material for consideration, or to delay his award until the party can apply to the Court for an order directing a special case, and the arbitrator refuses to comply with either of such requests, the arbitrator is *prima facie*, at all events, guilty of a breach of duty towards such party." Per Lindley, M.R., In re Palmer and Hosken, 1898, 1 Q. B. 131; see also Powell v. Lake Superior Power Co., 9 O. L. R. 236. If the arbitrator when applied to refuses to state a special case, and proceeds to execute his award, the Court will not, while the award stands, remit to the arbitrator to state his award in the form of a case: Redman, Arbitrations and Awards, 4th ed., 255. "The opinion of the Court" on a case stated pursuant to this section is a "decision" and

it is a "final" decision. The effect is to require such a case to be heard before a Divisional Court. A single Judge has no jurisdiction: Re Geddes and Cochrane, 2 O. L. R. 145; see also In re Knight and Tabernacle, 1892, 2 Q. B. 613, 1892, A. C. 298, and see H. & L. notes p. 861. The admissibility of evidence is a question of law within the meaning of this section. The exercise of the power conferred by this section rests in the discretion of the Court: Re Rogers and London Canadian, 12 O. W. R. 1295, 18 O. L. R. 8. Admissibility of evidence: Saunby v. London Water Commissioners, 11 O. W. R. 1076. Where a stated case is directed as to the principal question, it might properly be made to include some minor questions in dispute, although had these latter been the only questions, a stated case would not have been granted: Re Rathbun and Standard Chemical, 5 O. L. R. 286. A party to a reference is not entitled *ex debito justitiae* to have a special case directed whenever a question of law arises in the course of a reference. The matter rests with the discretion of the Court. There is no general rule that where the arbitrators are specially qualified to decide the question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question: Re Rathbun and Standard Chemical Co., 5 O. L. R. 286. An application for an order directing arbitrators to state a case as to the admissibility and relevancy of evidence before them, must be made before the execution of the award. It is too late for them to state a case after the award is made: Re G. T. R. and Petrie, 2 O. L. R. 284. The application may be made before the arbitrator gives a ruling on the question of law. The making of the order is a matter of discretion, the order granting or refusing the direction to the arbitrator being subject to appeal: In re Jenison and Kakabeka Falls, 24 A. R. 361. See notes to secs. 10 (*b*), 12, *ante*.

30. In setting aside an award the Court has discretion to deal with costs: Kennedy v. Beal, 29 O. R. 599.

33. This section does not apply to applications for order for leave to enforce award under sec. 14, but only to applications to set aside awards: Re Lloyd and Pegg, 5 O. L. R. 389. Stay of proceedings to enable application to be made to set aside award: withholding

order under sec. 14: Re Baker and Kelly, 9 O. W. R. 136. Time: motion to set aside award: Re Caughell and Brower, 24 A. R. 142 (but see now Judicature Act). Time for application to set aside award: Re Zuber and Hollinger, 20 O. W. R. 724, 25 O. L. R. 252.

36. Where valuers are appointed, the price they agree on is not an "award:" Re Laidlaw and Campbellford, etc., Ry., 5 O. W. N. 534. Under the provisions of a lease the award of three arbitrators may be a valuation and not an award. If so, no appeal lies: Re Irwin v. Campbell, 4 O. W. N. 156, 5 O. W. N. 229, 24 O. W. R. 896, 25 O. W. R. 172; Re Irwin and Hawken, 4 O. W. N. 1562, 24 O. W. R. 878. "Arbitration" and "appraisement:" Cole v. London Mutual, 10 O. W. R. 930, 15 O. L. R. 619.

SCHEDULE A.

(*b*) Submission to three arbitrators, power of two arbitrators to make award: U. K. Mutual Steamship v. Houston, 1896, 1 Q. B. 567.

(*f*) Time for making award: extension: Garside v. Webb, 10 O. W. R. 235, 11 O. W. R. 43. "Called on to act." A notice to arbitrators requiring them to appoint an umpire, is a notice by which they are "called on to act:" Re Baring Gould and Sharpington, 1899, 2 Ch. 80.

(*k*) Claims outside the reference: jurisdiction: Falkington v. Victorian Ry. Commissioners, 1900, A. C. 452.

CHAPTER 66.

THE BOARDS OF TRADE GENERAL ARBITRATION ACT.

CHAPTER 67.

The Boundary Line Disputes Act.

Refer to: Hunt on Boundaries and Fences.

3. Definition of boundary line: "Centre of the Concession:" Scriver v. Young, 14 O. W. R. 530, 15 O. W. R. 27; line between farm lots (fence-viewers): Delamatter v. Brown, 13 O. W. R. 58, 862 (and see R. S. O. 1914, ch. 259, notes); line fence: Forrest v. Turnbull, I O. W. N. 150, 14 O. W. R. 478; two differing surveys followed: Nikoden v. Saliegycki, 11 W. L. R. 148; line between two halves of irregularly shaped lot: Hooey v. Trip, 3 O. W. N. 738, 21 O. W. R. 738. Proof of location of boundary: Lake Erie Excursion Co. v. Berti, 3 O. W. N. 1191, 22 O. W. R. 42, 4 O. W. N. 111, 23 O. W. R. 94; line between north and south halves of lot: Williams v. Salter, 23 O. W. R. 34. Costs: see Thurston v. Brandon, 12 O. W. R. 1228.

See also, the Surveys Act, R. S. O. 1914, ch. 106; the Line Fences Act, ch. 259 and notes; also cases noted ch. 75, sec. 5 ,"Boundaries and Boundary Lines."

CHAPTER 68.

The Lunacy Act.

Refer to: Wood Renton, Law and Practice of Lunacy; Archbold on Lunacy; Pope on Lunacy; Heywood and Massey, Lunacy Practice; Bicknell and Kappele, Practical Statutes, p. 243, *et seq.*

2. Most of the interpretation clauses are taken from R. S. O. 1897, ch. 336; Imperial Act, 53 Vict. ch. 5 (The Lunacy Act).

2.—(*e*) Lunatic—In reference to definition given in Act: see R. v. Shaw, L. R. 1 C. C. 145; Re B., 1892, 1 Ch. 459; Re Martin's Trusts, 34 Ch. D. 118; Re Dewhurst's Trusts, 33 Ch. D. 416; Re Barber, 39 Ch. D.

187. As to the distinction between sanity and a disposing mind for testamentary purposes: see Banks v. Goodfellow, 6 Moo. P. C. 341; Dew v. Clark, 3 Add. 797; Boughton v. Knight, L. R. 3 P. & D. 64.

2.—(*f*) Senile imbecility: see Re Kelly, 6 P. R. 220; In re W., 21 Occ. N. 340; In re B., 21 Occ. N. 341. Unsoundness of mind as bearing on the power to contract: Molton v. Camroux, 4 Exch. 17.

3. Where action brought in name of alleged lunatic by next friend, inquiry as to mental condition: Fraser v. Robertson, 1 O. W. N. 843, 800, 894. The Court has no jurisdiction over lunatics not so found: Re Montgomery, 4 O. W. N. 308, 23 O. W. R. 342: but see sec. 37, *post*. As to lands of persons of unsound mind not so found: see Re X., 2 Ch. 415. The committal of a lunatic to a public asylum and the management of his property while there, are regulated by R. S. O. 1914, ch. 295. Private sanitaria are regulated by R. S. O. 1914, ch. 296. Powers and duties of inspector: R. S. O. 1914, ch. 301. The Inspector of Prisons and Public Charities is a corporation sole: R. S. O. 1914, ch. 301, sec. 6.

4. See 1913, Rules 207, 208; H. & L. notes, pp. 572, 573; former Con. Rules, 42 (5), and 336.

6. An inquisition is usually directed to be held on the application of a near relative—in fact the nearest relative: Ex parte Persse, 1 Mol., at p. 220; but it may be held on application of an executor, a trustee: (Shelford, p. 114); or a creditor: (In re Bell, 2 Cooper t. Cott, 163). Necessity for presence of lunatic: see Ex parte Roberts, 3 Atk. 7; Shelford, Lunacy, p. 151. There is jurisdiction to direct an inquisition as to the lunacy of an alien domiciled abroad who is temporarily resident in this country, although all the property of the alleged lunatic, except such personal chattels and cash as he may have brought with him, is situate abroad: Re Burbidge, 1902, 1 Ch. 426. Before granting an order declaring a person a lunatic, he must be served with notice of the application, and any counsel or other person he may desire to see must be allowed access to him: Re Miller, 1 Ch. Ch. 215. As to evidence required to dispense with such service as dangerous

to the lunatic or useless: see Re Newman, 2 Ch. Ch. 390; Re Patton, 1 Ch. Ch. 192; Re Mein, 2 Ch. Ch. 429. An application when renewed should be before the same Judge: Re Milne, 1 Ch. Ch. 194. Medical testimony required: Re Fleming, 13 C. L. J. 167. Affidavit of physician who keeps a private lunatic asylum not received (Anon. 6 Ir. Eq. R. 389; In re Anon., Drur. 286). Application must be supported by the affidavits of more than one medical man: Re Patton, 1 Ch. Ch. 192. Where an application was made by a daughter and it appeared that it was made with a view to attacking a disposition which the alleged lunatic had made in favour of another daughter with whom he lived, and that an action had already been begun for the purpose, and it also appeared that the alleged lunatic might properly remain in the care of the daughter with whom he then was, the application was dismissed, although the alleged lunatic undoubtedly was one: Re Clark, 14 P. R. 370. The alleged lunatic's property, and the fitness of the proposed committee must be shown on affidavit: Re Patton, 1 Ch. Ch. 192. Interest of alleged lunatic: see Re Connell, 3 O. W. R. 95. Separate committees may be appointed for distant estates: Re Robins, 2 Russ. & M., 449, or for person and estate: Re Talbot, 1882, 20 Ch. D. 269. Next of kin are preferred as a matter of convenience for committeeship of person, but not necessarily as to estate: In re Lord Bangor, 2 Mol. 518; In re Webb, 2 Ph. Ch., at p. 553. A commission may issue against an alien: In re Bariatinski, 1 Ph. Ch. 375; In re Houston, 1 Russ. 312; against a subject beyond the jurisdiction but possessing property within: In re Stevens, 2 Coop. t. Cott. 150. and against an infant: Beall v. Smith, 1873, L. R. 9 Ch., at p. 92. Right of foreign committee to money on deposit in bank in Ontario: Falls v. Bank of Montreal, 1 O. W. R. 538. Material required to make order under this section and cases referred to also inquiry into mental condition of alleged lunatic: Re Michael Fraser, 17 O. W. R. 383, 19 O. W. R. 545, 22 O. W. R. 354, 1 O. W. N. 1105, 2 O. W. N. 241, 2 O. W. N. 1321, 3 O. W. N. 1420, 24 O. L. R. 222, 26 O. L. R. 508. Former proceedings by inquisition, etc.: see Re Stuart, 4 Gr. 44; Re Milne, 11 Gr. 153; Re McNulty, 13 Gr. 463; Re Milne, 1 Ch. Ch.

194; see also Bicknell and Kappele, Practical Statutes, pp. 243-5.

7. Issue to be tried: Fraser v. Robertson, 1 O. W. N. 800; Peel v. Peel, 3 O. W. N. 1127, 19 O. W. R. 511, 21 O. W. R. 945. Proceedings on inquiry under Lunacy Act: presumptions and criterions: Re Fraser, 24 O. L. R. 222, 26 O. L. R. 508.

7.—(6) Appeal: see Con. Rule, 42 (5); 1913, Rule 209.

9.—(2) Presence of medical adviser at examination of plaintiff. Examination of plaintiff by alienist on behalf of defendants: Smith v. Stanley Mills Co., 4 O. W. N. 1269.

10. Application to supersede order declaring lunatic and evidence required thereon: Re Robinson, 1 O. W. N. 893. Section discussed: proper material to be filed: Re Annett, 5 O. W. N. 331, 25 O. W. R. 311.

11. Actions by and against lunatics: see Con. Rules, 217-220; H. & L. notes, pp. 406-412; 1913, Rules 94 et seq. The Inspector of Prisons and Public Charities is *ex officio* committee of lunatics detained in public asylums and without other committee: see R. S. O. 1914, ch. 295, sec. 40, *et seq.*

11.—(*a*) Before confirmation of Master's report appointing a committee of the person and estate of a lunatic and propounding a scheme for maintenance, the lunatic died: Held, the order should be made, the executors consenting, confirming the report, and for the discharge of the committee and surrender of his bond: In re Garner, 1 O. L. R. 405.

11.—(*d*) What will be deemed sufficient security: Re Ward, 2 Ch. Ch. 188.

12. Scope of section discussed: Peel v. Peel, 3 O. W. N. 1127, 21 O. W. R. 945. Moneys belonging to a lunatic on deposit in a bank which had been attached by a creditor were, on the application of the committee, ordered to be paid into Court for the maintenance of the lunatic in preference to the creditor's claim: Re Vernon, 20 C. L. T., Occ. N. 309. Money in Court to the credit of a lunatic, though not so

found, directed to be paid out in annual sums for maintenance: Re Hinds, 11 P. R. 5. Maintenance: see Re Plenderleith (1893), 3 Ch. 332; Re Faulkner, 3 O. W. R. 391. When the Court intervenes with respect to property of persons not *sui juris*, the money is not left to private investment, but paid into Court and made subject to its general administration. When part of the estate is converted and part kept for the abode of the lunatic or otherwise, the scheme for dealing with the whole is to be reported to the Court that proper directions may be given; moneys in the hands of the committee and to be collected from debtors or by the sale of land, must be forthwith paid into Court: In re Norris, 5 O. L. R. 99. Case for appointment of guardian: McPherson v. Ferguson, 4 O. W. N. 1564.

13. The common law right as to the priority of an execution creditor of a lunatic who has an execution in the Sheriff's hands before the lunatic has been declared such, will not be interfered with: In re Grant, 28 Gr. 457. The protection of the Court is not extended to the property of a lunatic from the time an application is made for a receiver, but only from the time some order is made: Re Clarke, 1898, 1 Ch. 336. The Court cannot prevent a judgment creditor from issuing execution against a lunatic's property if the creditor can reach it without interfering with the possession of an officer of the Court: Re Clarke, 1898, 1 Ch. 336.

14. The control of the Court ceases with the death of the lunatic and an order for the distribution of the lunatic's estate will not be made under proceedings in lunacy: Re Brillinger, 3 Ch. Ch. 290. The deeds of idiots and lunatics are voidable: Campbell v. Hill, 22 U. C. C. P. 526, 23 U. C. C. P. 473; Re Walker, 1905, 1 Ch. 160: see also 1 Pres. 327, 330. On a sale of land by an infant under Con. Rules 960, *et seq.*, an order was made barring the dower of the infant's mother who was a lunatic and confined in an asylum: Re Colthart, 9 P. R. 356: see Armour, R. P., p. 132; Armour, Titles, p. 204.

16. Power to sell and convey in the lunatic's name: see Imp. Acts, 16, 17 Vict. ch. 70, secs. 116, 124-139; 53 Vict. ch. 5, secs. 120, 124; Re Corbett, L. R. 1 Ch.

516; Re Wedd, 28 Ch. D. 514. Confirmation of sale of lands: Re Beard, 1 O. W. N. 807. Conversion and ademption of lunatic's property: see Digest English Case Law IX, pp. 684-6. Sale by committee: Re Tugwell, 27 Ch. D. 309; Re Briscoe, 2 De G. J. & S. 249. Application of purchase money: Dig. Eng. Case Law, IX., p. 664: Payment into Court: Re Barker, 17 Ch. D. 241. Where a lunatic is tenant for life—power to sell under Settled Land Act, 1882, sec. 62: see Re Ray, 25 Ch. D. 464, which applies only to lunatics so found: Re Boggs, 1894, 2 Ch. 416. Execution of lease by committee: Lawrie v. Lees, 7 App. Cas. 19. Power of Judge to order committee of lunatic to exercise election to take under or against will: Re Earl Sefton, 1898, 2 Ch. 378.

19. Where lands are sold for the purpose of effecting a partition, the share retains its character of realty: Thompson v. McCaffrey, 6 P. R. 193: see also Campbell v. Campbell, 19 Gr. 254; Fitzpatrick v. Fitzpatrick, 6 P. R. 134.

25. Dealing with stock standing in lunatic's name: Re Knight, 1898, 1 Ch. 257.

26. Vesting order of lands of lunatic mortgagee or trustee: see Re Montagu, 1896, 1 Ch. 549.

35. Petitioners' costs: Re Michael Fraser, 18 O. W. R. 96, 2 O. W. N. 597. Disposition of costs of application in lunacy matter: Re Peel, 2 O. W. N. 1275, 19 O. W. R. 511. Costs to be referred to taxing officer at Toronto: In re Norris, 5 O. L. R. 99. Costs: alleged lunatic found of sound mind: Re Cathcart, 1892, 1 Ch. 549. Costs of lunacy proceedings generally: see Dig. Eng. Case Law, IX., pp. 628-636.

37. Proper case to resort to powers of this provision: McPherson v. Ferguson, 4 O. W. N. 1564, 24 O. W. R. 871.

CHAPTER 69.

The Replevin Act.

Refer to: Holmested and Langton's Judicature Act and Rules, 3rd edition, pp. 1283-1292, Bicknell and Kappele, Practical Statutes, pp. 249, 250.

3. When an order of replevin may be obtained: see Con. Rules 1067-1079; H. & L. notes, pp. 1284-5; 1913 Rules, 359 *et seq.*: see Digest Ont. Case Law, Vol. III., p. 6126. The Court can take steps for the interim preservation of property and for the sale of perishable property: (1913 Rules 369-371). Horses are not within this provision on the ground that their keep is expensive and a trial not to be had quickly: Innes v. Hutcheon, 5 O. W. R. 357, 9 O. L. R. 392.

4. See provisions of R. S. O. 1914, ch. 215, sec. 134.

5. See Holmested and Langton, p. 1291.

8. As to place of trial: see Howard v. Herrington, 20 A. R. 175. Jurisdiction: see R. S. O. 1914, ch. 59, sec. 22 (1) (*e*).

9. See R. S. O. 1914, ch. 62, sec. 62 (4).

CHAPTER 70.

The Dower Act.

Note: In addition to Armour on Titles and on Real Property, see Cameron on Dower, and Bicknell and Kappele, Practical Statutes, p. 256 and p. 796.

2. This section was formerly 25 Edw. I., ch. 7 (Magna Charta), subsequently R. S. O. 1897, ch. 330, sec. 6, and R. S. O. 1897, ch. 322, sec. 1.
There is no right to dower:—
(1) In wild lands (sec. 6).
(2) In mining lands since December 31st, 1897, (sec. 7).
(3) In lands dedicated for streets (sec. 8).
(4) Where wife elopes (sec. 9).
(5) Where wife bars her dower; or
(6) (Since April 16th, 1895), has signed deed, (sec. 20).
(7) In case of jointure executed before marriage or jointure after marriage if she do not disaffirm (R. S. O. 1897, ch. 331, secs. 5 & 7). (Statute of Uses, 27 Hen. VIII, ch. 10, secs. 4 & 7. R. S. O. 1914, Vol. 3, p. VIII.).
(8) Election against dower under R. S. O. 1914, ch. 119, sec. 9: see Re Pettit Estate, 4 O. L. R. 506.
(9) Bar by lapse of time: R. S. O. 1914, ch. 75, sec. 26: but see Williams v. Thomas, 1909, 1 Ch. 713.
(10) No dower in husband's partnership property.
Dower may be barred:—
(1) By infant married woman: see R. S. O. 1897, ch. 165, sec. 5; R. S. O. 1914, ch. 150, sec. 6.
(2) Of lunatic: secs. 14 and 15.
(3) Where wife living apart from her husband for 2 years (sec. 14).
(4) Wife living apart for 5 years (sec. 17).
(5) Effect in case of mortgages: see secs. 10-12 and notes.

3. This section was formerly 20 Henry III., ch. 1 (St. of Merton), subsequently R. S. O. 1897, ch. 330, sec. 7.
Husband dying seized or not: see, as to recovery of

damages: Morgan v. Morgan, 15 O. R. 194; Humphries v. Barnett, 16 U. C. R. 463; Lozee v. Armstrong, 11 Gr. 517, and cases collected, I Dig. Ont. Case Law, col, 2088.

4 Originally 4 Wm. IV., ch. 1, sec. 13. Although, since the passing of 42 Vict. ch. 22 (now sec. 10), a married woman is entitled to dower out of an equity of redemption in land whether her husband dies seized of it or not, where such equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower; she is not entitled to dower out of an equity of redemption purchased and sold by him in his lifetime, the legal estate never having vested in him: Re Luckhardt, 29 O. R. 111, see the Registry Act, R. S. O. 1914, ch. 124, sec. 67. It is only when the husband dies beneficially entitled that the wife acquires any right to dower in an equitable estate, and the husband can deal as he pleases with such an estate, and a voluntary conveyance of it made with the object of preventing the wife acquiring any right to dower is unimpeachable by her: Fitzgerald v. Fitzgerald, 5 O. L. R. 279. There is no analogy between the common law right to dower in land in which the legal estate is in the husband, which arises out of the marriage relation and of which the wife cannot be deprived by the voluntary act of her husband in alienating the land during their joint lifetime, and the inchoate right to dower out of equitable estate where the wife has a mere chance of becoming dowable, depending under the statute upon whether the husband does or does not die beneficially entitled: Fitzgerald v. Fitzgerald, 5 O. L. R. 279. A lis pendens registered in respect of dower in husband's equitable estates, will be vacated as vexatious where husband still living: King v. King, 13 O. W. R. 760. As to women having jointures: see Statute of Uses, R. S. O. 1897, ch. 331, secs. 5, 6. 7. Jointures: see 3 Pres. 367; Wms. R. P. 317: see Duke of Manchester's Settlement, 1910, 1 Ch. 106.

5. See Armour, R. P., pp. 119, 131; Armour, Titles, p. 197.

6. Armour, Titles, p. 197.

8. See Armour, Real Property, p. 122. This section was formerly sec. 602 of the Consolidated Municipal Act, 3 Edw. VII., ch. 19.

9. This section was formerly 13 Edw. I. (St. of Westminster), ch. 34. Subsequently R. S. O. 1897, ch. 330, sec. 9: see notes to sec. 14, *infra*. Application of this section when wife in possession as dowress: Bowman v. Thurman, 14 O. W. R. 254. "Continue with her adulterer": as to meaning and effect of "continue" in this statute see Re S., 14 O. L. R. 536, 9 O. W. R. 819, also Woodward v. Douse, 10 C. B. N. S. 722; Bostock v. Smith, 34 Beav. 57; Graham v. Law, 6 C. P. 310. Though a woman leave her husband by reason of his cruelty, living in adultery will cause forfeiture of her dower: Bowman v. Thurman, 14 O. W. R. 254. The right to dower is lost by divorce: Frampton v. Stephens, 21 Ch. D. 164.

10. 42 Vict. 22 (now sec. 10), became law on 11th March, 1879, and has no retrospective effect on mortgages existing at that date: Martindale v. Clarkson, 6 A. R. 1. Under the law at that time, the wife having joined to bar her dower could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled. As long as such mortgage existed, her husband could effectively defeat her dower in the equity by subsequent conveyance or second mortgage, even where the second mortgage money is used to pay off the first mortgage and the first mortgage is subsequently discharged, the discharge vesting, by R. S. O. 1897, ch. 136, sec. 76, the legal estate in the second mortgagees: Anderson v. Elgie, 6 O. L. R. 147: see also Gardner v. Brown, 19 O. R. 202. Dower notwithstanding arrangement with heir: see McIntosh v. Wood, 15 Gr. 92. Effect of section where husband buys and sells equity of redemption: see Re Luckhardt, 29 O. R. 111, etc., notes to sec. 4. Where a judgment debtor, owning lands subject to mortgage in which his wife had joined, sold them and allowed her to receive part of the purchase money as her dower: Calvert v. Black, 8 P. R. 255. Where lands mortgaged to secure a loan have been sold by the mortgagee, the wife of the mortgagor who has joined in the mortgage to bar her dower is entitled to dower out of the surplus computed on what would be the full value of the land if unincumbered: Gemmell v. Nelligan, 26 O. R. 307: see also Re Croskerry, 16 O. R. 207; Re Robertson, Robertson v.

Robertson, 25 Gr. 276, 486; Re Hague, Traders Bank v. Murray, 14 O. R. 660; Gardner v. Brown, 19 O. R. 202; Martindale v. Clarkson, 6 A. R. 1 (at p. 6). A testator devised a farm to his son subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar dower and paid the legacies out of the proceeds. The son died seized of the farm with the mortgage still in force. It was held that the son took under the will the legal seizin, and not a mere equitable estate, nor was the case similar to a mortgage back for unpaid purchase money. His widow was entitled to dower out of the full value of the lands: In re Zimmerman, 7 O. L. R. 489. Right to dower not defeated when mortgage paid off, or when husband alone conveys equity to trustee for creditors: McNally v. Anderson, 4 O. W. N. 901, 24 O. W. R. 182. Where a mortgagor, whose wife had joined in the mortgage, assigns his equity of redemption to an assignee for benefit of creditors, his wife retains position as dowress and is entitled to redeem; but not after a binding contract of sale has been made by the mortgagee: Standard Realty v. Nicholson, 24 O. L. R. 46: and see Pratt v. Bunnell, 21 O. R. 1. Where, however, the mortgage is given to secure a part of the purchase money, the wife of the mortgagor would seem to be entitled only to dower computed in respect of the surplus: Pratt v. Bunnell, 21 O. R. 1: see criticism of this decision: Gemmell v. Nelligan, 26 O. R. 307. Basis upon which dower should be allowed where mortgage given for unpaid purchase money is the surplus value of the property over and above the mortgage, not the total value of the property. History of section and review of cases: Re Auger, 20 O. W. R. 656, 3 O. W. N. 377, 22 O. W. R. 118, 3 O. W. N. 1264, 26 O. L. R. 402. Security for bar of dower: validity of chattel mortgage executed by a husband to his wife to secure her against loss by reason of having barred her dower in certain mortgages: Morris v. Martin, 19 O. R. 564. The amendment to the Act of 1879, now incorporated in the section, was passed 16th April, 1895, and was formerly R. S. O. 1897, ch. 164, sec. 8.

Dower in an equity of redemption: see article by Shirley Denison, K.C., 49 C. L. J. 201, where cases

Standard Realty Co. v. Nicholson, 24 O. L. R. 46, and Re Auger, 26 O. L. R. 402, are considered and the following conclusions stated: (1) Where the husband purchases an equity of redemption the wife has dower only when he dies beneficially entitled; (2) Dower is only assigned to her out of one third of the value of that equity of redemption. The mortgage must be deducted before computing the widow's interest; (3) Before March 11th, 1879, where a wife joins with her husband to bar her dower in a mortgage, she may be deprived of her dower if the equity of redemption is conveyed either by her husband during his lifetime or by the mortgagee under power of sale; (4) Where since March 11th, 1879, a wife joins with her husband in a mortgage and bars her dower in lands of which he was previously seized of a legal estate in fee, her inchoate right to dower subsists and is not lost by the husband's conveyance of the equity of redemption in his lifetime; (5) Prior to March 11th, 1879, where a widow has barred her dower by a mortgage but becomes entitled to dower out of the equity of redemption, the amount assignable is 1-3 of the total value of the lands except where the mortgage is to secure unpaid purchase money when she had dower in 1-3 only of the surplus, and it makes no difference whether the surplus is realized from a sale under power of sale or legal process or where it is voluntary; (6) Since March 11th, 1879 (as before) a widow is entitled to dower based on the total value of the land except where the mortgage is for unpaid purchase money, when her dower is based upon the value of the surplus after deducting the mortgage, whether that surplus is realized from power of sale, legal process or by payment of the mortgage by voluntary sale or otherwise.

See also Armour, Real Property, pp. 122-125, Armour on Titles, pp. 200-203. Whether the wife of a mortgagor who has joined in the mortgage to bar her dower should be a party to an action for foreclosure or sale: see H. & L. notes, p. 334, where it is concluded that the safer practice is to add her as a party. As to right of dower under the Land Titles Act when land acquired subject to a charge or where owner after charging land, marries: see R. S. O. 1914, ch. 126, sec. 47.

11. As to practice in regard to the surplus after payment of the amount found due to the plaintiff, etc.: see Con. Rule 755; H. & L. notes, p. 987; also H. & L. notes, p. 334; 1913, Rule 479.

14. A husband whose wife has been living apart from him for two years and who for valuable consideration released him from all claims for alimony is not entitled to an order under this section. A bar by contract is not a bar "by law" such as is within the section: Re Tolhurst, 12 O. L. R. 45. An order was made under this section where the wife had not been heard of for several years, having left her husband again and again for the purpose of living as a prostitute. It is unnecessary to show continuous living with one man in adultery in order to deprive a wife of an award of dower: Re S., 14 O. L. R. 536, 9 O. W. R. 819; and see Re Soper, 3 O. W. N. 1573, 22 O. W. R. 851; see Graham v. Law, 6 C. P. 310; Woolsey v. Finch, 20 C. P. 132; Neff v. Thompson, 20 C. P. 211; Stat. West. 2 (13 Edw. I., ch. 34), now sec. 9, *ante*. The order under this section is made by a Judge as *persona designata*, and is not subject to appeal (unless by special leave under the Judges' Orders Enforcement Act, R. S. O. 1914, ch. 79, sec. 4): Re King, 18 P. R. 365; Re Rush, 28 C. L. J. 127. The wrong done by an improvident order would in many cases be irremediable and great care should be taken in the exercise of the large and exceptional power given by the section to ascertain that the case made by the applicant comes clearly within its provisions: Re King, 18 P. R. 365, at pp. 366-7. An order under this section should not be made *ex parte* unless under very exceptional, if under any, circumstances. Leave may be given to serve notice by advertisement if search is unsuccessful: Re King, 18 P. R. 365; Re Campbell, 25 Gr. 1887; Re McGuin, 7 P. R. 310. More need not be shown than that the wife had been living apart from her husband for two years and that the circumstances under which she has been living apart are such that she is not entitled to claim alimony: Re King, 18 P. R. 365. It must clearly appear that she is not entitled to alimony: Re Eagles, 7 P. R. 241. Judgment dismissing an alimony action in which defendant had set up adultery as a defence

as evidence of adultery on application under this section: see Re Campbell, 25 Gr. 480. Forfeiture of dower on account of adultery: see Hetherington v. Graham, 3 M. & P. 399, 6 Bing. 139. A woman forfeits her dower by adultery even though she originally departed from her husband's house in consequence of his cruelty: Woodward v. Douse, 10 C. B. N. S. 722, or although her departure may have been brought about by the misconduct of the husband: Bostock v. Smith, 34 Beav. 57. Where a wife obtains a divorce on the ground of her husband's misconduct she loses her right to dower: Frampton v. Stephens, 21 Ch. D. 164: see H. & L. notes, pp. 217, 131, 255, 572. Armour, Titles, p. 204; Armour, R. P., p. 132.

18.—(2) Registrar's fees for registering Judge's order endorsed on conveyance: see note to Registry Act, R. S. O. 1914, ch. 123, sec. 92 (b).

20. See Bellamy v. Badgerow, 24 O. R. 278, in consequence of which decision doubtless this enactment was made. For right of married women to convey or release dower: see R. S. O. 1914, ch. 150. Bar of dower under the Railway Act, see R. S. O. 1914, ch. 185, sec. 302.

21. There is no power to compel a dowress to accept a lump sum in lieu of dower against her will: McNally v. Anderson, 4 O. W. N. 386, 23 O. W. R. 547: see Con. Rules 177 to 179 inclusive; Holmested & Langton, notes, pp. 320, 321; 1913, Rules 51, 52.

23. A widow cannot recover damages for detention of dower when her husband did not die seized, even though she made demand for dower: Morgan v. Morgan, 15 O. R. 194; Losee v. Armstrong, 11 Gr. 517. The statute has not taken away or diminished the right of a dowress to damages as well as mesne profits as for detention against all persons and in all cases where they were recoverable before August 10th, 1850: Ryan v. Fish, 4 O. R. 335. The mere fact that at the death of or alienation by the husband his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages if the land has subsequently been made rentable by reason of improvements or otherwise, either by the heir or vendee, as in such a case a portion of the rent is attributable to

the land: Wallace v. Moore, 18 Gr. 560. Plea of tenant of readiness to render the plaintiff her dower: Ryan v. Fish, 4 O. R. 335.

29. Reports of commissioners to admeasure dower probably within Con. Rule 769: see Holmested and Langton, p. 1005; 1913, Rule 502; see also Con. Rule 667, and Holmested and Langton, note, p. 892; 1913, Rule 410. As to improvements allowed for, where dower was claimed in land upon a portion of which stood two-thirds of a dwelling house, the remaining third being in adjoining land which was not dowable, this was held not a case within sub-section 2 of this section. The commissioners were not bound, necessarily, to assign a portion of the building on the property, but might give an equivalent. They were bound, however, to assign one-third of the whole property, having regard to value as well as quantity: McIntyre v. Crocker, 23 O. R. 369.

CHAPTER 71.

The Libel and Slander Act.

Note: Refer to Addison on Torts; Underhill on Torts (Can. edn.); Bullen and Leake's "Pleadings," Odgers on Libel and Slander, Elliott on the Newspaper Libel Act, also Fraser on the same Act, and Fisher and Strahan's Digest of the Law affecting Newspapers; Kelly, Newspaper Libel; also King (Can.) on Libel and Slander; Bicknell and Kappele's Practical Statutes, pp. 115-117.

2. A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency, for the purpose of giving information to such subscribers, is a "newspaper," and "printed for sale": Slattery v. Dun, 18 P. R. 168.

4. Pleading apology: nature of plea under this section: Harrison v. Madill, 1 O. W. N. 583, 15 O. W. R. 593.

5. The respective functions of Judge and jury are in actions of libel in no way different from such functions in other actions except for the statutory provision in this section in favour of the defendant. It

is the duty of the Court to consider whether there is any reasonable evidence to go to the jury, and if not to dismiss the action: Macdonald v. Mail Printing Co., 32 O. R. 163. In a libel action where the jury has found not to be libellous that which is plainly a libel, the plaintiff is entitled to a new trial. Sydney Post v. Kendall, 43 S. C. R. 461; Lumsden v. Spectator, 29 O. L. R. 293. Publication: Wennhak v. Morgan, 20 Q. B. D. 635; Pullman v. Hill (1891), 1 Q. B. 524. What is defamatory: I'Anson v. Stuart, 1 Term. Rep. 748; Digby v. Thomson, 4 B. & Ad. 821; Fray v. Fray, 34 L. J. C. P. 45. Privilege: Ferguson v. Kinnoull, 9 Cl. and F., 321; Jenoure v. Delmege (1891), A. C. 73; Royal Aquarium v. Parkinson (1892), 1 Q. B. 431. Comment actuated by malice is not fair comment: Thomas v. Bradbury (1906), 2 K. B. 627. See article "The Intent in Libel," 42 Can. Law Journal, p. 209, John King. Repetition of libel: Lack of investigation as affecting malice and privilege: see Annotation, 9 D. L. R. 73. Repetition of slanderous statements to persons sent by plaintiff to procure evidence thereof: see Annotation, 4 D. L. R. 572.

6. What amounts to identity of libels to justify consolidation: Perkins v. Fry, 10 O. W. R. 874, 954. A member of a class can sue on behalf of the class if defamed: Cooper v. Jack Canuck Pub. Co., 5 O. W. N. 66, 25 O. W. R. 47. See Imperial Act, 51-2 Vic. ch. 64; Con. Rule 435; Holmested and Langton, note, p. 640; 1913 Rule, 320.

7. Pleading: Duval v. O'Beirne, 20 O. W. R. 884, 3 O. W. N. 513.

8. In an action brought against a newspaper company for alleged libellous articles, the notice was addressed to the editor and served on the city editor at the company's office, and a similar notice was served on the chairman of the Board of Directors: Held, this was merely notice to the editor and not to the defendants, and was insufficient: Burwell v. London Free Press, 27 O. R. 6. There was omission to give notice in an action for "wrongfully and maliciously publishing" articles calculated to injure the plaintiffs' business. The plaintiffs set up that the action

was not libel and that want of notice was not ground for summary dismissal. The matter was left to be disposed of by the trial Judge with leave to amend if desired: Gurney v. Emmett, 7 O. L. R. 604. One is not a candidate for a public office within this section before the date of the writ for the election: Conmee v. Weidman, 16 P. R. 239. Alleged libels against a candidate for a public office and as to pleading and security for costs: Conmee v. Weidman, 16 P. R. 239. The statement of claim must be confined to the statements complained of and specified in the notice given by the plaintiff before action. Where the notice specified parts of an article, and the statement of claim set out the whole of it, the parts not specified in the notice were struck out: Obernier v. Robertson, 14 P. R. 553. The defendant must make it clear what course he intends to take. He cannot plead at the same time justification, fair comment, retractation and apology: Currie v. Star Publishing Co., 11 O. W. R. 168. Particulars of "places where and persons to whom publication was made" in action against publisher of newspaper: Dingle v. Robertson, 12 O. W. R. 655. Requirements of notice: Benner v. Mail Printing Co., 3 O. W. N. 56, 24 O. L. R. 507. Criminal charge: Kelley v. Ross, 14 O. W. R. 617, 698, 1 O. W. N. 48, 116.

9. After money had been paid into Court and before trial the defendant died. On application of the legal representatives it was held that the Court had jurisdiction to declare to whom the money should be paid, and under the circumstances ordered it paid to the plaintiff: Brown v. Feeney, 1906, 1 K. B. 563. Failure of defence under Libel Act: claim to treat money paid in as general payment into Court: Oxley v. Wilkes, 1898, 2 Q. B. 56.

10. Publication of parliamentary report: Mangena v. Wright, 1909, 2 K. B. 958.

12.—(1) The publishers of a mercantile agency daily bulletin supplied to subscribers to the agency are entitled to the benefit of the provisions of this section as to security for costs: Slattery v. Dun, 18 P. R. 168. On an application for security for costs under this section the plaintiff was not allowed to

read or use an affidavit made by himself contradicting the affidavit of the defendants' agent: Bartram v. London Free Press, 18 P. R. 11. Publication in good faith: security for costs: Georgian Bay v. The World, 16 P. R. 320. An action cannot be considered "trivial or vexatious" merely because a good defence on the merits is shown by the defendants' affidavits, and is not contravened by the plaintiff. The latter may properly consider that on an application for security for costs denial on oath of the charges against him is unnecessary: Macdonald v. The World, 16 P. R. 324. The defence suggested by affidavits filed in motion for security for costs was that the defamatory words did not apply to the plaintiff. The Judge held that on a fair reading they did refer to the plaintiff, and that it did not appear that the defendants had a good defence on the merits, and that the statements were published in good faith, and therefore the order for security for costs was set aside: Lennox v. "Star," 16 P. R. 488. On an application for security for costs, it is not for the Judge to pass on disputed facts disclosed in conflicting affidavits; if it appears that the defendants have *prima facie* defence of justification or privilege and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied: Swain v. The Mail, 16 P. R. 132. The defendants did not contend that the action was trivial or frivolous, but swore that what they published was substantially true and was published in good faith and without malice, the plaintiff conceding that he had not sufficient property to answer costs. Security for costs was ordered. The intention of the Act is to protect newspapers reasonably well conducted with a view to the information of the public: Bennett v. The Empire Printing Co., 16 P. R. 63. What is within this enactment: In an action for slander a newspaper editor has no special privileges or immunities: Greenhow v. Wesley, 16 O. W. R. 585. Right of sub-editor to security: Robinson v. Mills, 13 O. W. R. 606, 763, 853, 19 O. L. R. 162. An action is not frivolous or trivial if the alleged libel may involve the charge of conviction for a crime: Kelly v. Ross, 14 O. W. R. 617, 698, 1 O. W. N. 48, 116. Defendant's absence of good faith: St. Clair v. Stair, 4 O. W. N. 731, 23 O. W. R. 930. What must be shown to obtain

security for costs: McVeity v. Ottawa Free Press: 18 O. W. R. 146, 2 O. W. N. 703. Affidavit in support of motion for security for costs: St. Clair v. Stair, 4 O. W. N. 645, 731, 23 O. W. R. 930. Section must be strictly complied with: McVeity v. Ottawa Free Press, 18 O. W. R. 146, 2 O. W. N. 703.

12.—(2) Where the plaintiff was accused in the defendants' newspaper with attempted "blackmail," it was held that that might involve the indictable offence defined by section 454 of the Criminal Code, and the question whether it did was for the jury: Macdonald v. The World, 16 P. R. 324. Where insolvency of plaintiff is admitted but publication complained of may involve a criminal charge, see: Pringle v. Financial Post, 12 O. W. R. 912. A statement that the plaintiff was "an unmitigated scoundrel," and that he had endeavoured to ruin his wife by inciting another person to commit adultery with her, did not involve a criminal charge: Bennett v. Empire Printing Co., 16 P. R. 63. "Involves a criminal charge" means "involves a charge that the plaintiff has been guilty of a criminal offence:" Georgian Bay v. The World, 16 P. R. 320. A criminal charge is not "involved" in an allegation that an incorporated company had tried to bribe aldermen by issuing to them paid-up stock in the company, for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender: Georgian Bay v. The World, 16 P. R. 320. Libel alleging criminal charge: pleading: Greenhow v. Wesley, 1 O. W. N. 996. Where the words used are alleged by the plaintiff to have been used in a sense involving a criminal charge, and may have that meaning, the case is within sub-sec. 2. That clause is applicable to case where an innuendo is necessary to give the words a defamatory sense. There cannot be a trial on the merits on an application for security for costs to determine whether the words used involve a criminal charge: Smyth v. Stephenson, 17 P. R. 374. "Blackmailing" as a criminal charge: see Macdonald v. The Mail, 32 O. R. 163, 2 O. L. R. 278. Criminal charge: innuendo: Duval v. O'Beirne, 20 O. W. R. 884, 3 O. W. N. 513; Kelly v. Ross, 14 O. W. R. 617, 698, 1 O. W. N. 48. See same case as to pleading plaintiff's character: 14 O. W. R. 1078. Barratry: Mackenzie v. Goodfellow, 13 O. W. R. 30. Allegation that bench warrant applied for: Titchmarsh

v. The World, 15 O. W. R. 362. Where the action was for words imputing a crime and it was shown that the article complained of stated that no one would believe that it referred to the plaintiff, and in a further article published after the commencement of the action, it was stated that the plaintiff was not the person complained of in the article in question, the action was held frivolous and the defendants entitled to security for costs: Graeme v. The Globe, 14 P. R. 72. Security for costs: see Con. Rule 1198; see Holmested and Langton's notes, pp. 1430, 1431, 1437; 1913 Rules 373, 374.

12.—(4) Where the Master in Chambers has jurisdiction to entertain an application for security for costs, there is no greater right of appeal than if the application were to a Local Judge: Kelly v. Ross, 14 O. W. R. 617, 698, 823, 1 O. W. N. 48, 116. Appeal: Robinson v. Mills, 19 O. L. R. 162.

13. Motion to change venue laid under this section: Baker v. Weldon, 2 O. W. R. 433; McAlpine v. Record Printing Co., 12 O. W. R. 1 (see also S. C., 10 O. W. R. 981). Place of trial: Curry v. Star Publishing Co., 10 O. W. R. 960; see Con. Rule, 529; H. & L. notes, p. 735; 1913 Rule 245.

14. As to defendant being allowed to amend by pleading defence under this section: see Morency v. Wilgress, 9 O. W. R. 302.

17. Allowing defendant to amend by pleading defence under this section: see Morency v. Wilgress, 9 O. W. R. 302. Third party procedure: see Con. Rule 209; Holmested and Langton note, p. 393; 1913 Rule 165.

19. In an action for slander within this section, the defendant moved for security for costs upon an affidavit which stated that the defendant had a good defence on the merits, but did not disclose such defence. Affidavit held insufficient, for a *prima facie* defence must be shown. However, the defendant's cross-examination was permitted to be read and counter affidavits could not be received: Lancaster v. Ryckman, 15 P. R. 199. Where an action combined a claim for slander within sub-section 1, with

a claim for assault, the stay of proceedings granted in the order made for security for costs did not apply to the count for assault: Lancaster v. Ryckman, 15 P. R. 199. An action was commenced by writ of summons endorsed "the plaintiff's claim is for damages for slander." No appearance was entered, and the plaintiff signed interlocutory judgment and set the case down for assessment of damages. There being nothing to shew that the case was within this section, it was treated as an ordinary action for slander: the delivery of a statement of claim was unnecessary, and the plaintiff's proceedings proper: Stanley v. Litt, 19 P. R. 101. Upon an application for security for costs in an action under sub-section 1, the onus is on the defendant to shew that the plaintiff has not sufficient property to answer the costs of the action; what this sum may be is not fixed: Flaster v. Cooney, 15 P. R. 290. The plaintiffs were an unmarried woman and a married man and brought action for damages in respect of alleged statements that they had been criminally intimate on three occasions and in respect of a letter to the female plaintiff. The male plaintiff claimed special damage, and the female plaintiff the benefit of this section. The plaintiffs were held entitled to sue in one action for damages in respect of the statements made on the three occasions, there being publication as to all and a common question of law and fact, but the joinder of the claim in respect of the letter, which would at most give an action to the male plaintiff, was improper, and unless amended, was simply in aggravation of damages and should be struck out as embarrassing: Agar v. Escott, 8 O. L. R. 177. What are words imputing unchastity: innuendo: question for jury: Paladino v. Gustin, 17 P. R. 553: see Con. Rule 1198, and Holmested and Langton note, pp. 1431, 1432; 1913 Rules 373, 374. The order for security for costs under this section is not obtainable on præcipe: see Con. Rule, 1199; Holmested and Langton note, p. 1437; 1913 Rule 375. Imputation of unchastity: Cook v. Cook, 5 O. W. N. 52, 25 O. W. R. 25. Without averment and proof of special damage, only nominal damages can be recovered under this section: Whitling v. Fleming, 16 O. L. R. 263, 11 O. W. R. 820. In default of defence, the action being one for pecuniary damages only

interlocutory judgment can be entered to fix damages. The damages, even though nominal, must be fixed by a jury, and the plaintiff is entitled to the costs of such trial: Whitling v. Fleming, 16 O. L. R. 263. Security for costs: when the allegation of *nulla bona* is made, the onus is on the plaintiff to displace it, and the matter is one within her own knowledge: Danard v. Moore, 11 O. W. R. 61. Pleadings: defence: admission. Welburn v. Sims, 10 O. W. R. 524. Pleadings in action under this section: see Pherrill v. Sewell, 10 O. W. R. 71; see Con. Rule 268; 1913 Rule 141.

CHAPTER 72.

The Seduction Act.

Refer to Bicknell and Kappele's Practical Statutes, pp. 119-120.

2. The mother of a girl seduced, suing as her mistress, had a sufficient common law right to bring the action during the residence of the father abroad. The Act is only an enabling Act, enlarging the right to maintain the action under circumstances which would not be sufficient at common law: Gould v. Erskine, 20 O. R. 347. In an action after the death of the father by the mother for the seduction of her daughter in the lifetime of the father who was an invalid supported by the mother and daughter, no evidence of the actual relationship of mistress and servant was given: the action was held not maintainable: Entner v. Benneweis, 24 O. R. 407.

3. Apart from the statute, see as to necessity for relation of master and servant: Davies v. Williams, 10 Q. B. 725, and what service will suffice: Bennett v. Alcott, 2 Term Rep. 166. Under the Act, an action lies by the parent, although the daughter may not have been living with him at the time of her seduction or subsequent illness. While mere illicit intercourse forms no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent if the girl had been living with

the parent, is all that is necessary. While there is under the Act in an action by the parent, an irrebutable presumption of service, there is no presumption of loss of service to the parent which must still be proved: Harrison v. Prentice, 28 O. R. 140, 24 A. R. 677. If the evidence disclosed a case of rape and not seduction, the plaintiff's right of action would rest on his daughter being his servant, and the provisions of the Act would not apply. E. v. F., 10 O. L. R. 489, 11 O. L. R. 582.

CHAPTER 73.

The Crown Administration of Estates Act.

3. Where a person possessed of real and personal estate dies leaving no known relatives in the Province, the Attorney-General may maintain an action to set aside letters probate of the person's will executed without mental capacity and in that action may obtain possession of the real estate, but a grant of administration should be obtained by a separate proceeding. Such an action is not for the purpose of escheating, but to protect the property for the benefit of those who may be entitled: R. v. Bonnah, 24 A. R. 220. Armour, Real Property, p. 269. See also the Escheats Act, R. S. O. 1914, ch. 104.

CHAPTER 74.

THE SETTLED ESTATES ACT.

1. The Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement and ought, accordingly, to receive a liberal construction: Re Hooper, 28 O. R. 179. Application of the Act: Re Phipps, 2 O. W. N. 1126, 19 O. W. R. 149; Re Cornell, 9 O. L. R. 128, 5 O. W. R. 60. Jurisdiction of the Supreme Court: see R. S. O. 1897, ch. 51, sec. 40 (6); R. S. O. 1914, ch. 56, sec. 12 *et seq*; see Holmested and Langton notes, pp. 1218-1225 inc. Cp. English Settled Estates Act, 1856; Settled Estates Act, 1877, and the Settled Land Act, 1882.

2. Under the scheme of a will, land was to be rented by the executors until the testator's youngest son came of age, unless with the sanction of certain adult children, the executors could sooner sell the property at good advantage. Held, this was substantially a trust for sale, but not until the youngest child was of age, unless sooner sold as directed, and was a limitation "by way of succession," and a sale was directed under this Act: In re Cornell, 9 O. L. R. 128; see also Carlyon v. Truscott, L. R. 20 Eq. 348; In re Shephard's Settled Estate, L. R. 8 Eq. 571; Re Denison, 9 O. W. R. 740; National Trust Co. v. Shore, 16 O. L. R. 177, 11 O. W. R. 228. Principles by which the Court will be guided in appointing new trustee of settled estate: Re Jones Trusts, 1 O. W. N. 418, 532. A person receiving, whether in his own right or as executor, the rents of land under a direction to accumulate, which is avoided by the Thellusson Act, has the powers of a tenant for life under the Settled Land Act, 1882: Vine v. Raleigh, 1896, 1 Ch. 37. A restraint on anticipation does not create a "settlement" so as to give a married woman the powers of a tenant for life: Bates v. Kesterton, 1896, 1 Ch. 159.

3. Power to lease with extended right of renewal up to 999 years may be granted: Re Watson, 21 O. R. 528. Leases by life tenant of unopened mines on settled

property: disposition of rent: Re Rayer, 1913, 2 Ch. 210. In leases for years under the Settled Estates Act, the terms of the lease must be such as not to affect or vary the common law liability of the tenant for waste. The ordinary short form covenant has not this effect: Morris v. Cairncross, 14 O. L. R. 544.

14. A settlement contained a clause: " the trustees may, with the approval of the settlors, sell, but not mortgage, the trust property, either by public auction or private sale." The trustees desired to raise money by mortgage to rebuild a burnt warehouse on the settled property. It was held that the provision in the settlement meant that the power of sale given to the trustees was not to be construed as including a power to mortgage and was not an " express declaration " that the lands should not be mortgaged: In re Currie and Watson, 7 O. L. R. 701. The Court cannot authorize the trustees of a settlement to raise money by mortgage to tear down and rebuild houses where it is not necessary for salvage of the property, though beneficial: Re Montagu, 1897, 2 Ch. 8. Trustees may be authorized, but cannot be compelled to make a mortgage: Shepard v. Shepard, 20 O. W. R. 810, 3 O. W. N. 469. Mortgage required to discharge incumbrance on settled land: Hampden v. Buckinghamshire, 1893, 2 Ch. 531. Where lands devised to A. for life, and A. is directed to pay legacies, they should be paid by mortgaging the estate under this Act: Re Ames, 5 O. W. N. 95, 25 O. W. R. 80. Charging estate of infant in reversionary interest with payment for infant's maintenance: Re Badger, 1913, 1 Ch. 385. Mortgage for repairs: Re Bridgman, 1 O. W. N. 468. Power to order sale: jurisdiction under this and sec. 16: Re Graham, 1 O. W. N. 674, 15 O. W. R. 809. Sale of vacant land where life tenant (widow) entitled to income not charged with maintenance of children who were entitled in remainder: effect of sale being to increase the widow's income by relieving her of taxes and to deprive the children of increased value: terms imposed: Re Hooper, 28 O. R. 179; see Re Denison, 9 O. W. R. 740.

18. Where a settled estate is sold under order of the Court under the Settled Estates Act, 1877, conveyance by the person directed to convey takes effect

under the section: Eyre v. Saunders, 28 L. J. Ch. 439, and cannot be invalidated as against a purchaser for any want of concurrence or consent: Re Hall Dare, 21 Ch. D. 41; see sec. 30, 31. It is essential to the validity of a sale under order of the Court that the terms of the order be complied with: Berry v. Gibbons, L. R. 15 Eq. 150.

19. Right of life tenant of an undivided share to sell: Cooper v. Belsey, 1899, 1 Ch. 639, overruling Re Collinge, 36 Ch. D. 516.

20.—(3) Holmested and Langton, pp. 1220, 1222.

20.—(4) See In re Cornell, 9 O. L. R. 128.

31. "The purchaser is a willing one and will be protected": see In re Cornell, 9 O. L. R. 128; Re Denison, 9 O. W. R. 740. Where the consent of the protector is given by the same assurance it is immaterial if he execute it after the death of the tenant in tail, Whitmore-Searle v. Whitmore-Searle, 1907, 2 Ch. 332 and see *ante* note to sec. 18.

33. Payment to induce tenant for life to execute lease: validity of lease: Chandler v. Bradley, 1897, 1 Ch. 315. An estate during widowhood is an estate for life within the meaning of this section: National Trust Co. v. Shore, 16 O. L. R. 177, 11 O. W. R. 228. Semble, a person entitled to the income of land under a trust or direction for payment thereof to him during his own life or any other life is entitled to exercise the power of leasing conferred by this section: Morris v. Cairncross, 14 O. L. R. 544, 9 O. W. R. 918. Who is a person entitled to exercise the power of leasing conferred by this section: see Morris v. Cairncross, 14 O. L. R. 544, 9 O. W. R. 918; Taylor v. Taylor, L. R. 20 Eq. 298, 1 Ch. D. 426, 3 Ch. D. 145; In re Pocock and Prankerd's Contract, 1896, 1 Ch. 302. "Fine, or sum of money in the nature of a fine": see Waite v. Jennings, 1906, 2 K. B. 11. Valid exercise of power to lease: Atkinson v. Farrell, 27 O. L. R. 204. See In re Cornell, 9 O. L. R. 128 (*ante*); see also In re Morgan's Settled Estate, L. R. 9 Eq. 587; Re Denison, 9 O. W. R. 740. Tenant for life: Re Marshall, 1905, 2 Ch. 325; Re

Bennet, 1903, 2 Ch. 136; Re Trenchard, 1902, 1 Ch. 378; Re Richardson, 1904, 1 Ch. 777; Re Baroness of Llanover's Will, 1903, 2 Ch. 16. Rights and powers: Re Cornwallis West, 1903, 2 Ch. 150; Re Bracken, 1903, 1 Ch. 265; Re Bolton, 1903, 2 Ch. 461; Middlemas v. Stevens, 1901, 1 Ch. 574; Re Aldam, 1902, 2 Ch. 46; Boyce v. Edbrooke, 1903, 1 Ch. 836; Pease v. Courtney, 1904, 2 Ch. 503; Re Sitwell, 1905, 1 Ch. 460. Sale by tenant for life: no heir: *bona vacantia*: Re Bond, 1901, 1 Ch. 15. Under the English Settled Land Act, since 1883, a life tenant in possession of settled land may even sell, subject to the settlement and without application to the Court, provided there are, at the time of completion 'trustees of the settlement' (Re Fisher & Grazebrook (1898), 2 Ch. 660), the purchaser being relieved from inquiring whether the statutory notice has been given: Marlborough v. Sartoris, 32 Ch. D. 623; Hatten v. Russell, 38 Ch. D. 334; Mogridge v. Clapp, 1892, 3 Ch. 382.

35. Representation of issue: Macdonald v. Peters, 2 O. W. N. 1209.

CHAPTER 75.

The Limitations Act.

Refer to: Darby and Bosanquet, Statutes of Limitations; Banning, Limitations of Actions; Anglin, Trustees' Limitations of Actions (Can.); Herbert on Prescription. See also Gale on Easements; Goddard on Easements; Innes, Digest of the Law of Easements; Banks on Support; Bicknell and Kappele, Practical Statutes, pp. 674-692; Armour on Titles; Armour, Real Property. Also the following articles: Mortgagees' Rights under the Statutes of Limitations (A. C. Galt), 13 C. L. T. 85; Statutes of Limitations as a Conveyancer (Armour), 3 C. L. T. 521, 17 C. L. T. 91, 198; Statutes of Limitations and Mortgages (Armour), 6 C. L. T. 422; Easements and Registration (Armour), 14 C. L. T. 45; Extinguishment of Easements, 20 C. L. T. 279; Executors and the Statute of Limitations, 29 C. L. T. 391. As to limitations in matters of contract and tort: Darby and Bosanquet on Limitations; Underhill on Torts (Can. Ed.); Addison on Torts; Addison on Contracts; Bicknell and Kappele, Practical Statutes, pp. 297-298.

2.—(*c*) The word "land" includes incorporeal hereditaments, and in this respect differs from the English Act. It has been held, however, that this Act, reducing the period of limitation to ten years, does not apply to the interruption of an easement such as a right of way *in alieno solo, e.g.*, a lane, which the defendant had occupied and obstructed for 10 years, but which the plaintiff had used prior to such obstruction: Mykel v. Doyle, 45 U. C. R. 65; see also McKay v. Bruce, 20 O. R. 709. Abandonment may be shown, however, by acquiescence in acts done by the owner of the servient tenement: Bell v. Golding, 23 A. R. 485, where Mykel v. Doyle is considered and doubted. The title of an owner of a building to certain rooms therein may be extinguished by possession for the statutory period: Iredale v. London, 14 O. L. R. 17, 15 O. L. R. 286, 40 S. C. R. 313. Does ten years limitations apply to actions to recover easements: Mykel v. Doyle, 45 U. C. R. 65; Bell v.

Golding, 23 A. R. 485; Ihde v. Starr, 19 O. L. R., 471, 21 O. L. R. 407. Lands: a mortgagor's interest in a share of the proceeds of land held in trust for sale is an interest in land, and will be barred in ten years: Re Fox, Brooks v. Marston, 1913, 2 Ch. 75. Ownership of subterranean property is not within the statute. The possession of the surface owner is not inconsistent with the possession of the subjacent proprietor: Farquerson v. Barnard, etc., Gas Co., 22 O. L. R. 319. See also 25 O. L. R. 93, (1912), A. C. 864.

2.—(*d*) An annuity charged on land is "rent" within the meaning of this Act: Trusts and Guarantee v. Trusts Corporation, 31 O. R. 504, 2 O. L. R. 97. Rent: Grant v. Ellis, 9 M. & W. 113; Adnam v. Sandwich, 2 Q. B. D. 485; Dublin v. Trumbleston; Baldwin v. Peach, 1 Y. & Coll. 453. Quit rent: Howitt v. Harrington, 1893, 2 Ch. 497; De Beauvoir v. Owen, 5 Ex. 166. Royalties: Darley v. Tennant, 53 L. T. 257. Tithes as periodical sums: Payne v. Esdaile, 13 App. Cas. 613; see also Dig. Eng. Case Law, IX., col. 152 *et seq.*

PART I.

Real Property.

3. Occupation by permission of true owner: estoppel: Dominion Improvident v. Lally, 24 O. L. R. 115.

4. See 9 Geo. III., ch. 16; R. S. O., 1897, ch. 324, sec. 41. The statute does not run as against the Crown, even when the Crown is trustee: A.-G. v. Midland Ry., 3 O. R. 511; R. v. Williams, 39 U. C. R. 397. Occupation of a portion of a municipal highway by an encroaching building does not confer any title to the land so encroached upon: Toronto v. Lorsch, 24 O. R. 227. Encroachment on highway: Sterling Bank v. Ross, 17 O. W. R. 284, 2 O. W. N. 13, 197: see also as to this section: Emmerson v. Maddison, 1906, A. C. 569; Doe d. Fitzgerald v. Finn, 1 U. C. R. 70.

5. What possession is sufficient:

Guest: where a nephew resided with his aunt for a couple of years, and afterwards made occasional visits and paid taxes, it was held that

he did not go on the lands on his own behalf, but as guest of his aunt, and paid taxes on her behalf: Hartley v. Maycock, 28 O. R. 508. The owner having died and left one son who, while very young, was taken by his aunt to the house on the land where he stayed one night, his aunt stating to the other persons in the house that he was heir to the property: held, this was not an entry upon the land as owner sufficient to stop the running of the statute: Brock v. Bennes, 29 O. R. 468.

Possession by husband: Though a man has been 20 years in possession of land granted to his wife for life, he does not acquire an absolute title, for he is merely seized, with her, by operation of law of her estate: Nolan v. Fox, 15 C. P. 565. Where a husband remained in possession of lands after his wife's death, having had a son by her, he was held to do so as tenant by the curtesy so as not to work tortiously against the heirs at law of his wife: Re Murray Canal, 6 O. R. 685. Husband usurping right of making lease of his wife's land to trespasser: wife bound by his knowledge: Harris v. Mundie, 7 A. R. 414.

Possession by widow: McKinnon v. Spence, 13 O. W. R. 186. Widow entering as trespasser: see Hartley v. Maycock, 28 O. R. 508. A man died intestate in 1864, seized in fee of certain lands, leaving a widow and several heirs at law. The widow remained in possession and cultivated the farm until her death in 1881, when she devised the lands to A. Held, her possession was not that of dowress even of one-third of the land, and the whole title of the heirs at law was barred: Johnston v. Oliver, 3 O. R. 26, affirmed, Cas. Dig. 653.

Possession by wife: Where A. left home for 30 years, leaving his wife in possession of the lands and after some time she married B. and lived with her new husband on A.'s land, it was held that A.'s absence did not bar his action as the wife's possession was his and, the second marriage being illegal, B.'s possession was no more than that of a bailiff or one working the farm on shares; McArthur v. Eagleson, 3 A. R. 577.

Caretaker: B. entered into possession of land which he fenced and cultivated. The agent of the

owner discovering B. to be in possession allowed him to remain, he agreeing to look after the property to protect the timber. The statute was held not to run in favour of B.: Greenshields v. Bradford, 28 Gr. 299. Where a person entered as caretaker for one tenant in common, afterwards the property was divided and he still continued to exercise acts of ownership such as fencing; it was held that he continued to be caretaker and acquired no title by possession. Heward v. O'Donahoe, 18 A. R. 529, 19 S. C. R. 341. Difference between tenant and caretaker: see Hickey v. Stover, 11 O. R. 106, and between caretaker and tenant at will: Ryan v. Ryan, 4 A. R. 563.

Possession by cattle: While the defendant was in possession as caretaker or tenant at will the owner put his cattle on the land to be fed. The produce of the land which the cattle took away was held to be profits which the owner by his cattle took for his own use, and as long as the cattle were on the land, the defendant was not in exclusive possession and the statute did not begin to run in his favour: Rennie v. Frame, 29 O. R. 586.

Possession by building: A. entered as a trespasser. To extinguish the rights of the heirs his possession must have been actual, visible and continuous. The dwelling house was burnt, and during a short time, until it was rebuilt, A. did not actually live on the farm, but worked it as usual and lived in the neighbourhood. It was held that his possession was a visible one by reason of the building operations and the farm work: Hartley v. Maycock, 28 O. R. 508. Acquiring title to strip of land over which roof of owner's house projects—title acquired subject to easement: Rooney v. Petry, 17 O. W. R. 83, 2 O. W. N. 113, 22 O. L. R. 101.

Part of a house: Possession of an upper room in a building supported entirely by portions of the story beneath may ripen into title thereto under the provisions of the Statute of Limitations. Query, whether the use of a stairway leading to such a room can be acquired in less than 20 years: Iredale v. London, 14 O. L. R. 17, 15 O. L. R. 286, 40 S. C. R. 313. See article on this case, 44 C. L. J. 593.

Possession by gates and fences: The plaintiffs being entitled to a right of way, put up gates at the end of a strip of land leading to the defendant's field, which gates they kept locked. These acts were held equivocal. When dispossession has to be inferred, the intention with which acts are done is all important. In order to acquire title it is necessary to prove dispossession of the true owner or discontinuance of his possession: Littledate v. Liverpool College, 69 L. J. Ch. 87; 1900, 1 Ch. 19. Enclosing land with fence not enough to give a trespasser title against rightful owners: Campeau v. May, 2 O. W. N. 1420, 19 O. W. R. 751. Possession by fencing and cultivation and cropping: Piper v. Stevenson, 28 O. L. R. 379. Proof of possession: location of fence: Yockman v. Johnston, 21 O. W. R. 86, 3 O. W. N. 624.

Mistake: Where a widow not knowing herself to be the heir to certain lands, but believing them to have descended to her eldest son, made a will giving all her real estate to A., the devise was held ambiguous and not sufficient to pass the property as against the son's possession: Hounsell v. Dunning, 71 L. J. Ch. 259; 1902, 1 Ch. 512.

Railway: A title by possession may be acquired as against a railway company to lands originally obtained by them for railway purposes: Erie and Niagara Ry. Co. v. Rousseau, 17 A. R. 483; Bobbett v. South-Eastern Ry. Co., 9 Q. B. D. 424. As to acquirement of title by possession by a railway: see Jessup v. G. T. R., 28 Gr. 583. The Statutes of Limitations as to land will not run against a railway unless where it may be shown that the land in question is not necessary for the railway, and, therefore, capable of being sold: see G. T. R. v. Valliear, 7 O. L. R. 364; McMahon v. G. T. R., 12 O. W. R. 324; R. S. O., 1914, ch. 185, secs. 54 (*c*), 95.

Payment of taxes: Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property did not show such a possession as is required to bar the right of the owner under the statute: In re Jarvis and Cook, 29 Gr. 203. As to significance of payment of taxes in making title by possession: see Doe d.

McDonell v. Ratray, 7 U. C. R. 321; Davis v. Henderson, 29 U. C. R. 344; Doe d. Perry v. Henderson, 3 U. C. R. 486. Payment of taxes not a payment of rent: see Finch v. Gilray, 16 A. R. 484 (noted under "Lessor and Lessee"). Payment of taxes (see "Guest"): Hartley v. Maycock, 28 O. R. 508. Possession of wild lands by mortgagee by payment of taxes: Kirby v. Cowderoy (1912), A. C. 599.

As between mortgagor and mortgagee: Whether a redemption suit is also an action for the recovery of land was much discussed in Faulds v. Harper, 11 S. C. R. 655. The Divisional Court (2 O. R. 405) followed Hall v. Caldwell, 8 U. C. L. J. 93, in preference to Foster v. Patterson, 17 Ch. D. 132, and Kinsman v. Rouse, 17 Ch. D. 104. The Court of Appeal treated Hall v. Caldwell as having been overruled. In the Supreme Court, Strong, J., agreed with the Judges of the Divisional Court "for the reason that since the two cases in 17 Ch. D. were decided, the House of Lords has held in Pugh v. Heath, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land." That being so, it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land: per Clute, J., Patterson v. Dart, 10 O. W. R. 79, 11 O. W. R. 241. See also S. C. 24 O. L. R. 609: see *infra*, sections 20 *et seq.* Legal effect of statutory discharge of mortgage as creating new starting point: Brown v. McLean, 18 O. R. 533, Noble v. Noble, 4 O. W. N. 359, 27 O. L. R. 342, where authorities reviewed and provisions of this Act and the Registry Act considered. Possession by mortgagee of vacant lands: Delaney v. C. P. R., 21 O. R. 11: see *infra* "Vacant lands."

Lessor and Lessee: A. being in possession without any title, and accepting a lease from B. as the heir at law, was estopped from setting up the adverse title of the real heir at law against B. and those claiming under him: Brock v. Benness, 29 O. R. 468. A tenant agreed to pay $6 a month and taxes. For 18 years he remained in possession, paying taxes and no rent, and at the expiration of the period gave the landlord an acknowledgment of rent for the whole period. Payment of taxes was held not a payment of rent within the Act, and although the

tenant had always intended to hold as a tenant, he had acquired title, and could not thereafter make himself liable for the rent by his acknowledgment: Finch v. Gilray, 16 A. R. 484. Where a landlord places a tenant in possession of Lot 1, and the tenant knowingly encroaches on Lot 2, the landlord's occupation does not enure to create for the landlord a title to Lot 2: Doe d. Smith v. Leavens, 3 U. C. R. 411. Where the lessor permits the lessee to continue during the term without paying rent, when the statute begins to run against the owner: Lurey v. Rose, 17 C. P. 186. A tenant taking land adjacent to his own by encroachment must as between himself and his landlord be deemed to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third parties: Bruyea v. Rose, 19 O. R. 433. Where title to land is extinguished by operation of the statute in favour of a tenant who has paid no rent, all rights of the reversioner are extinguished and no rent remains owing: Re Jolly, Gathercole v. Norfolk, 69 L. J. Ch. 661; 1900, 2 Ch. 616. See as to accrual of right of action and possession of leasehold: East Stonehouse v. Willoughby, 71 L. J. K. B. 873; 1902, 2 K. B. 318. A reversion in fee simple expectant upon a lease for years, is not a "future" estate within the meaning of the Act. Where a lessee surrenders his lease to the lessor before the expiration of the term, the surrender does not affect a title acquired against the lessee by a third person. Therefore, in such a case, the right of entry does not accrue to the lessor until the expiration of the time for which the term was granted: Walter v. Yeldon, 71 L. J. K. B. 693; 1902, 2 K. B. 304. Encroachment by tenant on uninclosed lands of landlord adjoining demised premises: Toronto v. Ward, 11 O. W. R. 653, 12 O. W. R. 426, 13 O. W. R. 312, 18 O. L. R. 214, and see sec. 7 (1) notes.

Tax purchaser: The statute does not begin to run against a tax purchaser until the period for redemption has expired: Smith v. Midland Ry. Co., 4 O. R. 494; see also Brooke v. Gibson, 27 O. R. 218.

Successive occupants: The fact of there being no conveyances between successive occupants of land does not prevent a possessory title being acquired

by virtue of the combined periods of possession provided the possession has been continuous against the true owner, and provided the successive occupants claim under each other in some sufficient way. The statute speaks of possession without reference to conveyances: Simmons v. Shipman, 15 O. R. 301; see also Handley v. Archibald, 30 S. C. R. 130 (under the Nova Scotia Act), and Doe. d. Baldwin v. Stone, 5 U. C. R. 388. A person claiming title by possession to land derived through prior trespassers and by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period: Brooke v. Gibson, 27 O. R. 218. The successive occupants must have followed one another in an unbroken chain. If there was any interval, the title would revert: Trustees, etc., Agency Co. v. Short, 17 App. Cas. 793, Handley v. Archibald, 30 S. C. R. 130. The plaintiff having proved possession by his predecessor, had given sufficient *prima facie* evidence of a fee simple: Robinson v. Osborne, 4 O. W. N. 120, 27 O. L. R. 248. Article on adverse possession: tacking: successive trespassers: 8 D. L. R. 1021.

Possession of wild lands: see *post*, note to sec. 6 (4). Ejectment as between trespassers of unpatented lands. Effect of possessory acts under colour of title: see annotation: 1 D. L. R. 28.

Vacant lands: Where a right to entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title; the mortgage being in default and no presumption of payment arising: Delaney v. C. P. R., 21 O. R. 11. Entering on uncleared land and cutting trees; not possession, but acts of trespass: Allison v. Rednor, 14 U. C. R. 459; Hartley v. Maycock, 28 O. R. 508; see also as to possession of vacant lands: Trustees and Agency Co. v. Short, 58 L. J. P. C. 4, 13 App. Cas. 793, note to sec. 9; see sec. 6 (12) notes.

Boundaries and boundary lines: Possession in accordance with line fence: see Shepherdson v.

McCullough, 46 U. C. R. 573; Horton v. Casey, 28 S. C. R. 739. Though the statute will bar an owner from recovering a portion of his lot which his neighbour has had enclosed for the statutory period, yet that would not affect the right to any other portion of his land not actually enclosed, as he could not be held dispossessed of a portion of land which the erroneous fence, if produced, would embrace: Beckett v. Nightingale, 5 U. C. R. 518; Bell v. Howard, 6 C. P. 292; Ferrier v. Moodie, 12 U. C. R. 379. Title by possession to wild land may be made out otherwise than by actual enclosure: *e.g.*, blazed line: Steers v. Shaw, 1 O. R. 26. Where a surveyor ran a line between the lands of A. and his neighbour, which line ran through a wood and for more than 10 years thereafter A. and his neighbours recognized it as the division line, and were in the habit of cutting timber up to it, it was held that this was sufficient occupation to give A. good title by possession up to the said line, whether it was the correct line or not: McGregor v. Keiller, 9 O. R. 677. The doctrine of constructive possession has no application to the case of a mere trespasser, having no colour of title, and he acquires title under the statute only to such land as he had actual and visible possession of by fencing or cultivating for the requisite period: Harris v. Mudie, 7 A. R. 414. Where one entered on a farm as a trespasser, his possession operated only as to the enclosed part, notwithstanding sales of timber from the uninclosed part, which sales were treated as mere acts of trespass: Hartley v. Maycock, 28 O. R. 508. Where persons have agreed to a division line between lands, and have lived up to it for ten years, even without a fence, such division is conclusive evidence of ownership: Forrest v. Turnbull, 14 O. W. R. 930. If part of a boundary is fixed by the Statute of Limitations, that has no effect towards establishing a line in continuation thereof: Charbonneau v. McCusker, 22 O. L. R. 46. Erection of wall within boundary line: discontinuance of possession: Kynoch v. Rowlands, 1912, 1 Ch. 527. This case is very like Rooney v. Petry, 22 O. L. R. 101, noted *ante* "Possession by building." See also R. S. O. 1914, ch. 67 and cases noted.

Kind of possession: "Actual, continuous and visible:" see McConaghy v. Denmark, 4 S. C. R. 609; Sherrin v. Pearson, 14 S. C. R. 581; Hartley v. Maycock, 28 O. R. 508; Doe d. Sheppard v. Bayley, 10 U. C. R. 310. Where a squatter occupied adjoining land and raised crops on the land in question in the summer but did nothing in regard to it in the winter except go on occasionally to spread manure, it was held that these were mere acts of trespass covering a very small part of the winter and that possession must have been vacant for the remainder of it, and the operation of the statute would cease until possession was taken again in the spring: Coffin v. North American Land Co., 21 O. R. 80. A possession of land, in order to ripen into title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time, the law will attribute it to the person having title: Handley v. Archibald, 30 S. C. R. 130. See *ante* "Successive occupants." See also Dig. Ont. Case Law, col. 3996 *et seq.* Merely fencing in lands in a lot but without putting it to some actual continuous use is not sufficient to make the statute run: Stovel v. Gregory, 21 A. R. 137. Acts of ownership: user of land by passing and repassing: Cosbey v. Detlor, 2 O. W. N. 668. Open, visible, exclusive unequivocal and continuous possession is required to extinguish a paper title: Nixon v. Walsh, 2 O. W. N. 1218, 19 O. W. R. 422. Essentials to establish ownership by prescription: Wright v. Olmstead, 20 O. W. R. 701, 3 O. W. N. 434. Adverse possession: dispossession: exclusion: Rooney v. Petrie, 22 O. L. R. 101. Interruptive acknowledgment of prescriptive title: Cap Rouge Pier Co. v. Duchesnay, 44 S. C. R. 130. Where a man knew of a will, he must be assumed to have taken the land under the trusts of the same and his possession is not adverse: Burch v. Flummerfelt, 14 O. W. R. 929. To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent, and is displaced by evidence of partial possession by the defendant: Radhamoni Debi v. Collector of Khulna, L. R. 27 Ind. App. 136 (1900), and see Shunk v. Downey, 13 O. W. R. 398. "Continuous" possession: Piper v. Stevenson, 4 O. W. N. 961. As

to doctrine of " adverse possession:" see Nepean v. Doe and Taylor dem. Atkyns v. Horde, 1 Smith's Leading Cases, pp. 558 *et seq.*

Kind of title obtained: see sec. 16, notes.

The running of the Statute: The Statute of Limitations only begins to run in favour of an original owner who is in possession under an unregistered conveyance from the date of the conveyance to the subsequent registered purchaser: McVity v. Tranouth, 1908, A. C. 60. Where the title of an infant to real proeprty vests in possession where a strnager is in adverse possession as against the infant's predecessor, the Statute of Limitations will continue to run against the infant: Garner v. Wingrove, 1905, 2 Ch. 233. Barring rent charge: Shaw v. Crompton, 1910, 2 K. B. 370. What amounts to dispossession of true owner, which gives the Act its starting point: Rooney v. Petry, 22 O. L. R. 101. See also notes to sec. 9.

Pleading: A defendant pleading the Real Property Limitations Act, must set out in his statement of defence or give particulars showing the section or sections on which he relies: Dodge v. Smith, 1 O. L. R. 46. Erroneous citation of wrong statute in pleading: amendment: Cain v. Pearce Co., 1 O. W. N. 1133.

6.—(1) The fact of possession is *prima facie* evidence of seizin in fee: *per* Merror, J., in Asher v. Whitlock, 35 L. J. Q. B. 17, L. R. 10 Q. B. 1. Onus of proof on occupier against owner of paper title: McMillan v. Atty.-Gen., 2 O. W. N. 1444, 19 O. W. R. 799. Title by prescription and paper title: Dom. Imp. Co. v. Lally, 17 O. W. R. 151, 2 O. W. N. 155, 1224, 19 O. W. R. 462. What amounts to possession sufficient to bar the true owner: McIntyre v. Thomson, 1 O. L. R. 163. The right to enter first accrues to the owner when the lands are fenced against him: Piper v. Stephenson, 28 O. L. R. 379. See *ante*, sec. 5, notes.

6.—(4) Where a man went into possession of a farm believing mistakenly that the property was devised to him under his father's will, he was taken to be

in possession of the whole property though only a part of it was cleared and cultivated: Re Bain and Leslie, 25 O. R. 136. The expression " state of nature " is used in contradistinction to the preceding expression " residing on and cultivating " and unless the patentee of wild lands or some one claiming under him has resided on the land or cultivated, improved or actually used it, the 20 years limitation will apply. Cultivation by trespassers will not avail to shorten this limit: Stovel v. Gregory, 21 A. R. 137. Where the plaintiff, in an action for recovery of land, claimed to have acquired title by possession, and originally that of a squatter to land patented and in a state of nature, such possession being without knowledge of the patentee, but failed to show sufficient length of possession, his action failed as against the defendant in possession, although such defendant did not claim through or in priority with the patentee: Donnelly v. Ames, 27 O. R. 271. This sub-section only operates to require 20 years' possession of non-cultivated lands in favour of the patentee and those claiming under him, and not in favour of a purchaser at a tax sale: Brooke v. Gibson, 27 O. R. 218. As to locatees of Crown lands, the rights involved are private and not affecting the Crown. Even in the case of unpatented lands, declaratory relief can be given subject to the Crown being willing to act on the judgment of the Court: Pride v. Rodger, 27 O. R. 320. Isolated acts of trespass committed on wild lands from year to year, will not give the trespasser a title. To acquire title there must be open, visible and continuous possession known, or which might have been known, to the owner, and not a possession equivocal, occasional or for a special or temporary purpose: Sherrin v. Pearson, 14 S. C. R. 581: see also Allison v. Rednor, 14 U. C. R. 459. Title to wild land can be made out otherwise than by actual enclosure, *e.g.*, by evidence of establishment and use of a blazed line: Steers v. Shaw, 1 O. R. 26. Where wild lands owned by several tenants in common were taken possession by trespassers, and the husband of one of the tenants made a lease to the trespasser ignoring the other tenants, on the expiry of the lease the statute commenced to run against the wife, notwithstanding the statute regarding wild lands: Harris v. Mudie, 7

A. R. 414. Possession of wild lands by mortgagee by payment of taxes: Kerby v. Cowderoy, 1912, A. C. 599. A patentee of wild lands and those claiming under him barred after 20 years notwithstanding the continuation of an outstanding tenancy by the curtesy: Hicks v. Williams, 15 O. R. 228. Clearing land by a person where there was no evidence that he did so under any claim of right was held not to be a constructive possession of the rest of the lot: McMaster v. Morrison, 14 Gr. 138: see cases cited, Digest Ont. Case Law, col. 3953 *et seq.*, under "Wild lands—occupation of part" and see also col. 4001 *et seq.*, "Possession as against patentee": As to vacant lands: see *ante*, note to sec. 5. See note on ejectment as between trespassers on unpatented lands and effect of possessory acts under colour of title, 1 D. L. R. 28; and also R. S. O. 1914, ch. 28, sec. 14, notes.

6.—(5) Payment of taxes by tenant not a payment of rent: see Finch v. Gilray, 16 O. R. 393, 16 A. R. 484 (see notes to sec. 5 "lessor and lessee.") What amounts to a "wrongful" reception of rent: see Hopkins v. Hopkins, 3 O. R. 223.

6.—(7) When a testator devised land of which his brother had been in possession for 25 years, to the testator's son after a life estate to the brother, on condition "that he neither rents nor sells without the consent of my son" and the brother made a lease, it was held that the brother having set at naught the conditions of the will, should not be presumed to have accepted the devise: having gone into possession as tenant at will during the testator's lifetime, he had now acquired a title by possession: Cobean v. Elliott, 11 O. L. R. 395. When time begins to run against owner where there is possession under agreement for a lease: Warren v. Murray, 1894, 2 Q. B. 648. Determination of tenancy: creation of fresh tenancy: Jarman v. Hale, 1899, 1 Q. B. 994. Entry by landlord to repair: Lynes v. Smith, 1899, 1 Q. B. 486. A purchaser in possession with the assent of his vendor and not in default, is not to be deemed a tenant at will within the meaning of this sub-section: Irvine v. McCaulay, 28 O. R. 92, 24 A. R. 446. The effect of the sub-section is that it

is for the purposes of the statute only that the tenancy at will is to be determined at the expiration of one year from the time it began: McCowan v. Armstrong, 3 O. L. R. 100. Whenever a new tenancy at will is created, this forms a fresh starting point for the statute: Re Defoe, 2 O. R. 623: see also Cope v. Crichton, 30 O. R. 603; Henderson v. Henderson, 23 A. R. 577, and see Dig. Ont. Case Law, col. 4006, *et seq.* "tenants at will."

6.—(8) This sub-section applies to the case of an implied trust: Irvine v. McCaulay, 28 O. R. 92, 24 A. R. 446 (note to 6 (7) *supra*). The relationship arising out of an agreement for the sale of land on payment of the purchase money, and the taking possession by the purchaser, is that of trustee and *cestui que trust*, and as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the *cestui que trust*: Building and Loan v. Poaps, 27 O. R. 470; Warren v. Murray (1894), 2 Q. B. 648. Position of mortgagee registering mortgage in ignorance that anyone else than the mortgagor is in possession under such circumstances: Building and Loan v. Poaps, 27 O. R. 470.

6.—(11) The sub-section deals with estates which were at one time preceded by another or other estates, and were therefore, at one time, future estates or interests, estates which for a time existed in interest only, and afterwards fell into possession. Remainders and reversions are mentioned as examples, and other future estates and interests must be *ejusdem generis*. That such is the meaning is plain from the last two lines. *Per* Maclennan, J.A.: Thuresson v. Thuresson, 2 O. L. R. 637, at p. 641. Application of this principal to the exercise of a power of appointment: Thuresson v. Thuresson, 30 O. R. 504, 2 O. L. R. 637. Land was granted by patent in 1838, to the plaintiff's mother. The mother died in 1856, leaving a husband entitled to an estate by the curtesy who survived until 1883. Neither husband nor wife nor any heirs at law had been in possession. Defendant claimed by 20 years' possession, commencing in 1853. It was held that the patentee had been dispossessed within the meaning of sec. 41 for 20 years, and was barred, notwithstanding the

tenancy by the curtesy: Hicks v. Williams, 15 O. R. 228. In the circumstances of this case it was held, that as there was no time prior to the death of the tenant for life when the trustee or the remainderman could have interfered with the possession of the land, the statute did not commence to run against the remainderman until the death of the life tenant: Adamson v. Adamson, 28 Gr. 221, 7 A. R. 592, 12 S. C. R. 563: see R. S. O. 1904, ch. 109, sec. 34.

6.—(12) See Delaney v. C. P. R., 21 O. R. 11, note to sec. 5 "vacant lands": see also Coffin v. N. A. Land Co., 21 O. R. 80; note to sec. 5 "kind of possession." Right of infant heirs of a mortgagor: see Anderson v. Hanna, 19 O. R. 58. Tenancy by the curtesy: McGregor v. McGregor, 27 Gr. 470. Tenant in tail: Re Shaver, 3 Ch. Ch. 379. Possession of no avail against lessor until his right of entry accrues: accretion to demised property: East Stonehouse v. Willoughby, 71 L. J. K. B. 873; 1902, 2 K. B. 318; see also Trustee and Agency Co. v. Short, 58 L. J. P. C. 4, 13 App. Cas. 793. The payment of interest by the assignee for life of an equity of redemption is sufficient payment to keep alive the right of action on the mortgagor's covenant: Dibb v. Walker, 1893, 2 Ch. 429. Continuous adverse possession of land: when statute commences to run: Willis v. Howe, 1893, 2 Ch. 545. A reversion in fee simple expectant upon a lease for years is not a "future estate": Walter v. Yelden, 1902, 2 K. B. 304. Where a person without title to land or with an imperfect title purports by deed or will to settle it, and the life tenant enters and remains long enough to bar any claim by the true owner, he is estopped as against the remaindermen from disputing the validity of the settlement: Dalton v. Fitzgerald, 1897, 2 Ch. 86. See also Re Earl of Devon's Settled Estates, 1896, 2 Ch. 562.

7.—(1) Effect of receiving order against reversioners interest where judgment more than 20 years old: Kinnear v. Clyne, 13 O. W. R. 1138, 18 O. L. R. 457. A reversion in fee simple expectant upon a lease for years is not a "future estate" within the meaning of the Act: see Walter v. Yeldon, 71 L. J. K. B. 693, 1902, 2 K. B. 304; see note to sec. 5 "Lessor and

lessee." See Adamson v. Adamson, 28 Gr. 221, 7 A. R. 592, 12 S. C. R. 563. Where the estate of a tenant for life with power to appoint to uses becomes barred, right of appointee and estate in remainder. See Re Earl of Devon's Settled Estates, 1896, 2 Ch. 562. See Armour, Real Property, pp. 457-8.

8. Where a creditor dies intestate on the day a debt becomes payable to him, the Statute of Limitations does not run against the administrator until administration has been taken out: Atkinson v. Bradford, 25 Q. B. D. 377. Application of section: Piper v. Stephenson, 4 O. W. N. 961. See Armour on Titles, 338; Real Property, pp. 276, 443, 451.

9. R. permitted L. to go on his land and alleged that in lieu of rent L. was to make improvements which would inure to R.'s benefit and was to give R. possession when so required. R. went on the property and spoke to L. about the improvements, telling him to make such as he chose. L. becoming financially embarrassed, restored the land to R. Held, that L. could not have set up title under the Statute of Limitations: Workman v. Rubb, 28 Gr. 243, 7 A. R. 389. Where the true owner of land, in exercise of his right, enters upon any portion of the land which is not in the actual possession of another, the entry is deemed to refer to the whole land: Great Western Ry. Co. v. Lutz, 32 C. P. 166. Entry by procuring acceptance of lease: Arnold v. Cummer, 15 O. R. 382. Where the owners entered, pulled down an old fence and put up a new one, this gave the statute a new starting point against a squatter: Coffin v. North American Land Co., 21 O. R. 80. See also Palmer v. Thornbeck, 21 C. P. 291. Where one of several tenants in common enters and dispossesses a trespasser, he is, as regards his co-tenants, exactly in the same position as a stranger would be, and such possession does not inure to the benefit of his co-tenants: Harris v. Mudie, 30 C. P. 484, 7 A. R. 414. Where a person held land under an inoperative conveyance and made an agreement for sale, thinking he was owner, and died, his widow returning shortly after, finding the proposed purchaser in possession, forcibly took possession herself: Held, that she entered as a tres-

passer: Hartley v. Maycock, 28 O. R. 508. Actual occupation is not necessary. It is sufficient that the owner enter on the land so as to put himself in legal possession of it. Putting up "sale" boards sufficient: Donovan v. Herbert, 4 O. R. 635. As to removal of a temporary structure with or without permission of claimant of title giving new point of commencement for statute: see Griffith v. Brown, 5 A. R. 303. A visit made by a father to his son on the lands in question and remaining some days is not an "entry" sufficient to stop the running of the statute: McCowan v. Armstrong, 3 O. L. R. 100. The statute does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title. Possession so abandoned leaves the rightful owner in all respects as he was before the intrusion took place: Trustees & Agency Co. v. Short, 58 L. J. P. C. 4, 13 App. Cas. 793. Title by possession of upper room as against landlord: Iredale v. London, 14 O. L. R. 17, 15 O. L. R. 286, 40 S. C. R. 313. Where the respondent applied to bring land under the Queensland Real Property Act and showed a complete documentary title and that he was in possession within 20 years before such application, the onus was held to be on the caveators in possession to show that the applicant's title had been defeated, that his entries had not been made *animo possidendi* or had been made after his title had been extinguished: Solling v. Broughton, 1893, App. Cas. 566. Proof required of continuous occupation adverse to owner: Robinson v. Osborne, 4 O. W. N. 120, 27 O. L. R. 248. Dispossession: maintenance of roof over land in dispute: dispossession of true owner: Rooney v. Petry, 22 O. L. R. 101. Discussion of the meaning and history of this section: Piper v. Stevenson, 28 O. L. R. 379. See notes to sec. 5, *ante*, "Successive occupants," "Running of the Statute," etc.; also notes to sec. 6 (1). See Armour, Real Property, pp. 426, 451.

10. See Armour, Real Property, pp. 340, 426.

11. See Armour, Real Property, p. 426.

12. A tenant in common in an action for the possession of land against a person without any title can recover judgment only for possession of his share:

Barnier v. Barnier, 23 O. R. 280. Where one of two tenants in common had possession of land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein interrupted the prescription accruing in favour of the tenant in possession: Handley v. Archibald, 32 N. S. Rep. 1, 30 S. C. R. 130. Caretaker of one tenant: see Heward v. O'Donohoe, 18 A. R. 529, 19 S. C. R. 341. See note to sec. 5 "caretaker." Where one of several tenants in common enters and dispossesses a trespasser, he is, as regards his co-tenants, in possession simply as a stranger. (But see remarks of Cameron, J.): Harris v. Mudie, 30 C. P. 484, 7 A. R. 414. Where of five tenants in common of a farm, three acquired title against the other two by virtue of the Statute of Limitations, it was held that the title acquired by the three was a joint tenancy, making them tenants in common of 3/5 and joint tenants of 2/5 of the lands: Re Livingstone, 2 O. L. R. 381 (but now see 1 Geo. V. c. 25, s. 14, R. S. O. 1914, c. 109, s. 14). Where there are several tenants in common of land, of whom all but one are in possession, and before the 10 years have run the latter acquires another undivided share from or under one of those in possession, the statute runs as to both shares from the time the last one was acquired: Hill v. Ashbridge, 20 A. R. 44. Wrongful working of coal: tenants in common: where title to minerals is founded on adverse possession it will be limited to that area of which actual possession has been enjoyed: Glyn v. Howell, 1909, 1 Ch. 666. Possession by one of several tenants in common: McKinnon v. Spence, 14 O. W. R. 1144, 20 O. L. R. 57, at p. 64; Foisy v. Lord, 2 O. W. N. 1217, 3 O. W. N. 373, 19 O. W. R. 390, 20 O. W. R. 699. See Hartley v. Maycock, 28 O. R. 508; see also Dig. Ont. Case Law, col. 4011, "Tenants in Common."

13. See Haig v. Haig, 20 O. R. 61; Hartley v. Maycock, 28 O. R. 508; Armour, Real Property, p. 429.

14. By an agreement in writing made shortly after the death of the father, between the devisees and legatees under the will, the defendant admitted that though the farm was occupied by him, his father was the owner of it, and agreed to abide by the terms of

the will then unknown. The real object of the arrangement was to avoid any difficulty which might arise owing to the defendant asserting his rights under the Statute of Limitations, of which rights he was then not aware. The agreement, even as a family arrangement, was held not binding on the defendant: McCowan v. Armstrong, 3 O. L. R. 100. Written acknowledgment after the statutory period has no effect: Finch v. Gilray, 16 A. R. 484; Coffin v. N. A. Land Co., 21 O. R. 80; McIntyre v. Canada Co., 18 Gr. 367; McDonald v. McIntosh, 8 U. C. R. 388; Doe d. Perry v. Henderson, 3 U. C. R. 486. Where a mortgagee in possession wrote to the owner of the equity: "The amount due on your mortgage was $..... on (such a date). No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest." Held, a sufficient acknowledgment to give the statute a new starting point: Miller v. Brown, 3 O. R. 210. An acknowledgment of title by the person in possession of land given to a mortgagor is sufficient to prevent the occupant acquiring title under the statute. The mortgagor for such purpose is a "person entitled" and need not be acting as agent for the mortgagee: Hooker v. Morrison, 28 Gr. 369. An acknowledgment to a person's trustee is sufficient: McIntyre v. Canada Co., 18 Gr. 367. A notice to quit from C. to B. during the currency of the prescriptive period will not save C. from being barred: Doe d. Ausman v. Minthorne, 3 U. C. R. 423. An oral acknowledgment will not save the statute: Doe d. Perry v. Henderson, 3 U. C. R. 486. Devise to person in possession and admission that will is operative: see Re Dunham, 29 Gr. 258. Payment of mortgage: see Henderson v. Henderson, 27 O. R. 93, 23 A. R. 577. Acknowledgment by debtor to person entitled to take out letters of administration and who afterwards does take out such letters is sufficient: Robertson v. Burrill, 22 A. R. 356. See Dig. Ont. Case Law, col. 3948 *et seq.*, "Acknowledgment of Title." See sections 54 *et seq. infra;* see Armour, Titles, p. 13; Armour, Real Property, pp. 459, 460.

15. See Brock v. Benness, 29 O. R. 468.

16. The effect of the statute is simply to bar and extinguish the right of the party out of possession and

not to transfer any estate of title to the party in possession: Tichborne v. Weir, 1892, 67 L. T. N. S. 735; Piper v. Stevenson, 28 O. L. R. 379. The execution and registration of a discharge of an existing mortgage revesting the legal estate in the mortgagor gave the statute a new starting point where, apart from the mortgage, the statutory period had run in favour of a son of the mortgagor: Henderson v. Henderson, 27 O. R. 93, 23 A. R. 577. Where title by possession was acquired by two persons who entered under a lease as tenants in common (R. S. O. 1914, ch. 109, sec. 13), it was held that holding over after the expiration of their term and acquiring title by possession, they did so as tenants in common and not as joint tenants, nothing having occurred to alter the nature of their tenure: Brock v. Benness, 29 O. R. 468, at p. 472. But ordinarily where title by possession is acquired by two persons they formerly took as joint tenants: Re Livingstone, 2 O. L. R. 381, note to sec. 12. R. S. O. 1897, c. 119, s. 11 (R. S. O. 1914, ch. 109, sec. 13), left untouched the case of title acquired in this manner, but now see R. S. O. 1914, ch. 109, sec. 14. As to acknowledgment after the lapse of the statutory period, see Finch v. Gilray, 16 A. R. 484, and other cases noted under sec. 14. A person who had acquired title by possession subsequently took a conveyance from the owner by paper title for expressed valuable consideration, reserving to the grantor the mines and minerals, and gave a mortgage back for $300, "save and except the mines which the mortgagor has no claim to." This was held not to revest the mines in the grantor: Dodge v. Smith, 3 O. L. R. 305. Where a woman is in possession of lands and married, if the possession ripens into title, it is her separate estate: Myers v. Ruport, 8 O. L. R. 668. The title of an owner of a building to certain rooms therein may be extinguished by possession for the statutory period: Iredale v. London, 14 O. L. R. 17, 15 A. L. R. 286, 40 S. C. R. 313. In an action for recovery of land, proof of possession is *prima facie* evidence of title, and no other interest appearing in proof, evidence of seizin in fee: Doe d. Hughes v. Dyebalt, Moo. & M. 346; Doe d. Carter v. Barnard, 13 Q. B. 945; Eccles v. Paterson, 22 U. C. R. 167; Donelly v. Ames, 27 O. R. 271. A plaintiff must, in

an action for the recovery of land, succeed on the strength of his own title, and if it be proved that the title is in another, the action fails even though the defendant be in possession not claiming under or in priority with that other: Doe d. Carter v. Barnard, 13 Q. B. 945; Doe d. Haldane v. Harvey, 4 Burr. 2284, 2287; Doe d. Dawn v. Horn, 3 M. & W. 333; Culley v. Doe d. Taylerson, 11 A. & E. 1008; Donelly v. Ames, 27 O. R. 271. The benefit of a restrictive covenant affecting the user of land is a paramount right in the nature of a negative easement binding the land in equity, and a squatter who acquires title under this Act acquires his title subject to it even though he has no actual notice of it: Re Nisbet and Potts, 1905, 1 Ch. 391, 1906, 1 Ch. 386, 75 L. J. C. L. 238. Extinguishment of title: McKinnon v. Spence, 20 O. L. R. 57, at 64. Effect on operation of statute of discharge of mortgage under Registry Act form: Noble v. Noble, 25 O. L. R. 379; 27 O. L. R. 342. Acquisition of title subject to easement: Rooney v. Petry, 22 O. L. R. 101. Title acquired subject to mortgage: see sec. 23, note. Effect of possession for 10 years as bar to right to easements: Ihde v. Starr, 19 O. L. R. 471, 21 O. L. R. 407; see also Mykel v. Doyle, 45 U. C. R. 65; and see sec. 34, notes. See the provisions of R. S. O. 1914, ch. 126, sec. 29, as to adverse possession against a registered owner under the Land Titles Act. Note the present wording of the Registry Act, R. S. O. 1914, ch. 124, secs. 62 and 67 as to effect of registration of discharge of mortgtge.

17. "Waste lands of the Crown:" see Fensom v. C. P. R., 7 O. L. R. 254, at 258. See R. S. O. 1914, ch. 28, sec. 2, notes.

18. The restrictions placed on the right to recover arrears of interest charged on land by secs. 18 and 25, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage in trust. Such coupons partake of the nature of a specialty and are good for at least 20 years: Toronto General Trusts v. Central Ont. Ry., 6 O. L. R. 534. Where an executor was also legatee of money charged on land and held the land eight years till it could be sold more advantageously the statute had no application, "the hand to

pay and the hand to receive being one and the same:" In re Yates, 4 O. L. R. 580. The provision that no more than 6 years' arrears of interest charged on land is recoverable only applies where a mortgagee is seeking to enforce payment out of the lands of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle: Delaney v. C. P. R., 21 O. R. 11; see also Howeren v. Bradburn, 22 Gr. 96. But in an action for redemption by a second mortgagee against a first mortgagee, the latter is entitled to only six years' arrears of interest: McMicking v. Gibbons, 24 A. R. 586; see fully on this point, H. & L. notes, pp. 970-971. Where property was sold under power of sale, in a suit by the mortgagor for the surplus, the mortgagee was entitled to retain arrears of interest for more than six years: Ford v. Allen, 15 Gr. 565. The statute is no bar as against a mortgagee in possession to an account for more than six years' rent: Caldwell v. Hall, 9 Gr. 110, 8 U. C. L. J. 93. Where there is the usual provision in a mortgage that in default of payment of interest the principal secured becomes payable, the principal does become due on default and the statute begins to run: McFadden v. Brandon, 6 O. L. R. 247, 8 O. L. R. 610. The Statute of Limitations is not a bar to a claim against a mortgagee in possession for occupation rent: Caldwell v. Hall, 9 Gr. 110. Interest chargeable between mortgagor and mortgagee in redemption or foreclosure action: Macdonald v. Macdonald, 11 O. R. 187; Airey v. Mitchell, 21 Gr. 512. The rule in Hunter v. Nockolds (1 Mac. & G. 640), namely, that in a foreclosure action the mortgagee can only recover 6 years' arrears of interest, does not apply to redemption proceedings taken by the mortgagor, nor where the proceeds of sale have come to the hands of the mortgagee, nor where the mortgagor seeks payment out of Court of the proceeds of land sold in an administration action: Re Lloyd, Lloyd v. Lloyd, 1903, 1 Ch. 385, where Edmunds v. Waugh, L. R. 1 Eq. 418; Re Marshfield, 34 Ch. D. 721, and Dingle v. Coppin, 1899, 1 Ch. 726, and other cases are reviewed. Arrears of interest on mortgage: see Dig. Eng. Case Law, IX., 224. A mortgage of personal estate is not analogous to a mortgage of real estate so as to induce the Court

to limit the amount of arrears recoverable to six years: Mellersh v. Brown, 45 Ch. D. 225. The provision of this section does not affect the right of a mortgagee who has sold under power of sale to retain out of the proceeds more than six years' arrears of interest: Re Marshfield, 34 Ch. D. 721. Upon the sale of property subject to a mortgage the purchaser enquired of the mortgagee the amount due, who endorsed a memorandum on the mortgage. The deed to the purchaser was made subject to such amount, and contained a covenant to pay it but was not executed by the purchaser. The statement in the deed was held not to be an acknowledgment of which the mortgagee could take advantage, and as against an incumbrancer claiming under the purchaser he was entitled to six years' arrears only: Colquhoun v. Murray, 26 A. R. 204. Arrears of annuity: the existence of a power of distress will not take the case out of the general rule: Crone v. Crone, 27 Gr. 425. Though the remedy of a creditor to recover the debt be barred by the Statute of Limitations he may hold the collateral securities for such debt till paid: Wiley v. Ledgard, 10 P. R. 182; see Holmested and Langton notes, pp. 880-881, and p. 973; also pp. 970-972, as to interest, etc. A vendor's lien attaches not only to principal, but extends to interest from the time the lien came into existence, and there is no Statute of Limitations applicable in such a case to the right to recover interest, but the vendor can recover interest for the whole period from the date of the sale: Rose v. Watson, 10 H. L. C. 672; In re Hancock, Hancock v. Berry, 57 L. J. Ch. 793; Mellersh v. Brown, 60 L. J. Ch. 43, 44, 45 Ch. D. 225, 229; In re Stucley, Stucley v. Kekewich, 1906, 1 Ch. 67, 75 L. J. Ch. 58. Acknowledgment by one of two executors that more than 6 years of interest are due not sufficient to entitle the mortgage in foreclosure to more than 6 years' arrears. Such an acknowledgment would, semble, be sufficient against the personal assets: Astbury v. Astbury, 1898, 2 Ch. 111. See Armour, Real Property, p. 460.

19. See Holmested and Langton notes, p. 973.

20. A conveyance from a mortgagee in possession by which he "conveyed, assigned, released and quitted claim" to the grantees, their heirs, etc., "as

and for all the estate and interest of the grantor " passed the fee and enabled the grantees, taking the benefit of the mortgagee's possession coupled with their own, to claim an absolute possessory title: Bright v. McMurray, 1 O. W. R. 172. Where actual possession is once obtained by a mortgagee in assertion of his legal right, it need not be maintained continuously for the statutory period: Kay v. Wilson, 24 Gr. 212, 2 A. R. 133. Where a mortgagee took possession of the premises to pay himself out of the rents and profits and subsequently sold, the vendee was able to plead the statute in an action for redemption brought by the mortgagor after the lapse of the statutory period: Dedford v. Boulton, 25 Gr. 561. Where a purchaser is in possession of land either under a written contract of sale or with the assent of the vendor, the purchase money being payable by instalments, the vendor's right of entry does not first accrue until default occurs in payment of an instalment: Irvine v. McCaulay, 28 O. R. 92, 24 A. R. 446. An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person entitled to take out letters of administration, and who does afterwards take out such letters is an acknowledgment within the statute: Robertson v. Burrill, 22 A. R. 356. Where a mortgagee has gone into possession under his mortgage, the mortgagor, subsequent mortgagees, and the grantee of the equity of redemption, are barred after ten years. Section 23 will not apply to hinder the mortgagee from making good title: Re Thomas and Stephenson, 9 O. W. R. 625. Where the mortgagor and mortgagee agreed for possession by the mortgagee and for a reconveyance on payment, and a sale if default was made and no sale took place, as long as the mortgagee retained possession for the purposes of the agreement the statute had no application: Patterson v. Dart, 8 O. W. R. 800, 10 O. W. R. 79, 11 O. W. R. 241, and see further in reference to same case, 24 O. L. R. 609. Where land and an insurance policy were mortgaged in one instrument to secure one amount and subject to one proviso for redemption, the right to redeem the policy will be barred at the same time as the right to redeem the land: Charter v. Watson, 1899, 1 Ch. 175. Death of mortgagee in possession: partial intestacy: barring

equity of redemption: Re Loveridge, Pearce v. Marsh, 1904, 1 Ch. 518. An equitable mortgagee will be barred if there is no acknowledgment as well as a legal mortgagee: Kibble v. Fairthorne, 1895, 1 Ch. 219. Who is a person claiming under a mortgage: see Heath v. Pugh, 6 Q. B. D. 345; Thornton v. France, 1897, 2 Q. B. 143; Ford v. Ager, 2 H. & C. 279. Acknowledgment of mortgagor's title by mortgagee in possession: Re Metropolis, etc., Building Society, 1911, 1 Ch. 698. Possession by mortgagee where lands vacant: Agency Commissioners v. Short, 13 App. Cas. 793; Delaney v. C. P. R. 21 O. R. 11; Kay v. Wilson, 2 A. R. 133; Kerby v. Cowderoy, 1912, A. C. 599; Re Jarvis and Cook, 29 Gr. 303. As to whether debts payable out of mixed fund may be barred against personal estate under sec. 49, but not against real estate: see Re Raggi, Brass v. Young, 1913, 2 Ch. 206. On the question whether an action to redeem a mortgage is or is not an action to recover land within the meaning of the R. P. Limitations Act: see Faulds v. Harper, 9 A. R. 537; but see judgment of Strong, J., in this case in 11 S. C. R. 639, and Heath v. Pugh, 7 App. Cas. 235; see note to sec. 5 "mortgagor and mortgagee": see Dig. Ont. Case Law, col. 3991 *et seq.* "mortgagor and mortgagee."

23. The effect of the usual statutory provision in a mortgage that in default of payment of the interest thereby secured, the principal thereby secured should become payable is to make the principal due at once, so that a cause of action then accrues: McFadden v. Brandon, 6 O. L. R. 247. This provision does not confer a new right of entry on the mortgagee where at the date of the mortgage a person is in possession adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor: Thornton v. France, 1897, 2 Q. B. 143; McVity v. Trenouth, 9 O. L. R. 105, where Cameron v. Walker, 19 O. R. 212, is said to be no longer authority (see Chamberlain v. Clark, 28 Gr. 454); see also Ludbrook v. Ludbrook, 1901, 2 K. B. 96; Archibald v. Lawlor, 1902, 35 Nov. Sco. 48. Where mortgagee in possession has obtained title under sec. 20, this section has no application to aid the mortgagor and those claiming under him:

Re Thomson and Stevenson, 9 O. W. R. 625. As to recovery of interest: see Delaney v. C. P. R., 21 O. R. 11, where it is held that a mortgagor seeking to redeem must pay all arrears of interest up to the statutory limit of the action: see also McMicking v. Gibbons, 24 A. R. 586, which decides that a second mortgagee seeking to redeem need pay only 6 years' arrears: see notes *supra*. The execution and registration of a statutory discharge of mortgage gave a new starting point to the statute in favour of the owner as against his son in possession: Henderson v. Henderson, 23 A. R. 577. Payment of interest: see Chamberlain v. Clark, 28 Gr. 45. Mortgage by husband to wife's trustee: mortgage is not barred by nonpayment of interest: Re Hawes, Burchell v. Hawes, 62 L. J. Ch. 463. The statute runs from time of first default in payment of interest: Reeves v. Butcher, 1891, 2 Q. B. 509. Acquiring title subject to mortgage: Fletcher v. Roblin, 20 O. W. R. 148, 3 O. W. N. 155; Noble v. Noble, 25 O. L. R. 379, 27 O. L. R. 342. The Act does not confer a new right of entry on a mortgagee when at the time of making the mortgage some person is in possession of the mortgaged property adversely to the mortgagor: Thornton v. France, 1897, 2 Q. B. 143. Difference between rights of mortgagee who acquires his mortgage before any adverse possession has begun against the mortgagor and after: Thornton v. France, 1897, 2 Q. B. 143; and see also McVity v. Trenouth, 9 O. L. R. 105, 36 S. C. R. 455; 1908, A. C. 60. A. being the owner of land, let B. into possession as tenant at will. B. acquired title by possession against A., but not as against C., the mortgagee, whose mortgage A. made payments on and kept alive. After B. had acquired title to the equity of redemption, A. paid off C.'s mortgage, and registered a certificate of discharge. The Court held that A. was not entitled to recover possession from B., but did not decide whether A. was entitled to a lien in respect of the mortgage money paid by him: Noble v. Noble, 27 O. L. R. 342. See also Brown v. McLean, 18 O. R. 533. Power of attorney to realize money out of the rents of lands and registered. Such an instrument has no longer life under the statute than a formal mortgage: Brown v. Thompson, 5 O. W. N. 19, 24 O. W. R. 967. Payment on account: Robinson v. Robinson, 14 O. W. R.

155, 1000. Equitable mortgagee: see Kibble v. Fairthorne, 1895, 1 Ch. 219. If estates A. B. and C. are included in one mortgage, and the owner of A. pays the interest, the mortgagee is not barred from his remedy against B. and C.: Chinnery v. Evans, 11 H. L. Cas. 115. Unregistered conveyance: subsequent registered conveyance to mortgagee: McVity v. Tranouth, 1908, A. C. 60. Extinguishment of mortgagee's title: Re Hazeldine, 1908, 1 Ch. 34. Section discussed: Noble v. Noble, 25 O. L. R. 379, 27 O. L. R. 342. See also notes to sec. 16 *ante*.

24. The section merely limits suits which directly affect land or its proceeds to ten years. An action on a covenant in a mortgage may still be brought within twenty years: Allan v. McTavish, 2 A. R. 278; McDonald v. Elliott, 12 O. R. 98; (Sutton v. Sutton, 22 Ch. D. 511, and Fearnside v. Flint, 22 Gr. 579, not being followed). This applies only to mortgage covenants made before 1st July, 1894, since which date see sec. 49. Notwithstanding this section, 20 years is the period of limitation on an action on a judgment of a Court of Record: see sec. 49 and notes: Boice v. O'Loane, 3 A. R. 167; McMahon v. Spencer, 13 A. R. 430; Allison v. Breen, 19 P. R. 119, 143; Butler v. McMicken, 32 O. R. 422; Mason v. Johnston, 20 A. R. 412. In Boice v. O'Loane, 3 A. R. 167, it was held by the Court of Appeal that the Real Property Limitation Act did not apply to a judgment, and an action might be brought on it as being a specialty within 20 years from the time of its recovery. Following the rule laid down by the Privy Council in Trimble v. Hall, 5 App. Cas. 664, the Court would now be compelled to overrule this decision and follow Jay v. Johnstone, 1893, 1 Q. B. 189, in which the English Court of Appeal dealing with a section identical in this respect with that in force here as it formerly stood, came to a conclusion, diametrically opposite to Boice v. O'Loane. But in confirming the Revision of 1887, the legislature adopted the rule in Boice v. O'Loane by omitting the word judgment altogether from sec. 23, so that there is no longer anything in the section to which the English decisions can apply: see H. & L. notes, p. 973. The rule that the only person whose payment on account will prevent foreclosure from

being barred is the mortgagor or his privy in estate, or the agent of either of them must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments: Lewin v. Wilson, 9 S. C. R. 637, 11 App. Cas. 639. An acknowledgment out of indebtedness by letter written after the creditor's decease by the mortgagor to the person entitled to take out letters of administration and who does subsequently take them out is a sufficient acknowledgment within the statute: Robertson v. Burrill, 22 A. R. 356. A mortgage of lands was given as an additional security to a chattel mortgage. On default of payment of the chattel mortgage, the mortgagee went through a form of sale, but actually retained the goods himself. Over ten years later, the mortgagor's possession not having been interfered with, the mortgagee's assignee attempted to exercise the power of sale in the mortgage of lands. Held, that the intended sale was a 'proceeding' under this section which the assignee was precluded from taking: McDonald v. Grundy, 8 O. L. R. 113. The analogy of the statute applies to applications for leave to issue execution after the lapse of 20 years from the date of the judgment: Price v. Wade, 14 P. R. 351; see also McCullough v. Sykes, 11 P. R. 337; McMahon v. Spencer, 13 A. R. 430; see Con. Rule 864; H. & L. notes, pp. 1120-1122 (1913 Rule 566). It was held that an execution, *fi. fa.* lands, in the Sheriff's hands was a lien, and the money mentioned therein "money charged on land" and although duly renewed, where a writ of *fi. fa.* had been more than 10 years in the Sheriff's hands, and no payment or acknowledgment made meanwhile, the lien was gone and the proceedings on the writ would be restrained: Neil v. Almond, 29 O. R. 63; In re Woodall, 8 O. R. 288; Caspar v. Keachie, 41 U. C. R. 599, but by amendment of 1905 (now sub-section 2), the lien is not now barred when writ duly renewed: see H. & L. notes, pp. 1125-26; 1913, Rule 571. After the Statute of Limitations has run against the mortgagor of lands, service of notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title being in no way affected: Shaw v. Coulter, 11 O. L. R. 630. The effect of the usual statutory provision in a mortgage

that in default of the payment of the interest the principal shall become payable, is to make the principal at once due so that the cause of action then accrues: McFadden v. Brandon, 6 O. L. R. 247. Where a subsequent mortgagee took a conveyance of the mortgaged property from an assignee in insolvency without covenanting and subsequently conveyed to a third party, and yet continued to pay interest to the first mortgagee till within 10 years of bringing of foreclosure, it was held that under the Insolvent Act of '65, sec. 19, the subsequent mortgagee had become liable primarily to pay off the prior incumbrances and, therefore, his payments kept alive the prior mortgagee's rights: Trust & Loan v. Stephenson, 21 O. R. 571, 20 A. R. 66. Where money was got in by one of two residuary legatees and executors and not accounted to the other as agreed: Re Kirkpatrick, 3 O. R. 361. A mortgagee who has suffered the statute to run before he asserts his rights, cannot by afterwards getting possession of the property revive his title to it. Court v. Walsh, 1 O. R. 167. An assignment by an insolvent mortgagor does not stop the running of the statute so as to keep alive the claim of a mortgagee against the land: Court v. Walsh, 1 O. R. 167, 3 A. R. 294. A suit of foreclosure is an action to recover land and, after 10 years, the mortgagee is at best only entitled to a judgment on a covenant (made before 1st July, 1894): Fletcher v. Rodden, 1 O. R. 155. Effect of express trust: see Cameron v. Campbell, 7 A. R. 361; see, generally, cases in Dig. Ont. Case Law, col. 3991, *et seq.* "mortgagor and mortgagee": see also Bicknell & Seager D. C. Act, p. 230. The time at which a bar to an action for foreclosure arises is not when the personal remedy ceases, but when the remedy against the property subject to the charge is taken away, *e.g.*, personal property is not subject to any similar statute to this, and the chattel mortgagee's right to the property not destroyed: London and Midland Bank v. Mitchell, 1899, 2 Ch. 161. An action by a mortgagee against a mortgagor on the covenant to repay in a mortgage of a reversionary estate in realty is within the Act, although the estate is still reversionary at the date of the action: Kirkland v. Peatfield, 1903, 1 K. B. 756.

Money charged on land as a lien under an instrument without mention of interest: held to carry interest from the time the money becomes payable, and will not be statute barred where the hand to receive and the hand to pay interest are the same: Re Drax, Saville v. Drax, 1903, 1 Ch. 781. Debts charged on realty: Re Balls, Trewby v. Balls, 1909, 1 Ch. 791. Money secured on land by express trust: Williams v. Williams, 1900, 1 Ch. 152. A testator left everything to his wife and children, and appointed his wife sole executrix. The plaintiff was the only child and was told about the will and received part of her share. After her mother's death more than 10 years elapsed before action was taken. Held, that what the plaintiff claimed was a legacy, and that her mother was not express trustee for her, and she was therefore barred: Re Mackay, Mackay v. Gould, 1906, 1 Ch. 25, 75 L. J. Ch. 47. Limitation where there is a mixed fund of real and personal property for payment of debts: Re Balls, Trewby v. Balls, 1909, 1 Ch. 791. Second life estate: Currie v. Currie, 15 O. W. R. 389, 20 O. L. R. 375, 1 O. W. N. 473. Where a mortgagee's right of action in respect of a sum of money charged on the proceeds of sale of land is barred under the statute, the mortgage is not dead: and if money representing the property charged is paid into Court, the mortgagor can only obtain payment of it out of Court by doing equity and satisfying the mortgage: Re Hazeldine's Trusts, 1907, 1 Ch. 686. Covenant to pay money in settlement money also charged on land: devise in fee to tenant for life being also executor of covenantor: not sufficient to prevent statute running as to personal estate: Re England, 1895, 2 Ch. 820. Claim of residuary legatees to require contribution from specific devisees towards payment of charge barred: see Re Allen, Bassett v. Allen, 1898, 2 Ch. 499.

The principle underlying all the statutes of limitation is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom payment is made: Harlock v. Ashberry, 51 L. J. Ch. 394, 19 Ch. D. 539. A part payment to take a case

out of the statute must be such a payment as implies an acknowledgment of liability and a promise to pay the residue: a payment in bankruptcy proceedings is insufficient: Taylor v. Hollard, 1902, 1 K. B. 676. Payment of interest by the assignee for life after equity of redemption: Dibb v. Walker, 1893, 2 Ch. 429. Payment of interest by continuing trustees: liability of retired trustee: Barnes v. Glentom, 1899, 1 Q. B. 885. Acknowledgment by one of two executors not sufficient to permit mortgagee in foreclosure to recover more than six years' arrears: Astbury v. Astbury, 1893, 2 Ch. 111. "Person by whom the same is payable or his agent" includes any person who, as between himself and the mortgagor, is bound to pay the interest: Bradshaw v. Widdrington, 1902, 2 Ch. 430; see also Re Viscount Cobden, 1900, 1 Ch. 774. Money "charged upon" land: see Skene v. Cook, 1902, 1 K. B. 682. Breach of trust by trustee who has ceased to be executor: see Re Timmis, Nixon v. Smith, 1902, 1 Ch. 176. "In the meantime": Re Viscount Clifden, 1900, 1 Ch. 774. The existence of a prior mortgage at the date of the creation of a mortgage, does not make the mortgagor's interest a future estate or interest for the purpose of determining the time when the statute commences to run against the puisne mortgagee: Johnson v. Brock, 1907, 2 Ch. 533. Where real estate has been specifically devised subject to a mortgage containing the usual covenants for payment of principal and interest, continued payment of interest by the devisee prevents the statute from taking effect in favour of another specifically devised real estate not subject to the mortgage. Consequently, if the mortgaged property proves insufficient, the mortgagee will in respect of his debt, notwithstanding the lapse of time, be entitled to an order for the administration of the whole of the testator's real estate: Re Lacey, Howard v. Lightfoot, 1907, 1 Ch. 330. See as to this section: Archibald v. Lawlor, 38 C. L. T. 214.

25. These restrictions not applicable to the case of interest coupons in railway bonds: see Toronto General Trusts v. Central Ont. Ry. Co., 6 O. L. R. 534. Trusts: See *infra*, secs. 47, 48.

26. In an action by a devisee to establish a destroyed will a decree was made declaring the devisee entitled to the fee simple subject to the dower of the testator's widow. The decree was held not to prevent the running of the statute so as to bar the remedy of the widow: Cope v. Cope, 26 O. R. 441. Absence from the province does not prevent the statute from running: Re Foster and Knapton, 13 O. W. R. 176, 507. An action for assignment of dower is not within the Real Property Limitations Act: Williams v. Thomas, 1909, 1 Ch. 713; Armour on Titles, pp. 197, 206; Real Property, p. 131.

27. This section expresses the view of Proudfoot, V.C., in Laidlaw v. Jackes, 27 Gr. 101, dissenting from Spragge, C. and Blake, V.C.: see also Fraser v. Green, 27 Gr. 63. Computation of time within which action can be brought: Re Foster and Knapton, 13 O. W. R. 176, 507. Action for assignment of dower; part possession: Williams v. Thomas, 1909, 1 Ch. 713.

32. The husband of one of several tenants in common bought land at a Sheriff's sale which was known to the other tenants who took no steps to set the sale aside until after the lapse of the statutory period. Held, that whether the sale under execution was operative or not, possession had ripened into title: Kennedy v. Bateman, 27 Gr. 380. G. made a conveyance in fee of certain lands, and the holder of an unsatisfied judgment brought action to set it aside as voluntary. The statute was pleaded as a defence, but it was held that the plaintiff was entitled to succeed as a fraudulent deed remains fraudulent to the end of time, though it may not be effectively impeachable because purchasers for value without notice have intervened or because the creditor's debts themselves have become barred: Boyer v. Gaffield, 11 O. R. 571: "Concealed fraud" as used in this section considered: Re McCallum, 1901, 1 Ch. 143; see also Bulli Coal Mining Co. v. Osborne, 1889, A. C. 351; Re Astley and Lyldesley Coal Co., 68 L. J. Q. B. 252; Ecclesiastical Commissioners v. North Eastern Ry., 4 Ch. D. 845; Willis v. Howe, 1893, 2 Ch. 545; Blennerhassett v. Day, 2 Ball & B. 118.

Concealed fraud: see Dig. Eng. Case Law IX., col. 306, *et seq.*; also col. 121, *et seq.*, Dig. Ont. Case Law, col. 3985, *et seq.* As to pleading: see Lawrance v. Norreys, 15 App. Cas. 210. There is no time protected fraud in equity: Pickering v. Stamford, 2 Ves. J. 280.

34. After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription, the tenant of the dominant tenement without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right. It was held that even if an act of this kind could in any event effect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority: Ker v. Little, 25 A. R. 387. Abandonment of an easement may be shown not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement: Bell v. Goldring, 23 A. R. 485. Interruption after acquirement of prescriptive right: Avery v. Fortune, 8 O. W. R. 953. Right of way to rooms in a house which are acquired by possession for statutory period: Iredale v. London, 8 O. W. R. 963, 14 O. L. R. 17, 15 O. L. R. 286, 40 S. C. R. 313. No legal possession is acquired by a man walking across the land of a friend or using a private way, thinking it is a public one. There must not only be a corporal detention or that quasi detention which, according to the nature of the right, is equivalent to it, but there must also be the intention to act as owner: Adams v. Fairweather, 13 O. L. R. 490, 8 O. W. R. 886; Gale on Easements, 7th ed., p. 164; Earl de la Warr v. Miles, 17 Ch. D. 535. Unity of possession of the dominant and servient tenements for a period will interrupt the running of the statute: Re Cockburn, 27 A. R. 450. Even though the occupation of the servient tenement be wrongful and without the privity of the true owner: Innes v. Ferguson, 21 A. R. 323, 24 S. C. R. 903. Unity of possession by means of lease: Stothart v. Hilliard, 19 O. R. 542. Where a railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A right of

way may be acquired although the dominant tenement is not contiguous to the servient tenement: Guthrie v. C. P. R., 27 A. R. 64. The owner of a servient tenement who takes water by an artificial stream from the dominant tenement created by the owner of the latter for his own convenience to discharge surplus water, acquires no right to insist on the continuance of the flow. Length of time does not alter the character of the easement nor change the dominant into the servient tenement: Oliver v. Leckie, 26 O. R. 28; see as to rights of way: Mykel v. Doyle, 45 U. C. R. 65; McKay v. Bruce, 20 O. R. 79, note to sec. 2 (*c*); see also Knock v. Knock, 27 S. C. R. 664; Maughan v. Casei, 5 O. R. 518; Duncan v. Rogers, 15 O. R. 699, 16 A. R. 3. Easement for water pipes for conveying water: Canada Southern v. Town of Niagara Falls, 22 O. R. 41. Party walls: see James v. Clements, 11 O. R. 115. Water rights: Ellis v. Clemens, 21 O. R. 227, 22 O. R. 216. Lateral support: Backus v. Smith, 5 A. R. 341. Injury to easement: 14 O. R. 594. No prescriptive right to nuisance can be acquired: Regina v. Brewster, 8 C. P. 208. It is a plain common law right to have the use of air in its natural unpolluted state, and an acquiescence in its being polluted for any period less than 20 years will not bar the right. To bar the right within a shorter period there must be such encouragement or other act on the part of the complainant as to make it a fraud in him to object: Radenhurst v. Coate, 6 Gr. 139. Right to air as an easement: Cable v. Bryant, 1908, 1 Ch. 259. Prescriptive right to pollute stream against public policy: R. S. C., 1906, ch. 115, sec. 19; Hunter v. Richards, 26 O. L. R. 458, 4 O. W. N. 854, 28 O. L. R. 267. Where there has been long enjoyment of a way in connection with which payment has been made, the presumption is that the payment is rent and the onus of establishing that the enjoyment confers an easement, lies upon the person who claims it as of right: Gardner v. Hodgson's Kingston Brewery, 1903, A. C. 229. Where two adjoining tenements are held under one common lease, and one tenant has enjoyed uninterrupted access of light for the period of prescription, he thereby acquires in respect of the dominant tenement, an absolute right of light over the servient tenement, not only as

against the tenant, but as against the common landlord: see Fear v. Morgan, 1906, 2 Ch. 406, and cases there considered, but since 1880 see sec. 37 *infra*.

The right to support of lands is independent of prescription: Boyd v. Toronto, 23 O. L. R. 421. The right to lateral support of land is a natural right: Dalton v. Angus, 6 App. Cas. 740, and also the right to vertical support: Davis v. Treharne, 6 App. Cas. 460; Butterknowle Colliery v. Bishop Auckland, etc., Co., 1906, A. C. 305; Howley Park, etc., Co. v. L. & N. W. Ry., 1913, A. C. 11. There is no natural right to support of land weighted with buildings: Dalton v. Angus, 6 App. Cas. 740, either from subjacent land or adjoining buildings: Peyton v. London Corporation, 1829, 9 B. & C. 725; Southwark, etc., Co. v. Wandsworth, 1898, 2 Ch. 603. But a right in the form of an easement may be acquired to the continuance of the support afforded to houses by the adjoining land: Dalton v. Angus (*supra*), or by adjoining house: Lemaitre v. Davis, 19 Ch. D. 281; Waddington v. Naylor, 60 L. T. Rep. 480, and these rights may be acquired like other easements. Rights in nature of easements arising from sale of lots on plan showing open places called "private entrance" and "park": Ihde v. Starr, 19 O. L. R. 471, 21 O. L. R. 407. See as to prescription of easements: McGhie v. R., 7 Exch. C. R. 309. Common practice of early settlers of permitting their neighbours to cross their lands will not establish rights of way: Duncan v. Rogers, 15 O. R. 699; Cameron's Sup. Ct. Cases, at p. 362; Avery v. Fortune, 11 O. W. R. 784. See the provisions of the Land Titles Act as to adverse possession in derogation of the title of a registered owner under that Act: R. S. O., 1914, ch. 126, sec. 29.

35. What is required to establish prescriptive right: Hunter v. Richards, 18 O. W. R. 813, 2 O. W. N. 855, 22 O. W. R. 408, 3 O. W. N. 1432, 26 O. L. R. 458, 4 O. W. N. 854. See as to actions to recover easements: Mykel v. Doyle, 45 U. C. R. 65; McKay v. Bruce, 20 O. R. 709; Bell v. Goulding, 23 A. R. 485; and see notes to sec. 2 (*c*) *ante*. Easement by continuous user as of right: Leslie v. Pere Marquette,

24 O. L. R. 206. Effect of tax sale on easement: Essery v. Bell, 13 O. W. R. 395. Interruption acquiesced in for a year before action brought is fatal to action to establish easement in prior use for over 20 years: McCullough v. McCullough, 17 O. W. R. 639, 2 O. W. N. 331. Extinguishment of easement by cessation of enjoyment: time: intention to renounce right: Currah v. Ray, 13 O. W. R. 652. "Consent or agreement": see Easton v. Isted, 1903, 1 Ch. 405. It is difficult to acquire a right of way by prescription over railway lands. The right being assumed to rest in the presumption of a grant, if an actual grant would have been illegal and void, an implied grant could not be valid. The rights of a railway to grant lands is practically restricted to cases where such grant is for the benefit of the railway company, or is of lands not required for its purposes: see R. S. O. 1914, ch. 185, secs. 54 (*c*), 95; G. T. R. v. Vallieər, 7 O. L. R. 364; McMahon v. G. T. R., 12 O. W. R. 324. A stranger may acquire title by possession to land vertically over a railway tunnel, even though not superfluous land, subject to the right of the railway to use the tunnel: Midland Ry. v. Wright, 1901, 1 Ch. 738. Twenty years user of undergrade crossing: prescription: Leslie v. Pere Marquette, 24 O. L. R. 206, 25 O. L. R. 326. Acquisition of right of farm crossing: Guthrie v. C. P. R., 27 A. R. 64; and see notes to sec. 5 "Railways." Acquirement of easement to pen back water: Cardwell v. Breckenbridge, 4 O. W. N. 1295, 24 O. W. R. 569. Acquisition of easement: water privilege: Davey v. Foley Reiger, 19 O. W. R. 195, 2 O. W. N. 1028, 19 O. W. R. 531, 2 O. W. N. 1284, 21 O. W. R. 408, 3 O. W. N. 856. Essentials of prescription to acquire use of lane: Plummer v. Davies, 20 O. W. R. 806, 3 O. W. N. 466. What is necessary to acquire a private right of way by prescription: McLachlin v. Schievert, 2 O. W. N. 649, 18 O. W. R. 457. What amounts to proof of right of way: see Albertson v. Harpell, 11 O. W. R. 56. Prescriptive acquisition of right of way: Sinclair v. Peters, 3 O. W. N. 1045, 4 O. W. N. 338, 23 O. W. R. 441. Proof required to establish right of way by prescription: Salter v. Everson, 4 O. W. N. 1457, 24 O. W. R. 757. A right of way in common with the owner of the servient tenement may be acquired. What amounts

to a substantial change in the "way": see Cardno v. Cooper, 12 O. W. R. 75. Unity of possession of dominant and servient tenement by a yearly tenant for 23 out of 40 years preceding the action in which a private right of way is sought to be established is fatal to such action: Damper v. Bassett, 1901, 2 Ch. 350. Where adjoining tenements are held under one landlord one tenant might acquire by prescription an easement of light (before 1880) as against the other lessee and the landlord: Morgan v. Fear, 1907, A. C. 425. An easement created by severance of a tenement is not within the Registry Act, and is not affected by subsequent dealing with the land: Israel v. Leith, 20 O. R. 361 (see R. S. O., 1914, ch. 124, sec. 2 (*e*), note). Easement: right of way: unity of ownership: subsequent severance: revival of easement: reservation: McClellan v. Powassan Lumber Co., 15 O. L. R. 67, 17 O. L. R. 32, 42 S. C. R. 249. Unity of possession: right of way: Thompson v. Maxwell, 3 O. W. N. 995. Where two tenements are held under one landlord, one tenant cannot acquire an easement as of right over land in the possession of the other. The easements under the section can only be acquired by prescription in respect of the fee: Bright v. Walker, 3 L. J. Ex. 250; Kilgour v. Gaddes, 1904, 1 K. B. 457. Where title by possession is acquired to an upper room in a building, as to aquisition of right of support and access to stairway to room: see Iredale v. London, 14 O. L. R. 17, 15 O. L. R. 286, 40 S. C. R. 313.

36. In a case in which the right of way in question was a mere track on the snow and not used at other times of the year, notwithstanding this customary use, the cessation of user for one year immediately preceding the commencement was a bar to the action: Knock v. Knock, 27 S. C. R. 664. A right to the use of the water of a spring will not necessarily give a right to have the water run through pipes and an arrangement whereby pipes were maintained was held to be not as of right, but under a license from the owner of the spring, and an interruption to the prescription: McKay v. Bruce, 20 O. R. 709. Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period even one

day over nineteen years (before 5th March, 1880), he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of 12 months: Flight v. Thomas, 11 A. & E. 688, 8 Cl. & F. 231; Burnham v. Garvey, 27 Gr. 80. Computation of the period during which access and use of light was enjoyed: Hyman v. Van den Bligh, 1907, 2 Ch. 516; 1908, 1 Ch. 167. Interruption: Davy v. Foley, 2 O. W. N. 1028; McCulloch v. McCulloch, 2 O. W. N. 331.

37. It is improper to couple "light" and "air" together in every case. A right to maintain openings for air, *i.e.*, ventilation may be established: Davids v. Newell, 8 O. W. R. 297. To constitute an actionable obstruction to ancient lights it is not enough that the light is less than before. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, or to prevent business being carried on beneficially as before: Colls v. Home and Colonial Stores, 1904, A. C. 179; Jolly v. Kine, 1905, 1 Ch. 480; 1907, A. C. 1. The rules settled by the Court in case of interference with ancient lights have no application to a case where the plaintiff's rights are dependent on a prior conveyance from the common owner of his lot and the adjoining one, the plaintiff being entitled to receive such access of light through his windows as they had at the time of severance of his lot from the adjoining one. Simpson v. Eaton, 15 O. L. R. 161. A *bona fide* sale by a mortgagee under power of sale of a portion of the mortgaged property, carries with it all legal incidents, and with others, a right to light over the unsold portion: Born v. Turner, 1900, 2 Ch. 211. Light: derogation from grant: see Carter v. Grassett, 14 A. R. 685; Israel v. Leith, 20 O. R. 361; Ruetsch v. Spry, 9 O. W. R. 696. What amounts to an obstruction: Brummel v. Wharin, 12 Gr. 283. Time of prescription: see Burnham v. Garvey, 27 Gr. 80, note to sec. 36. Effect of raising house so as to alter position of windows: Hall v. Evans, 42 U. C. R. 190. An easement of light attached to the dominant tenement let on lease is not extinguished by the acquisition of the dominant tenement by the owner of the servient tenement: Richardson v. Graham, 1908, 1 K. B. 39. A

green-house is a "building," and where ancient lights have been acquired therein, the right can be enforced: Clifford v. Holt, 1899, 1 Ch. 698. Ancient lights: alteration of buildings: Colls v. Home and Colonial Stores, 1904, A. C. 179; Andrews v. Waite, 1907, 2 Ch. 500; Ankerson v. Connelly, 1907, 1 Ch. 678; Scott v. Pape, 31 Ch. D. 554; Hyman v. Vanden Bergh, 1907, 2 Ch. 516, 1908, 1 Ch. 167. Damages for obstruction of ancient lights: Griffith v. Clay, 1912, 2 Ch. 291.

40. An annuity charged on land is "rent" (see sec. 2 (*d*)) in respect of which, apart from the question of disability, the right of action would have been barred in 10 years from the last payment. Sections 40 and 41, extended the time for 5 years from the removal of the disability, or for 20 years, and the action being thereby brought in time, 6 years arrears could be recovered: Trusts and Guarantee v. Trusts Corporation, 2 O. L. R. 97. The fact that heirs are resident out of Ontario, entitles them to no longer time to bring their action than if they were residents: 25 Vict. ch. 20; Hartley v. Maycock, 28 O. R. 508. Redemption Action: infant heirs: see Faulds v. Harper, 2 O. R. 405, 9 A. R. 537, 11 S. C. R. 639. See also as to applicability of these section to actions of redemption: Patterson v. Dart, 10 O. W. R. 79, 11 O. W. R. 241, note to sec. 5 "mortgagor and mortgagee," and note to sec. 20, and see also 24 O. L. R. 609. Married woman: disability: husband suing in right of wife: see Hounsell v. Dunning, 1902, 1 Ch. 512.

41. Where patentee was dispossessed, her heirs were barred in 20 years, notwithstanding outstanding tenancy by the curtesy: see Hicks v. Williams, 15 O. R. 228. Where a person enters upon the lands of infants, not being father or guardian, or in fiduciary relation to owner, and remains in possession for the statutable period, the rights of the infants will be barred: Re Taylor, 8 P. R. 207, 28 Gr. 640. Where the statute begins to run, it will continue, notwithstanding the death of the owner and the succession to the lands of an infant heir: Wigle v. Stewart, 28 U. C. R. 427: see Dig. Ont. Case Law, col. 3987. See Hounsell v. Dunning, 1902, 1 Ch. 512, note to sec. 40, *supra*.

44. Effect of section considered in case of lease for 999 years: Palmer v. Jones, 1 O. L. R. 382.

PART II.

Trusts and Trustees.

47.—(1) What amounts to a trust: see Re Rowe Jacobs v. Hind, 58 L. J. Ch. 703; James v. Holmes, 4 DeG. F. & J. 470; Soar v. Ashwell, 1893, 2 Q. B. 390; Cunningham v. Foot, 3 App. Cas. 984; Price v. Phillips, 13 R. 191; Re Watson, 7 Jur. 1001; Pooley v. Budd, 14 Beav. 34; and see Dig. Eng. Case Law XIV. 328.

47.—(2) Action for payment away in breach of trust by a trustee of moneys which he should have held to secure an equity is barred in 6 years: How v. Earl of Winterton, 1896, 2 Ch. 626. Form of order in action for accounts, where trustees are protected from rendering accounts for more than six years: see Re Davies: Ellis v. Roberts, 1898, 2 Ch. 142. Where a principal has remitted moneys to an agent for the purpose of being invested in the purchase of land, an express trust is created, and the Statute of Limitations will be no bar to an action brought for an account of the balance of the money not applied for the particular purpose: North American Land and Timber Co. v. Watkins, 1904, 2 Ch. 233. Action of tenant for life against trustees in respect of innocent breach of trust through defalcation of trustees' solicitor: Re Fountaine, Fountaine v. Amherst, 1909, 2 Ch. 382. Payment of interest by trustees to a tenant for life within six years is not an acknowledgment amounting to a promise to pay previous interest or uninvested balances: Re Fountaine, Fountaine v. Amherst, 1909, 2 Ch. 382. Where husband seized some separate property of his wife and retained it, his executors could not plead the Statute of Limitations: Wassell v. Leggatt, 1896, 1 Ch. 554. A trifling balance in the hands of the trustee will not prevent the statutory limitation from commencing to run: Stephens v. Beaty, 27 O. R. 75. Judgment for administration by some residuary as a starting point to bar other residuary legatees:

see Boys' Home v. Lewis, 27 A. R. 242. Where an executor paid away the residue of an estate to the detriment of an outstanding guarantee, a claim founded on a *devastavit* was held barred, when brought more than six years after the handing over of the assets to the residuary legatee: Lacons v. Warmoll, 1907, 2 K. B. 350. Right of trustees to plead the Statute of Limitations, where estate distributed more than 6 years before action, without provision being made to meet future liabilities under a lease, except an indemnity from beneficiaries. The action being for "administration," and not to recover money, statute held not to apply: Re Blow: Bartholemews Hospital v. Cambden, 1913, 1 Ch. 358, but see Lacons v. Warmoll, 1907, 2 K. B. 350. Executors relying on the statement of the testator's solicitor, that funds were retained to pay an annuity, distributed the estate. Subsequently it was found that before the testator's death, the solicitor had misappropriated the money given him to invest, it was held that the executors could avail themselves of the Limitation Act, and that no right of action was kept alive against them by payments made by the solicitor, ostensibly of interest received from the fund: Clark v. Bellamy, 30 O. R. 532, 27 A. R. 435. Where a sale is effected under a mortgage made pursuant to the Short Forms Act, and a surplus remains in the hands of the mortgagee, the mortgagee becomes an express trustee, and the mortgagor is entitled to an account notwithstanding the expiration of six years from the time of sale: Briggs v. The Freehold Loan, 26 A. R. 232, 31 S. C. R. 136. Action to recover personal estate from representative under Imp. Act, 23-4 Vict. ch. 38, sec. 13 (R. S. O. 1897, ch. 72, sec. 9): see In re Pardoe McLaughlin v. Penny, 1906, 1 Ch. 265, 2 Ch. 340. Position where person to be sued is co-executor, and running of statute in that case: In re Pardoe (*supra*). Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good, money lost by his negligence, and the limitation of this section does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession: Stewart v. Snyder, 30 O. R. 10, 27 A. R. 423; see Bicknell & Seager D. C.

Act p. 242. Where executors were appointed to carry out alternative provisions of a will, which really never took effect, the persons named as executors having obtained probate became trustees for the persons entitled in intestacy and payments made under the alternative provisions became breaches of trust. This section was held a bar as to any breaches occurring more than six years before action brought, and moreover the trustees were entitled, in view of the doubtful construction of the will to protection from all liability under R. S. O. 1914, ch. 121, sec. 37; Henning v. MacLean, 2 O. L. R. 169, 4 O. L. R. 666. One executor having been guilty of misappropriation, action against estate of co-executor by a new trustee appointed was held barred after six years: Gardner v. Perry, 6 O. L. R. 269. Account: Re Page, Jones v. Morgan, 1893, 1 Ch. 304; Re Bowden, 45 Ch. D. 444; How v. Winterton, 1896, 2 Ch. 626. Conversion: Re Gurney, 1893, 1 Ch. 590. Directors of a company: Re Lands Allotment Co., 1894, 1 Ch. 616. Payment of claims barred by the Statute of Limitations: claim of executor: Emes v. Emes, 11 Gr. 325; Crooks v. Crooks, 4 Gr. 615. Claim of executor when disputed by creditor: Re Ross, 29 Gr. 385. Administration order giving statute new day: Re Cannon, Oates v. Cannon, 13 O. R. 70. Claim of wife: Re Starr, 2 O. L. R. 762. Cestui que trust: Stewart v. Snider, 30 O. R. 110. Right of executors to pay statute-barred debts: Norton v. Frecker, 1 Atk. 524. Construction of section: Date from which statute runs: see Nicholls, Hall v. Wildman, 4 O. W. N. 930, 1511, 24 O. W. R. 216, 29 O. L. R. 206; Re Somerset, Somerset v. Poulet, 1894, 1 Ch. 321; Thorne v. Heard, 1895, A. C. 495; Re Bowden, Andrew v. Cooper, 45 Ch. D. 444; Moore v. Knight, 1891, 1 Ch. 547; Re Swain, Swain v. Bringernan, 1891, 3 Ch. 233; Re Timmins, Nixon v. Smith, 1902, 1 Ch. 176. See H. & L. notes pp. 62-3; see sec. 50 *infra* and notes.

48. Where money was advanced by a wife to her husband to purchase land, it was held that if it was an express trust, it was at an end when the land was conveyed to him; if it was a loan her claim was barred by the statute, for the statute is applied in such a claim by a wife against her husband, just as

if she were not his wife, and as her husband's executrix, she had lost her power of retainer, if any, by not registering a caution, as required by the Devolution of Estates Act: Re Starr, 2 O. L. R. 762. Statute no bar in action by administrator of escheated estate against deceased's trustee: Simpson v. Corbett, 5 O. R. 377, 10 A R. 32. Money handed to another for investment: relation of trustee and *cestui que trust*: statute no bar: Coyne v. Broddy, 15 A. R. 159. Conduct of executors whereby they became express trustees, and money in their hands, which one had applied to his own uses was recoverable with interest: Cameron v. Campbell, 7 A. R. 361; see also Wall v. Stanwick, 34 Ch. D. 763; In re Hobbs, 36 Ch. D. 553; Lyell v. Kennedy, 14 App. Cas. 437. In Clarke v. Macdonell, 20 O. R. 564, it was held that while the father could not obtain a possessory title against his infant children, he could do so after they came of age, when his possession as guardian changed to that of a stranger, but this case and Hickey v. Stover, 11 O. R. 106, were not followed in Kent v. Kent, 20 O. R. 445, 19 A. R. 352. But a person entering on lands of infants, not being their father or guardian, or standing in a fiduciary relation, can obtain a possessory title: In re Taylor, 28 Gr. 640: see Dig. Ont. Case Law, col. 3947, *et seq.* A constructive trustee is in a different position from an express trustee, and can acquire title: Ferguson v. Ferguson, 28 Gr. 380; see also Hickey v. Stover, 11 O. R. 106. Possession adverse to trustees of marriage settlement: Murchison v. Murchison, 17 O. R. 254; see Dig. Ont. Case Law, col. 3988, *et seq.* Where one of two executors and residuary legatees got in portions of the residuary estate, in an action for account, the six years bar was held to apply: Re Patrick, 10 P. R. 4; see also Cook v. Grant, 32 C. P. 511. Provisions of the statute as regards equitable estates considered. The owner of an equitable estate is still bound to proceed against a trespasser in the name of his trustee: Per Burton, J.A.: Adamson v. Adamson, 7 A. R. 592, 12 S. C. R. 563. A man married in 1854, conveyed in 1870 certain lands to his wife, and they continued to occupy them. She died in 1872, leaving the lands to two of her infant children by this husband. The husband remained in possession until 1890. Held that the presumption

was that the husband was in possession of the lands on behalf of his wife and after her death he remained on behalf of the children as their natural guardian. This being so the statute never began to run: Kent v. Kent, 20 O. R. 445, 19 A. R. 352. As to legacies being barred by the Statute of Limitations, an executor is not, as such, an express trustee: Re Mulholland and Morris, 1 O. W. N. 214. As between executors of an estate and creditors or legatees, no express trust, speaking generally, exists: McKinley v. Graham, 3 O. W. N. 256, 20 O. W. R. 441. In an action by an incorporated company against its managing director for the return of moneys retained by him on various pretexts, the Statute of Limitations is not a defence on account of the fiduciary relationship of the parties: Saskatchewan Land Co. v. Moore, 5 O. W. N. 183, 25 O. W. R. 125. The mere fact of the existence of a fiduciary relation does not prevent the defence of the statute: Henry v. Hammond, 1913, 2 K. B. 515. Money charged on land by express trust: Williams v. Williams, 1900, 1 Ch. 152. Mortgagee who has sold under power of sale and has balance in hand is express trustee: Briggs v. Freehold Loan, 26 A. R. 232, 31 S. C. R. 136 (see sec. 47 (2) note). If a person commences to receive rent as agent for another and afterwards continues to receive such rents without paying them over he must be presumed to receive them as agent, and as to the accumulated profits to have made himself a trustee: Lyell v. Kennedy, 14 App. Cas. 437; Smith v. Bennett, 30 L. T. 100. Protection of purchaser: Re Snell v. Dyment, 4 O. W. N. 759, 24 O. W. R. 64. Executor's right of retainer of statute barred debt: Crooks v. Crooks, 4 Gr. 615; Emes v. Emes, 11 Gr. 325. Waiver by executor of right of retainer of statute-barred debt: Trevor v. Hutchins, 1896, 1 Ch. 844. Right of executor to pay statute-barred debt: Norton v. Frecker, 1 Atk. 524. Effect of Devolution of Estates Act and non-registration of caution on right of retainer: Re Starr, 2 O. L. R. 762; see H. & L. notes, pp. 62, 63; and see notes to sec. 49 (1g) *post*.

PART III.

Personal Actions.

49. Pleading the Statute of Limitations: see Con. Rule 271, Holmested and Langton note, p. 480: (1913 Rule 143). Appearance not the proper place to set up the statute: see Con. Rule 176, Holmested and Langton, p. 320 (1913 Rule 148). Execution on judgment after six years: see Con. Rule 864, Holmested and Langton note, p. 1121; (1913 Rule 566) as to period of limitation of judgment. A defendant pleading the Statute of Limitations must set out in his statement of defence or give particulars shewing the section or sections on which he relies: Dodge v. Smith, 1 O. L. R. 47; see also Bicknell and Kapelle, Prac. Stat., p. 297. Where writ issued just in time to save the bar of the statute and by defect issued in name of former Sovereign: Bank of Hamilton v. Baldwin, 28 O. L. R. 175. Where the last day expires on Sunday, the plaintiff cannot begin his action on the following Monday. The Rules of Court have no bearing on the running of the Statute of Limitations: Gelmini v. Moriggia, 1913, 2 K. B. 549; but see Interpretation Act, R. S. O. 1914, ch. 1, sec. 28(h). The statute applies only as between debtor and creditor. Where a third party creates a trust, those within the trust take, despite the statute: Re Kerr, 2 O. W. N 1342, 19 O. W. R. 642. Administration: Statute a bar in absence of fraud: see Hughes v. Hughes, 6 A. R. 373.

49.—(1*b*) What is sufficient to change simple contract debt into specialty: evidence of payment and acknowledgment of debt: Bank of Montreal v. Lingham, 5 O. L. R. 519, 7 O. L. R. 164. A judgment of a Court of record remains in force 20 years: Mason v. Johnston, 20 A. R. 412; Butler v. McMicken, 32 O. R. 422: Chard v. Rae, 18 O. R. 371; Boice v. O'Loane, 3 A. R. 167; McCullough v. Sykes, 11 P. R. 337; see notes to sec. 24, *ante*. The analogy of the statute applies to applications for leave to issue execution: Price v. Wade, 14 P. R. 351. Balancing of accounts and running of statute: Stewart v. Gage, 13 O. R. 458. A foreign judgment not a specialty: North v. Fisher, 6 O. R. 206. Effect of covenant implied under Land

Titles Act charge: Beaty v. Bailey, 26 O. L. R. 145. In case where rent charge barred after statutory period, it was held that the remedy on the covenant was also gone: Shaw v. Crompton, 1910, 2 K. B. 370; Sutton v. Sutton, 22 Ch. D. 511; but see Allen v. McTavish, 2 A. R. 278; Macdonald v. Macdonald, 11 O. R. 187; McDonald v. Elliott, 12 O. R. 98. Effect of receivership order on expiry of judgment: Kinnear v. Clyne, 13 O. W. R. 776, 1138, 18 O. L. R. 457.

49.—(1*g*) The statute is not a bar to an action for criminal conversation where adulterous intercourse between defendant and the plaintiff's wife has continued to a period within 6 years from the time action is brought: Bailey v. King, 27 A. R. 703, 31 S. C. R. 338. Payment by trustee to wrong person —money demand: Re Robinson, 1911, 1 Ch. 502. Effect of scheduling statute-barred debt in application for probate: Re Beavan, 1912, 1 Ch. 196. Limitation where there is a mixed fund of personalty and realty for payment of debts: Re Balls, Trewby v. Balls, 1909, 1 Ch. 791. If a cause of action accrues after the death of a creditor, the statute only commences to run on the appointment of an executor or administrator: Grant v. McDonald, 8 Gr. 468. Action on running account against executors: Corroboration: see Wilson v. Howe, 5 O. L. R. 323. What amounts to conversion of simple contract debt into specialty debt: see Bank of Montreal v. Lingham, 5 O. L. R. 519, 7 O. L. R. 164. Limitations in partnership matters: see Storm v. Cumberland, 18 Gr. 245; Cotton v. Mitchell, 3 O. R. 421. Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full, and as against an executor claiming as creditor any other creditor may set up the Statute of Limitations: Re Ross, 29 Gr. 385; see Re Samson; Robbins v. Alexander, 1906, 2 Ch. 584, note to R. S. O. 1914, ch. 121, sec. 53. (Executor's right of retainer of statute-barred debt: see sec. 48, note). A married woman was held still entitled, notwithstanding R. S. O. 1877, ch. 125, sec. 20, to bring an action in respect of her separate property within 6 years after being discovert: Carroll v. Fitzgerald, 5 A. R. 322. An action for damages for injuries received by collision with a motor vehicle is not an action within sub-sec. (*h*), but within

sub-sec. (*g*): Maitland v. Mackenzie & Toronto Ry., 23 O. W. R. 80, 4 O. W. N. 109.

49.—(1*h*) Action by shareholder against directors and promoters of a company under the Directors Liability Sections of the Company Act is not subject to two years' limitation: Thomson v. Lord Clanmorris, 1900, 1 Ch. 718. This does not include the period for bringing an action against a municipal clerk for omitting names from the collector's roll: Peterboro' v. Edwards, 31 C. P. 231.

49.—(1*j*) Claim for assault subject of a former action: Jordan v. Jordan, 4 O. W. N. 219, 24 O. W. R. 525.

49.—(1*k*) Mortgage made before 1st July, 1894: Beaty v. Bailey, 3 O. W. N. 990, 21 O. W. R. 848, 26 O. L. R. 145. Effect of acceleration clause in mortgage on Statute of Limitations: McFadden v. Brampton, 6 O. L. R. 277, 8 O. L. R. 610; Cameron v. Smith, 4 O. W. N. 1459, 24 O. W. R. 767. Extinguishment of mortgagee's remedy: Re Hazeldine, 1908, 1 Ch. 34. "Contained" in a mortgage. Does this extend to an implied covenant?: see R. S. O. 1914, ch. 112, sec. 6; Beatty v. Bailey, 26 O. L. R. 145. Six years' arrears only chargeable as against subsequent incumbrancer coming in to redeem: McMicking v. Gibbons, 24 A. R. 586; Cogswell v. Grant, 21 Occ. N. 351; see Holmested and Langton, pp. 880-882; *supra* sec. 18, notes.

50. The time within which a client must assert his right as against his solicitor to obtain, or, in case of error to open an account, is not limited to six years or to any other definite period: Cheese v. Keen, 1908, 1 Ch. 245. A dividend paid by an assignee for the benefit of creditors is not such a part payment as will take a debt otherwise barred out of the statute 21 Jac. 1 ch. 16; Birkett v. Bisonette, 15 O. L. R. 93. The Statute of Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose: North American L. & T. Co. v. Watkins, 1904, 2 Ch. 233. Onus of proof on party who sets up part payment on partially statute-barred account: Ross v. Flanagan, 2 O. W. N. 1267, 19 O. W. R. 499. Cross accounts: items more than 6 years old: Halliwell v. Zwick, 13

O. W. R. 1. Running account: payments: Scott v. Allen, 3 O. W. N. 1484. Partnership: account containing statute-barred items: payment on account: appropriation by creditor: Re Friend, 1897, 2 Ch. 421. Trustees' accounts: see Ellis v. Roberts, 1898, 2 Ch. 142; and see secs. 47-48, *ante*. Partnership accounts: history of former exception in the Statute of Limitations (21 Jac. 1, ch. 16, sec. 8) as to partners: Hamilton Brass Mfg. Co. v. Barr Cash and Package Carrier, 38 S. C. R. 216. Executors' accounting: produce and rents and profits; application of six years bar: see Re Kirkpatrick, 3 O. R. 361, 10 P. R. 4; see also Ross. v. Robertson, 7 O. L. R. 413; Wilson v. Horne, 5 O. L. R. 323; Holmested and Langton, notes, p. 881.

51. Infancy does not prevent the running of the statute R. S. O. 1914, ch. 161, sec. 39, in favour of a medical practitioner in an action for malpractice: Miller v. Ryerson, 22 O. R. 369. An infant has 6 years after attaining his majority to bring an action for work and labour performed by him during his infancy; R. S. O. 1877, ch. 135, sec. 5 (R. S. O. 1914, ch. 147, sec. 5) in no way interferes with the right: Taylor v. Parnell, 43 U. C. R. 239; see Con. Rule 944; H. & L. notes, p. 1190; 1913 Rule 608.

52. To make the statute run in the defendant's favour his return must be open and of sufficiently long duration to have enabled the creditor, if he had known of it, to bring an action, though the creditor's knowledge is not essential: Boulton v. Langmuir, 24 A. R. 618. A foreign judgment being a mere contract debt, it is, under ordinary circumstances, barred in 6 years, but the plaintiff's remedy may be saved under this section: Stewart v. Guibord, 6 O. L. R. 262; see also Bugbee v. Clergue, 27 A. R. 96. The power given by Con. Rule 162 of service out of the jurisdiction does not affect the provisions of this section: see H. & L. notes, p. 299; see 1913 Rule 25. See Moor v. Balch, 1 O. W. R. 824; see Digest Ont. Case Law, vol. ii., col 4020.

54. Effect of written acknowledgment or part payment. What amounts to acknowledgment: Dig. Eng. Case Law, IX., col. 89. Conditional acknowledgment:

ib., col. 109. Signature of acknowledgment, *ib.*, col. 112. Proof of, *ib.*, col. 113. By and to whom made, *ib.*, col. 116. Payment on account. What amounts to: *ib.*, col. 125; and see sec. 55 (2) *infra*. By and to agents, etc.: *ib.*, col. 131. After action: *ib.*, col. 139. Proof of: *ib.*, col. 139. Agreements to waive the statute: *ib.*, col. 143. A debt barred by the statute and as to which the remedy is gone, is still a good consideration for a written promise to pay: La Touche v. La Touche, 3 H. & C. 577; Flight v. Reed, 1 H. & C. 703; Wright v. Wright, 6 P. R. 295; Kenzie v. Harper, 11 O. W. R. 408, 15 O. L. R. 583. Unconditional admission of debt with expression of present inability to pay: Cooper v. Kendall, 1909, 1 K. B. 405. Acknowledgment: taking notes: principal and interest before and after maturity: In re Williams, 7 O. L. R. 156, 3 O. W. R. 251. Effect on period of limitation of giving cheque prior thereto and payment thereof within same: Marreco v. Richardson, 1908, 2 Ch. 584. See Re Friend; Friend v. Friend, 1897, 2 Ch. 421.

55. In order to take a debt out of the statute there must be either (*a*) an acknowledgment of the debt from which a promise to pay may be implied; (*b*) an unconditional promise to pay the debt: Phillips v. Phillips, 1844, 3 Hare 281; or (*c*) a conditional promise to pay the debt and evidence that the condition has been fulfilled: Tanner v. Smart, 6 Barn. & Cress. 603. Since the case of Tanner v. Smart, 6 Barn. & Cress. 603, there has been a large number of cases, for short and well arranged summaries of which see Darby and Bosanquet's Statutes of Limitations, 2nd ed., p. 69; Chitty's Statutes, 5th ed. Limitation, p. 13 *et seq.*; Bicknell & Seager D. C. Act, p. 234 *et seq.*: see also Dig. Ont. Case Law, col. 4029-4034.

The following cases on acknowledgments given by or to executors: An acknowledgment of a debt not being a debt by specialty must be made to the creditor or his agent. A general acknowledgment of liability or an acknowledgment to a third person is not sufficient: Goodman v. Boyes, 17 A. R. 528; King v. Rogers, 31 O. R. 573; Beard v. Ketchum, 5 U. C. R. 114. An acknowledgment made and signed as testimony in an administration action has been held

sufficient (see R. S. O. 72, sec. 9): Roblin v. McMahon, 18 O. R. 219. The executor of a will of one of the joint makers of a promissory note proved the will after the debt had become barred. The executor gave a power of attorney (not knowing of the note) to the other joint maker "to do all things legally requisite for the carrying out of the provisions of the will." A letter written by the surviving maker after the execution of this power was held not to be an acknowledgment within this section. There was no trust to pay debts not any legal obligation on the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts: King v. Rogers, 31 O. R. 573. A letter from the executor to the holder of the note to the effect that the holder should look to the surviving maker was held not such a recognition as amounted to a promise to pay: King v. Rogers, 31 O. R. 573. An acknowledgment of indebtedness written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate and who does afterwards take them out is a sufficient acknowledgment: Robertson v. Burrill, 22 A. R. 356; but see Beard v. Ketchum, 5 U. C. R. 114. An admission by an executor, coupled with a statement that the debt could not be paid for want of assets, is not sufficient: Lampman v. Davis, 1 U. C. R. 179. There must be an express promise by the executor; an admission of the debt due is not sufficient: Watkins v. Washburn, 2 U. C. R. 291. An executor *de son tort* cannot by giving a confession of judgment, making payments or other acts, give a new start to the statute: Grant v. McDonald, 8 Gr. 468; Boatwright v. Boatwright, L. R. 17 Eq. 71; Ellis v. Ellis, 1905, 1 Ch. 613.

Part payment by the tenant for life of the simple contract debt of his testator and of interest thereon is sufficient to keep the debt alive, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator: Re Chant, Bird v. Godfrey, 1905, 2 Ch. 225. A promise to pay such balance of an original debt as may be found due on taking an account is a sufficient promise to take a case out of the Statute

of Limitations: Langrish v. Watts, 1903, 1 K. B. 636 An agent who has authority to pay a debt of his principal has authority to promise to pay it. From payment on account by an agent a promise to pay the balance will be inferred: Re Hale; Lilley v. Foad, 1899, 2 Ch. 107. Claim for payment for solicitor's services: acknowledgment: Segsworth v. De Cew, 10 O. W. R. 575. A dividend paid by an assignee under the usual voluntary assignment for benefit of creditors is not such a part payment as will take a debt otherwise barred out of the Statute of Limitations: Birkett v. Bisonette, 15 O. L. R. 93. Effect of payment by one joint and several maker of a promissory note as against the other: Paxton v. Smith, 18 O. R. 178. It is sufficient if the payment be made in respect of a larger debt, which is the one sued on: Boultbee v. Burke, 9 O. R. 80. Application for payment: St. John v. Rykert, 26 Gr. 249, 4 A. R. 213, 10 S. C. R. 278. Payment on note made by indorser: Slater v. Musgrave, 29 Gr. 392. Application of unappropriated payments: 14 O. R. 188. Acknowledgment by person holding power of attorney from executor: King v. Rogers, 1 O. L. R. 69. See also on this section: Halliwell v. Zwick, 13 O. W. R. 1. See Imperial Act, 9 Geo. IV. ch. 14, sec. 1, 19 & 20 Vic. ch. 97, sec. 13.

56. Before the section: see Sifton v. McCabe, 6 U. C. R. 394. See Imperial Act, 19 & 20 Vic. ch. 97, sec. 14. After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment on it out of his own moneys and on his own account was made by the surviving maker, who was the sole executor of his deceased co-maker: held not a sufficient acknowledgment as regarded the estate of the latter: Paxton v. Smith, 18 O. R. 178; see also King v. Rogers, 31 O. R. 573 *ante*. The provision as to executors being chargeable on an acknowledgment made by one, means "personally chargeable:" Re Hollingshead, 37 Ch. D. 651; Re Macdonald, 2 Ch. 181. An acknowledgment or part payment by a partner of a partnership debt during the partnership takes the debt out on the statute: Goodwin v. Parton, 41 L. T. 91, 42 L. T. 568; Watson v. Woodman, L. R. 20 Eq. 730. English rule as to payment and acknowledgment by one of co-obligors: Read v. Price, 1909, 1 K. B. 577, 2 K. B. 724.

58. Imperial Act, 9 Geo. IV. ch. 14, sec. 3 (Lord Tenterton's Act). Such an indorsement was formerly admissible as evidence of payment as a statement made by a deceased person against his interest: Briggs v. Wilson, D. M. & G. 12. Such an entry is still admissible, but not after the debt is barred: Newbound v. Smith, 29 Ch. D. 882. "Operation of this Act," that is in effect, the "Act of King James."

59. Cf. English Act, 9 Geo. IV. ch. 14, sec. 4: Baker v. Courage, 1910, 1 K. B. 56.

CHAPTER 76.

The Evidence Act.

Refer to Taylor on Evidence; Roscoe's Nisi Prius Evidence; Odger's Powell on Evidence (Can. notes); The Annual Practice; Bicknell and Kappele, Practical Statutes, pp. 93-98.

6. Review of changes in law of evidence removing disabilities and making persons, whether parties or not, both competent and compellable witnesses: R. v. Fox, 18 P. R. 343 at p. 350. This section has no reference to an action for criminal conversation which is within section 8 (*q.v.*): Fleury v. Campbell, 18 P. R. 110. Constitutionality: R. v. Bittle, 21 O. R. 605. A plaintiff or defendant called as a witness is not entitled to any other notice or to be subpœnaed differently from any other witness: Nash v. Bush, 5 C. P. 300. When a party to a suit calls the opposite party he is not necessarily concluded by his answers: Mair v. Cully, 10 U. C. R. 321. As to evidence in Master's office: see Con. Rule 669; H. & L. notes, p. 902; 1913 Rule 411.

7.—(1) Review of changes in law of evidence removing disabilities: Reg. v. Fox, 18 P. R. 343, at p. 350. In an action for a penalty under the Alien Labour Act it was held that the defendant could be examined for discovery before trial under the corresponding Dominion legislation (61 Vic. ch. 53): R. v. Fox, 18 P. R. 343. In an action for libel the defendant is

not excused from answering on the ground that the answers might tend to criminate him, and therefore, under Con. Rule 439 (1250), 1913 Rule 327, he is in the same position on examination for discovery. If he objects to answer on that ground his answer is within the protection of the section: Chambers v. Jaffray, 12 O. L. R. 377. Upon a summons calling on the defendant to shew cause why he should not be found guilty of corrupt practices under the Election Act, the only evidence taken was his own, and was given by him under the general objection that he should not be called on to incriminate himself. It was held that by sec. 189 of R. S. O 1897, ch. 9, the defendant having truly answered all questions put to him, was entitled to protection and could not be convicted on his own testimony. This section was held not to apply, because it was not a case where but for it "the witness would have been excused from answering: Re Sault Ste. Marie, 10 O. L. R. 85. Prior to the amendment of 1904 it was held that the president of a recreation club need not produce the membership roll, he having stated that its production might lead to a criminal prosecution against him: Atty. Gen. v. Toronto Junction Recreation Club, 7 O. L. R. 248; see also Weiser v. Heintzman, 15 P. R. 407; Hopkins v. Smith, 1 O. L. R. 659; and as to a corporation: see D'Ivry v. The World, 17 P. R. 387. But no privilege on the ground that his answers might incriminate him was allowed a plaintiff who was compelled to give the names of persons for whom he was trustee: Mills v. Mercer, 15 P. R. 276. Too late to take objection before Divisional Court: Millar v. McTaggart, 20 O. R. 617; see Con. Rule 455, 467; H. & L., pp. 665, 666, 679 (1913 Rule 343). As to corresponding Dominion legislation: see R. v. Clark, 3 O. L. R. 176; R. v. Hammond, 29 O. R. 211, where history and authorities are reviewed; R. v. Williams, 28 O. R. 583; R. v. Hendershott, 26 O. R. 678: see note to R. S. O. 1914, ch. 215, sec. 107.

7.—(2) "But for this section:" see application: Re Sault Ste. Marie, Lamont's Case, 10 O. L. R. 85; and see also Chambers v. Jaffray, 12 O. L. R. 377, noted *ante*.

8. An action for criminal conversation and alienating the affections of the plaintiff's wife is an action within

the meaning of this section, and the defendant cannot be compelled to submit to examination for discovery: Fleury v. Campbell, 18 P. R. 110; Mulholland v. Misener, 17 P. R. 132; Taylor v. Neil, 17 P. R. 134.

9. See Conolly v. Murrell, 14 P. R. 187; Williamson v. Merrill, 4 O. W. R. 528, 5 O. W. R. 64; H. & L., p. 665.

10. Expert evidence: limitation of number of witnesses: Galusha v. G. T. R., 1 O. W. N. 559. This section applies to the calling and examination of witnesses at trial and not, for example, to affidavits of medical experts filed on a lunacy application: Re Michael Fraser, 1 O. W. N. 1105. Effect of disregard of statute: Rice v. Sockett, 4 O. W. N. 397, 27 O. L. R. 410. See. Con. Rule 96, and H. & L., notes thereto, pp. 244 *et seq.*

11. See Costello v. Hunter, 12 O. R. 333; Yarwood v. Hart, 16 O. R. 23, 16 A. R. 532.

12. See Smith's Leading Cases: Price v. Earl of Torrington, II. 320, as to admission of entries by a deceased person in a book in accordance with his duty or office; Higham v. Ridgway, II. 327, as to admission of entries by deceased person contrary to his interest at the time. Proof of applicant's claim: H. & L., pp. 1188-1189. Nature of corroboration required: H. & L. notes, p. 1189. In an action on a promissory note against the personal representative of the maker the Judge was entitled to compare the signature with the signature on a registered mortgage, and to act on his own conclusion as to their identity: Thompson v. Thompson, 4 O. L. R. 442. A person interested as *cestui que trust* in a claim in question in a proceeding by or against executors is not debarred by his interest from giving material corroborative evidence: Batzold v. Upper, 4 O. L. R. 116. Method of keeping accounts: Wilson v. Howe, 5 O. L. R. 323. Solicitor and client: *donatio mortis causa*: Davis v. Walker, 5 O. L. R. 173. Matters occurring after death: no corroboration required: McClenaghan v. Perkins, 5 O. L. R. 129. Evidence of one not claiming adversely: Brown v. Brown, 8 O. L. R. 332. Corroboration by cheques, although not shewing on their face whether given for goods supplied or in respect of advances: In re Jelly, 6

O. L. R. 481. Corroborative evidence within the meaning of the enactment may (*semble*) be given by an interested party, as long as he is not the party obtaining the decision: In re Curry, 32 O. R. 150. Gift of chattel without delivery—joint property with survivorship: Schwent v. Roetter, 21 O. L. R. 112. Effect of section considered: McClenaghan v. Perkins, 5 O. L. R. 129. Each item in an account is an independent transaction requiring corroboration: Re Ross, 29 Gr. 385. The corroborating evidence need not be in itself sufficient to establish a case: Thompson v. Coulter, 34 S. C. R. 261. What amounts to sufficient corroboration; running account: see Wilson v. Howe, 5 O. L. R. 323. Corroboration in action against executors: Wilson v. Hare, 5 O. L. R. 323; Radford v. Macdonald, 18 A. R. 167; Green v. McLeod, 23 A. R. 676; Parker v. Parker, 32 U. C. C. P. 113; McGregor v. Currie, 5 O. W. N. 90, 25 O. W. R. 58. Instances of corroboration: see Curry v. Curry, 32 O. R. 150; McDonald v. McDonald, 33 S. C. R. 145; Green v. McLeod, 23 A. R. 676; Tucker v. McMahon, 1 O. R. 718; Little v. Hyslop, 4 O. W. N. 285; Schwent v. Roetter, 1 O. W. N. 749; 16 O. W. R. 5, 21 O. L. R. 112.

16.—(4) The provision seems to contemplate only the attendance of witnesses at trial and is not applicable to the examination of a party for discovery merely. A defendant resident out of Ontario cannot be compelled to attend under Con. Rule 447, 1913 Rule 328, for examination for discovery within Ontario; *aliter* where it is sought to examine a plaintiff: Lefurgey v. The Great West Land Co., 11 O. L. R. 617; see Lick v. Rivers, 1 O. L. R. 67; Meldrum v. Laidlaw, 5 O. W. R. 87. The section does not take away the power of the Court nor deprive the plaintiff of the right to examine witnesses by commission: McIntyre v. Fair, 6 P. R. 110; Stratford v. G. W. R., 6 P. R. 91. The term "witness" includes parties to the cause, as well as witnesses in the ordinary sense: Moffatt v. Prentice, 6 P. R. 33. A submission to arbitration made a rule of Court is a suit pending within the section: Elliott v Queen City Assurance Co., 6 P. R. 30. A defendant asking for an order for a subpœna to examine a plaintiff resident in Quebec need not shew that there is no cause

of action for the same matter pending there: Daly v. Robinson, 1 Ch. Ch. 271; but see McPherson v. McPherson, 3 Ch. Ch. 58, sec. 16 (6). The Court has power to grant a subpœna, though the evidence of the proposed witness is not intended to be used at the hearing of the cause: McKeichie v. Montgomery, 1 Ch. Ch. 225; see also Young v. O'Reilly, 24 U. C. R. 172.

16.—(6) As to suit pending in other jurisdiction: see McPherson v. McPherson, 3 Ch. Ch. 58; Daly v. Robinson, 1 Ch. Ch. 271.

19. History of section: R. v. Graves, 21 O. L. R. 329.

21. The books, indictments and records of the Court of General Sessions are public documents which everyone who is interested has a right to see. A defendant who has been tried and acquitted at sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain a fiat of the Attorney General therefor: Atty. Gen. v. Scully, 2 O. L. R. 315, 4 O. L. R. 394. Overruling in effect: R. v. Ivry, 24 C. P. 78; Hewitt v. Cane, 26 O. R. 133.

23. See Con. Rule 479, H. and L. notes, pp. 702, 703, referring to secs. 23, 26, 28, 41-49 (1913 Rule 274).

29. As to secs. 29, 30, 33, see Armour on Titles, 123-6, 138-9.

38. Con. Rule 516, H. and L. notes, pp. 726 to 728, 1913 Rule 291. Affidavits sworn by others than the persons mentioned, cannot be used: McEwan v. Boulton, 3 Ch. Ch. 63.

42. See Con. Rule 527, H. and L. notes, pp. 732, 733. Certified copy of registered probate not evidence: Barber v. McKay, 17 O. R. 562, 19 O. R. 50. Notwithstanding the Devolution of Estates Act, Letters Probate are only *prima facie* evidence of the testamentary capacity of the testator, so far as real estate is concerned: Sproule v. Watson, 23 A. R. 692. Effect of certified copy where original will registered, see R. S. O. 1914, ch. 124, secs. 56 (1*a*) (3), 22 (1), 10 and sec. 46 *post*.

46. Armour on Titles, pp. 110-117. As to effect of production of an original duplicate, the registration of which is certified: see R. S. O. 1914, c. 124, sec. 50.

50. Order of foreign Court: order in Ontario Court compelling attendance of an ex-officer of a corporation (who is a *quasi* party and stands for the person to be examined for discovery by the corporation defendant), may be made *ex parte*, where party refused to attend to be examined for discovery: Kirchoffer v. Imperial Loan, 7 O. L. R. 295.

51. Armour Real Property, p. 319.

54. See R. S. O. 1897, ch. 134, of which this was formerly sec. 3. What actions referred to by the section: see London Loan v. Smyth, 32 C. P. 530.

CHAPTER 77.

THE COMMISSIONERS FOR TAKING AFFIDAVITS ACT.

10. R. ex Rel. Milligan v. Harrison, 16 O. L. R. 475, 11 O W. R. 678.

CHAPTER 78.

THE COSTS OF DISTRESS ACT.

4. Bailiff distraining under mortgage: see 45 C. L. T. 126.

6. A judgment of the High Court on a case stated on a summons for treble the amount taken in excess, is a judgment in a criminal cause or matter within the meaning of the Judicature Act: Robson v. Biggar, 1908, 1 K. B. 672.

16.—(1) See Gormley v. Brophy Cains Limited, 10 O. W. R. 913, 11 O. W. R. 727.

CHAPTER 79.

The Judges' Orders Enforcement Act.

4. There is no right of appeal (except under this section), where Judge exercises special statutory powers. In such cases, he acts as *persona designata*: Re Paquette, 11 P. R. 463; Re Young, 14 P. R. 303. There is no right of appeal in respect of certificate of County Court Judge, upon audit of engineer's account, under Municipal Drainage Act: Re Moore and March, 1 O. W. N. 38, 14 O. W. R. 1194, 20 O. L. R. 67. Jurisdiction of Judge of the High Court as to appeals from County Judge's order under the Assignments and Preferences Act, R. S. O. 1914, ch. 134, sec. 25: Re Aaron Erb, 16 O. L. R. 594, 597, 12 O. W. R. 108. See Judicature Act, R. S. O. 1897, ch. 51, sec 74, H. & L. notes p. 131. Con. Rules 117, 761, 793, 835, H. & L. notes, pp. 255, 1001, 1016, 1043, 1906, 1913 Rules 3*g*, 533 *et seq.*

CHAPTER 80.

The Execution Act.

Refer to Mather, Sheriff Law; Anderson, Law of Execution; Elphinstone, Law of Judgments; Chaster, Executive Officers; Smith's Leading Cases, Semayne's Case, I 104, etc. The Annual Practice; The Annual County Court Practice; Bicknell and Kappele, Practical Statutes, pp. 328-333.

2.—(*a*) History of statutory right of seizure and sale: see (1) 13 Edw. I. ch. 18, (2) 29 Car. II, ch. 3, Statute of Frauds, R. S. O. 338, sec. 11, goods not bound till execution in Sheriff's hands (McIntosh v. McDonell, 4 O. S. 159) (3), 5 Geo. II. ch. 7, applied only to North American Colonies; made lands saleable as goods saleable in England (4) R. S. O. 1877, ch. 66.

2.—(*b*) The sheriff may be sued for improper sale: McNichol v. McPherson, 15 O. L. R. 393.

3. At Common Law, assets which could not be physically transferred were exempt from seizure, *e.g.*
   (*a*) Choses in action: Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541; Moore v. Roper, 35 S. C. R. 533 (exceptions now, see sec. 20).
   (*b*) Liquor licenses: Walsh v. Walper, 3 O. L. R. 158.
   (*c*) Trademarks: Gegg v. Bassett, 3 O. L. R. 263.
   (*d*) An interest requiring partition, *e.g.*, dowress: C. B. of Commerce v. Ralston, 4 O. L. R. 106.

   And by statute property exempt from seizure comprises:
   (*a*) Exemptions under this sec.: see Pickering v. Thompson, 24 O. L. R. 378; Field v. Hart, 22 A. R. 449.
   (*b*) Inchoate right of dower: see sec. 34 (2).
   (*c*) Interest of locatee and his wife before patent of free grant under Public Lands Act, R. S. O. 1914, ch. 28, sec. 45 (1): Beaty v. Finlayson, 27 O. R. 642.
   (*d*) Interest of patentee and his wife for 20 years after location, R. S. O. 1914, ch. 28, sec. 45 (2).

   An execution debtor can do as he pleases with the statutory exemptions, and the execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale: Field v. Hart, 22 A. R. 449. Tools and implements ordinarily used in the debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used: Wright v. Hollinshead, 23 A. R. 1. Right of widow administratrix to exemptions: Pickering v. Thompson, 2 O. W. N. 1361, 19 O. W. R. 697, 24 O. L. R. 378. Construction of exemptions under English Act, 51-2 Vict, ch. 21 sec. 4: Boyd v. Bilham, 1909, 1 K. B. 14. Meaning of the words "by law exempt from seizure," *e.g.* in R. S. O. 1914, ch. 134, sec. 8: see Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, at pp. 136-7. Where exemptions are burned, a judgment creditor cannot attach the insurance money payable in respect of them: Osler v. Muter, 19 A. R. 94.

6. Goods of a deceased husband exempt from seizure under the Execution Act are not, except as to funeral

and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of this section being to give the wife a parliamentary title thereto: Re Tatham, 2 O. L. R. 343. After death the right to exemptions vests in the widow: Pickering v. Thompson, 24 O. L. R. 378. This right is one to be exercised against the vendor: Pickering v. Thompson, 24 O. L. R. 378.

10. In England, lands bound on signing judgment, goods bound when execution in sheriff's hands, 29 Car. II. ch. 3, sec. 16, R. S. O. 1897, ch. 338, sec. 11. In Canada, lands and goods bound from delivery of writ to sheriff: 5 Geo. II., ch. 7; McIntosh v. McDonell, 4 O. S. 195; Aldjo v. Hollister, 5 O. S. 739; Burnham v. Simmons, 7 U. C. R. 196. The above now includes an equity of redemption (see sec. 17), formerly bound only from time of seizure: McDowell v. McDowell, 1 Ch. C. 140, at p. 144; Allan v. Place, 15 O. L. R. 476, at p. 486; see also Culloden v. McDowell, 17 U. C. R. 359; McDougall v. Waddell, 28 C. P. 191; Patterson v. McCarthy, 35 U. C. R. 14. Armour Titles, p. 171. On signing judgment or order execution may issue. No notice to debtor is necessary: Rossiter v. Toronto Ry., 15 O. L. R. 297. "Acquired in good faith:" knowledge of proceedings taken to protect a seizure is notice of the writ: McPherson v. Temiskaming, 2 O. W. N. 553, 854, 18 O. W. R. 319, 811. The Sheriff's right to seize partnership interest in land and goods, gives only right to debtor's interest in winding-up and gives no right to specific goods: Rennie v. Quebec Bank, 1 O. L. R. 103, 3 O. L. R. 541; C. P. R. v. Rat Portage, 10 O. L. R. 273; McPherson v. Temiskaming, 2 O. W. N. 553. Sale by sheriff of oil leases: these are not saleable as goods, but as incorporeal hereditaments, *profits à prendre*, to be sold as land: Can. Ry. Accident v. Williams, 1 O. W. N. 991. The licensee of Crown Timber has an interest exigible in execution. A *fi. fa.* lands will bind the standing timber, and a *fi. fa.* goods will bind it when cut: McPherson v. Temiskaming, 1912, A. C. 145. An unpatented mining claim is "lands," within the meaning of this Act: Clarkson v. Wishart, 24 O. W. R. 937 (P.C.); (1913), A. C. 828, and now see R. S. O. 1914, ch. 32, sec. 77 (5). A license under the Liquor License Act

cannot be seized by the Sheriff under a *fi. fa.* goods. Walsh v. Walper, 3 O. L. R. 158. The right of property in a registered specific trademark is not saleable by itself under an execution; if saleable at all, only as appurtenant to the business in which it has been used: Gegg v. Bassett, 3 O. L. R. 263. Purchase by person who has acquired rights of execution creditor: Steen v. Steen, 9 O. W. R. 65, 10 O. W. R 720. Further as to writs of *fi. fa.* see Con. Rules 843, 1016, H. & L. notes, pp. 1100, 1252, 1913 Rules 538 *et seq.* Sheriff's sale must always be preceded by actual seizure: Book v. Brooker, 41 S. C. R. 331. Mere mistakes or inadequacy of price will not invalidate sale: McNichol v. McPherson, 15 O. L. R. 393. Rules governing sales: see C. R. 875-882 and 1252, 1913 Rules 557-564. As to renewal of writs of *fi. fa.*, see Con. Rule 872, 1913 Rule 571. Writs other than *fi. fa.*, see H. & L. note p. 1125, 1147; also Con. Rue 911, 1913 Rule 590.

12. At common law, Sheriff could not seize or sell anything which could not be physically possessed or transferred: see Clarkson v. Wishart, 27 O. L. R. 70; and also S. C. in P. C., 24 O. W. R. 937; (1913), A. C. 828. Stock in a company whose head office is out of Ontario: Nickle v. Douglas, 35 U. C. R. 126, 37 U. C. R. 51. Sale of stock: interpleader: Brown v. Nelson, 10 P. R. 421. Stock held in a representative capacity: Robinson v. Grange, 18 U. C. R. 260. Assignment of stock: Morton v. Cowan, 25 O. R. 529; Brock v. Ruttan, 1 C. P. 218.

13. Copy of writ must accompany notice: Goodwin v. O. & P. Ry. Co., 22 U. C. R. 186. Sheriff must comply strictly with Act in seizing stock of incorporated company: Maloof v. Labad, 21 O. W. R. 575, 3 O. W. N. 796, 22 O. W. R. 99, 3 O. W. N. 1235.

15. What amounts to sufficient following of writ, demand and notice: In re Goodwin and O. & P. Ry. Co., 13 C. P. 254.

18. Seizure of patent: see Edwards v. Picard, 1909, 2 K. B. 903.

19. As to sale under execution of equity of redemption in shares prior to 1899: see Morton v. Cowan, 25 O. R.

529. Equity in a term: Chisholm v. Sheldon, 1 Gr. 108. Sale by Sheriff under *fi. fa.* against lands of the reversioner after a term of 1,000 years had been created by way of mortgage, carries with it the right to redeem the term: Chisholm v. Sheldon, 2 Gr. 178, 3 Gr. 655. Mortgages on leasehold, right of purchaser of equity at Sheriff's sale to redeem: McDonald v. Reynolds, 14 Gr. 691; Waters v. Shade, 2 Gr. 457. Sale of equity of redemption in a ship: Bethune v. Corbett, 18 U. C. R. 498; Scott v. Carveth, 20 U. C. R. 430. Sale of equity of redemption in chattels: Smith v. Cobourg, 3 P. R. 113; Squair v. Fortune, 18 U. C. R. 547; Swift v. Cobourg, 5 L. J. 253; Ross v. Simpson, 23 Gr. 552; see also Allan v. Place, 11 O. W. R. 238, 15 O. L. R. 476. See also Con. Rule 911; H. & L. notes, pp. 1158-9; 1913 Rule 590.

20. The right of a Sheriff to seize under a *fi. fa.* money or bank notes of an execution debtor, can only be exercised during the debtor's lifetime: Johnson v. Pickering, 1908, 1 K. B. 1. A chose in action is not bound by execution put in the Sheriff's hands, but only by seizure made thereunder: Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541. Insured's interest in a policy of insurance not a "security for money" within sec. 20: Re Asselin and Cleghorn: 6 O. L. R. 171. But a paid-up policy is: Canadian Mutual Loan v. Nisbet, 31 O. R. 562. Seizure of money paid to debtor: when property passes: Hall v. Hatch, 3 O. L. R. 147. Interest in mortgage assigned as security: Rumohr v. Marx, 3 O. R. 167. Sale of mortgagee's interest: Parke v. Riley, 3 E. & A. 215, 231; Lador v. Creighton, 9 C. P. 295. Money paid into Court: Calverley v. Smith, 3 L. J. 67. Money bond for conveyance of land: R. v. Potter, 10 C. P. 39. Fire policy after loss is a security: Bank of Montreal v. McTavish, 13 Gr. 395. Money made under execution at suit of A. cannot be detained by Sheriff under an execution against A.: Sharpe v. Leitch, 2 C. L. J. 132. See Armour on Titles, p. 394.

24. The right of a Sheriff to an interpleader order depends either on his having the subject-matter of the interpleader in his possession or having the right under an execution accompanied with the intention to take possession: Keenan v. Osborne, 7

O. L. R. 134. Interpleader by Sheriff: see H. & L., p. 1309, 1312-1320, 1324, 1325, 1327, Con. Rules 1102 to 1128; 1913 Rules 625 *et seq.*

25. See H. & L. p. 1147, Con. Rule 911, 1913 Rule 590: see also Guthrie's decisions on the Registry Act, 1897, p. 9. Where an execution debtor who was a mortgagee of lands had assigned the mortgage, although the assignment was not registered until after the notice under this section, it was held that the mortgage could not be seized under this section: the Sheriff could not interplead, but must wait until the creditors had obtained a declaration that the assignment was void: Keenan v. Osborne, 7 O. L. R. 135.

30. As to equitable execution: see Thompson v. Gill, 1903, 1 K. B. at p. 795; see also C. R. 1016-1020. Receiver: see R. S. O. 1914, ch. 56, sec. 17 and notes. The enactment is declaratory. McEvoy v. Clune, 21 Gr. 515; see Bank of U. C. v. Brougn, 2 E. & A. 95; Lowell v. Bank of U. C. 10 Gr. 57. As to sales under *fi. fa.* lands: see Con. Rules 875-882, 911, H. & L. notes pp. 1127-1130, 1158-9; 1913 Rules 557 *et seq.*

31. This applies only to simple cases, and not where special equitable procedure required to realize: Heward v. Wolfenden, 14 Gr. 188, at p. 190. Receiver by way of equitable execution: see R. S. O. 1914, ch. 56, sec. 17; ch. 81, sec. 25 notes. Can an equity of redemption be sold in a judgment on covenant in the mortgage in question: Van Norman v. McCarty, 20 C. P. 42. Mortgage on part of land: Sale under different executions, in different rights: Samis v. Ireland, 28 C. P. 478, 4 A. R. 118. Equity in lands which lie in different counties: Heward v. Wolfenden, 14 Gr. 188. Execution prior to mortgages: Bank of Montreal v. Thompson, 9 Gr. 51, 3 E. & A. 239. Mortgage by deed absolute in form: McCaber v. Thompson, 6 Gr. 175; McDonald v. McDonnell, 2 E. & A. 393. Where the interest of the debtor was a life estate which he had conveyed by mortgage by deed absolute in form: Fitzgibbon v. Duggan, 11 Gr. 188. Mortgage by devisees: see Johnston v. Sowden, 19 Gr. 224. A Right to dower in an equity of redemption is not, before assignment, exigible in execution under a *fi.*

fa., nor is the share of one of several tenants in common in an equity of redemption. In such a case an execution creditor seeking equitable execution should proceed under the Rules of Court, and not by action: Bank of Commerce v. Rolston, 4 O. L. R. 106. Interest in mortgage assigned as security: Rumohr v. Marx, 3 O. R. 167. Where lands are subject to charge for maintenance, the interest of the persons beneficially interested therein, subject to the charge, is saleable under execution: Rathbun v. Culbertson, 22 G. R. 465. Where there are two mortgages, no sale can be had: Kerr v. Styles, 26 Gr. 309; Donovan v. Bacon, 16 Gr. 472; Re Keenan, 3 Ch. Ch. 285; Shaw v. Tims, 19 Gr. 496; McDonald v. Reynolds, 14 Gr. 691; unless the mortgages cover different portions of property: Rathbun v. Culbertson, 22 Gr. 465. Where a mortgagee bought an equity of redemption at a Sheriff's sale (the sale being invalid on a technical ground), and went in *bona fide*, and dealt with the property for seventeen years, an action to redeem was dismissed as inequitable: Skae v. Chapman, 21 Gr. 534. Invalid sale: see Howes v. Lee, 17 Gr. 459; Lee v. Howes, 30 U. C. R. 292. Where a mortgagee purchased under an execution, and the sale proved inoperative, it was held that he could not add the amount paid to his mortgage debt: Paul v. Ferguson, 14 Gr. 230. Equity of redemption in leasehold: McDonald v. Reynolds, 14 Gr. 691. Mortgage prior to judgment: Pegge v. Metcalfe, 5 Gr. 628. Partnership real eastate: death of one partner after judgment and before execution: Baxter v. Turnbull, 2 Gr. 521. Judgment against executors of mortgagor: Walton v. Bernard, 2 Gr. 344. Equity of redemption in a term of 1,000 years: Chisholm v. Sheldon, 1 Gr. 108, 2 Gr. 178, 3 Gr. 655. Sale under mortgage after sale of equity: Fisken v. McMullen, 12 C. P. 85: see Armour on Titles, p. 392; R. S. O. 1897, ch. 136, sec. 76; R. S. O. 1914, ch. 124, secs. 62, 67. Deeds of lands sold under Court process must be registered within 6 months to retain their priority: R. S. O. 1897, ch. 136, sec. 90; R. S. O. 1914, ch. 124, sec. 78.

32. See R. S. O. 1897, ch. 136, secs. 76, 83; R. S. O. 1914, ch. 124, secs. 62, 67, and cases cited.

33. See Armour, Real Property, p. 208; Armour on Titles, p. 393. See as to operation of statutory provisions, where equity purchased by devisees of mortgagee: Woodruff v. Mills, 20 U. C. R. 51.

34. A right to dower in an equity of redemption before assignment is not exigible under a writ of *fi. fa.*: Bank of Commerce v. Rolston, 4 O. L. R. 106; McAnnany v. Turnbull, 10 Gr. 298. As to dower see also Allen v. Edinburgh Life, 25 Gr. 306: Douglas v. Hutchinson, 12 A. R. 110. The equitable interest of an assignee from the purchaser under a contract for sale of lands, is exigible under *fi. fa.* against lands of assignee, and the purchaser is entitled to specific performance of the contract: Ward v. Archer, 24 O. R. 650. Lands vested in trustee; executions against *cestui que trust*: Trusts Corporation v. Medland, 22 O. R. 539. Interest of certificated holder of mining claim before patent: Re Clarkson and Wishart, 27 O. L. R. 70; and in P. C., 24 O. W. R. 937; (1913), A. C. 828; and see R. S. O. 1914, ch. 32, sec. 77 (5). Execution binding on interest of Crown timber licensee: Glenwood Lumber Co. v. Phillips, 1904, A. C. 408. Seizure of rights of timber licensee: McPherson v. Temiscaming, 20 O. W. R. 13, 23 O. W. R. 458 (P.C.), 1912, A. C. 145, and see note to sec. 10 *ante*. Reversionary interest in fee, subject to a term for 1,000 years: Wightman v. Fields, 19 Gr. 559. Interest of husband in his wife's freehold: Moffatt v. Grover, 4 C. P. 402. See Armour on Titles, pp. 180, 390. Charging estate of infant in reversionary interest, with payment for infant's maintenance: Re Badger, 1913, 1 Ch. 385.

36. The lands of a testator or intestate are liable to be sold only for his debt. Where the execution creditors were never creditors of the deceased, a sale cannot be supported: Freed v. Orr, 6 A. R. 690. Heirs impeaching sale: McEvoy v. Clune, 21 Gr. 515. Execution against executor, testator's debt, heirs bound: Lovell v. Gibson, 19 Gr. 280. Lands as assets in the hands of executors and administrators: see Digest Ont. Case Law, Vol. II., cols. 2754, 2755, 2756: see also Armour, Real Property, p. 103.

37. Formerly 3 Edw. VII., ch. 19, sec. 471: see Con. Rule 843, 1913 Rule 538.

CHAPTER 81.

The Creditors Relief Act.

Refer to Bicknell and Kappele, Practical Statutes, pp. 430, 431.

4. The Act dates from 1880. Priority: see H. & L. notes, p. 961. Notice to execution creditors in foreclosure: see Con. Rules 393, 750, H. & L. notes, pp. 603, 980; 1913 Rule 489. Distribution of residue of purchase money after sale in mortgage action: Con. Rule 755; H. & L. notes, p. 987; 1913 Rule 479.

5. The provisions as to attachment must be construed to refer only to a case where the facts would entitle the Sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under sub-sec. 1. To entitle him to such an order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick: Re Thompson, 17 P. R. 109: see Con. Rule 911; H. & L. notes, p. 1147 and p. 1160 (as to money realized under equitable execution); Con. Rule 914; H. & L. notes, p. 1164, and Con. Rule 921; H. & L. notes, p. 1169 (1913 Rules, 590, 594, 599).

6.—(1) "Forthwith" in this section means "without any delay," and even if equivalent to "within a reasonable time," a delay of 15 days was not reasonable: Maxwell v. Scarfe, 18 O. R. 529. The Act is intended to abolish priority, not to alter the legal effect of the executions themselves or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy: McDonagh v. Jephson, 16 A. R. 607. The provisions of the Act are not to be extended to cases not actually provided for by the Act: McLean v. Allen, 14 P. R. 84. The fact that the Crown is the debtor, will not stand in the way of the Court going as far as it can, without assuming to direct what shall be done by the Crown, toward making

such an asset of a judgment debtor available to satisfy the claim of his judgment creditor: Steward v. Jones, 19 P. R. 227.

6.—(4) Execution creditors' rights under this section against an assignee for the benefit of creditors, cannot arise, and the section does not come into play so as to override R. S. O. 1914, ch. 134, sec. 14, at least until the execution creditors have a judgment in their favour in an interpleader or some other binding way: Sykes v. Soper, 29 O. L. R. 193, 4 O. W. N. 1554. Construction of section, status of assignee: Re Henderson Roller Bearings, 22 O. L. R. 306, 24 O. L. R. 356. Aff. *sub nom*: Martin v. Fowler, 46 S. C. R. 119. Reference of contesting creditors: Soper v. Palos, 24 O. W. R. 526, 4 O. W. N. 1258. Rights of creditors in interpleader proceedings: Bank of Hamilton v. Durrell, 15 A. R. 500; Levy v. Davies, 12 P. R. 93; Reid v. Gowans, 13 A. R. 501. Claim under chattel mortgage: Interpleader: execution subsequently obtained: Wait v. Sager, 14 P. R. 347: see Con. Rule 1103; H. & L. notes, p. 1318 (1913 Rule 625).

6.—(10) Adjustment of rights of execution creditors and under registered judgment for alimony: Abbott v. Abbott, 3 O. W. N. 683, 21 O. W. R. 281.

8. Where a prior creditor has filed a Sheriff's certificate under this section, it is not necessary for a subsequent creditor to do so. Semble, that the provisions of the section are directory only, and also that it is not open to another creditor to question the sufficiency of the affidavit of claim, where the execution debtor does not object: Re Secord and Mowat, 12 O. L. R. 511.

11. Although a creditor who does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the moneys realized and entitled to contest the certificates of claim of other creditors: Bank of Hamilton v. Aitken, 20 A. R. 616. An order made at the instance of a contesting creditor, setting aside a judgment and execution is appealable: see H. & L. notes, p. 1042, and cases cited there.

24. Disposition by Sheriff of surplus proceeds of mortgagee's sale under power: Re Ferguson and Hill, 4 O. W. N. 1339, 24 O. W. R. 634. Payment to Sheriff of fund, in Court: Campbell v. Croil, 8 O. W. R. 67: see Dawson v. Moffatt, 11 O. R. 484.

25. Receiver by way of equitable execution: Mfrs. Lumber Co. v. Pigeon, 2 O. W. N. 79, 341, 1437; 17 O. W. R. 9, 691; 19 O. W. R. 818; 22 O. L. R. 36, 378. Kelly v. Ottawa Journal, 14 O. W. R. 934. See also notes to R. S. O. 1912, ch. 56, sec. 17, and to ch. 80, secs. 30, 31.

26.—(4) No power by staying proceedings to enable creditors to rank, to interfere with the Sheriff's proceeding upon writs of *fi. fa.* regularly in his hands: Mason v. Cooper, 15 P. R. 418.

27. Two writs of execution were placed in the Sheriff's hands on the same day, no further steps being taken by the first, but the second directing the Sheriff to advertise and sell lands, which he did, under the second writ. It was held that the advertisement was in law the seizure, and the second creditor was entitled to payment in full of his taxed costs and costs of execution: McGuinness v. McGuinness, 3 O. L. R. 79.

30. Creditors whose executions are placed in the Sheriff's hands after the execution debtor has made assignment for benefit of creditors, are not entitled to share in the proceeds of goods seized by the Sheriff under prior executions before the assignment was made, the proceeds being insufficient to pay these prior executions: Roach v. McLaughlin, 19 A. R. 496; Breithaupt v. Marr, 20 A. R. 689.

33. By Section 30 of the Assignments Act, R. S. O. 1897, ch. 147, an assignee is enabled to take the proceedings authorized by this section: Re Simpson and Clafferty, 18 P. R. 402: see R. S. O. 1914, ch. 134, sec. 34.

39. An assignee for benefit of creditors having taken under R. S. O. 147, sec. 30, the proceedings authorized under sec. 33 of this Act; it was held that there was no appeal from the order of a County Court

Judge, dismissing an application by a claimant to vary the scheme of distribution made by the assignee, the Judge being *persona designata*: Re Simpson and Clafferty, 18 P. R. 402.

CHAPTER 82.

The Absconding Debtors' Act.

Refer to Sinclair, Absconding Debtors (Can.); Holmested and Langton, Judicature Act and Rules, 3rd edition; Bicknell and Kappele, Practical Statutes, pp. 264-266.

3.—(1) See H. & L. p. 1277 *et seq.*, where section fully noted. The Court has no right to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction, unless he has appeared to the process or agreed to submit to the jurisdiction: Sirdar Gurdyal Singh v. Rajah of Faridkote (1894), A. C. 670; Emanuel v. Symon (1908), 1 K. B. 302. If there is property within the jurisdiction: see 1913 Rule 25 (*h*). What amounts to being "resident." Consideration of acts indicating an intention to acquire domicile or residence by foreigner, who comes into the jurisdiction and then departs: Emperor of Russia v. Proskouriakoff, 18 Man. L. R. 56. "Served with process." Consideration of position where tort committed within Ontario by tort-feasor, who has property within jurisdiction: Anderson v. Nobels Explosive Co., 12 O. L. R. 644.

3.—(2) Con. Rule 1058. The proceedings are those in an ordinary action: Bank of Hamilton v. Aitken, 20 O. R., at p. 626.

4. See H. & L., p. 1277 *et seq.* Where defendant has left the jurisdiction, as to writ: see Con. Rule 162 *et seq.*, 1913 Rules, 25 *et seq.* Form of affidavit for order of attachment: H. & L. Forms, 1214, 1215. What must appear in the affidavit, and the indebtedness for which attachment may issue: see H. & L., pp. 1278-9. Corroboration required: see Yolles v. Cohen, 4 O. W. N. 819, 24 O. W. R. 66. Application for order *ex parte*: see Con. Rules 42, 45, 1913

Rules, 208, 209. Where order granted by County Court Judge, who may set it aside: see Disher v. Disher, 12 P. R. 518; H. & L., p. 1279-80. Form of order: see H. & L. Forms, 1216.

7. Con. Rule 1061.

8. Effect of attachment: see H. & L., p. 1280-81. Application of Creditors' Relief Act: see secs. 16-18 *post*.

13. Letting in the defendant to defend: see H. & L. notes, p. 1282, especially as to former law.

18. See H. & L. notes, p. 1281, as to former effect of Creditors' Relief Act.

19. Order directing third persons to deliver up debtor's property: see Bunting v. Williams, 16 P. R. 43.

CHAPTER 83.

Fraudulent Debtors' Arrest Act.

Refer to Holmested and Langton's Judicature Act and Rules, 3rd edition (especially at pages indicated); Bicknell and Kappele, Practical Statutes, pp. 275-278.

3.—(1) "Person liable to arrest:" see note to sec. 12 *infra*, as to persons permanently and temporarily exempt. As to arrest of non-resident temporarily within the jurisdiction in respect of a debt contracted in his own domicile: see Elgie v. Butt, 26 A. R. 13; Butler v. Rosenfeldt, 8 P. R. 175. As to debt contracted in Ontario, while formerly resident: Kersteman v. MacLellan, 10 P. R. 122; Scane v. Coffey, 15 P. R. 112. The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for order for arrest, but it is a question of fact, and the Judge may infer it from the facts and circumstances of the affidavits: Beam v. Beatty, 2 O. L. R. 362. Intent to leave territory: intent to defraud: Grant v. Reiner, 3 W. L. R. 506; see also Phair v. Phair, 19 P. R. 67; Fleming v. McCutcheon, 8 O. W. R. 368.

The former conduct of the defendant in regard to the same debt is a fact or circumstance to be considered on the question of intent: Beam v. Beatty, 2 O. L. R. 362. Former sec. R. S. O. 1897, ch. 80, sec. 1: see H. & L., p. 1256-7, 1268-71, 1276. The affidavit may be sworn before the plaintiff's solicitor: see 1913 Rule 297. Form of order: see H. & L., Form 1183. Defective affidavit: Laing v. Slingerland, 12 P. R. 366; Runciman v. Armstrong, 2 C. L. J. 165. By 1913 Rule 208 the Master-in-Chambers cannot dispose of an application for arrest. Former practice as to *ca. sa.* and *ne exeat*: see H. & L. p. 1255.

3.—(2) Order for arrest: Bank of Montreal v. Partridge, 3 O. W. N. 149, 20 O. W. R. 206.

4. Con. Rule 1023; Holmested & Langton, p. 1258, as to what needed for second order.

5. R. S. O. ch. 80, sec. 9 and 10.

6. Con. Rule 1022; H. & L., p. 1258. As to proceedings against a defendant in alimony about to quit Ontario: see also Judicature Act, R. S. O. 1897, ch. 51, sec. 34: see H. & L., p. 29.

7. Con. Rule 1024. The form of order given as form 135 in the appendix of the Con. Rules, H. & L. forms 1183, appears to be directed to the Sheriff of whatever county the defendant may be found in. This section provides for concurrent or duplicate orders. When a writ of *ca. sa.* has expired by lapse of time, a concurrent writ cannot issue: Merchants Bank v. Sussex, 4 O. L. R. 524.

8. Con. Rule 1026.

9. Con. Rule 1025; H. & L., p. 1259.

10. Con. Rule 1027; H. & L., p. 1260.

11. Con. Rule 1028.

12. Certain persons are permanently exempt from arrest *e.g.*, the members of the Royal family and their households, Ambassadors and their households,

Judges, married women (sec. 14). Certain others are temporarily exempt, *e.g.*, members of the Legislature (see R. S. O. 1914, ch. 11, sec. 47), members of the Parliament of Canada, Barristers on Circuit, Solicitors attending Court, bail, etc: see Archibald's Practice, and H. & L. notes, p. 1256-7. R. S. O. 1897, ch, 80, sec. 4.

13. R. S. O. 1897, ch. 80, sec. 5. See Con. Rule 853; H. & L. notes, pp. 1105-1107; and cases there cited as to when non-payment of money may be punishable by attachment. See also Fawkes v. Griffin, 18 P. R. 48, where a receiver was liable to attachment for disobeying the order of the Court as to payment of moneys. See 1913 Rule 545.

14. R. S. O. 1897, ch. 80, sec. 6. An order may be made for the commitment of a married woman to gaol for refusal to attend for examination as a judgment debtor: Watson v. Ontario Supply Co., 14 P. R. 96. See R. S. O. 1897, ch. 163, sec. 3 (2); R. S. O. 1914, ch. 149, sec. 4 (2); Con. Rule 900; H. & L. notes, pp. 1136-7; 1913 Rule 580. It seems that the freedom from arrest given to married women by this section continues in favour of widows: Doull v. Doelle, 4 O. W. R. 525, 10 O. L. R. 411.

15. Where an order for arrest is made on materials which justify it, although the defendant may be discharged from custody under it upon fresh affidavits, the Judge may, in his discretion, impose terms of bringing no action, and may withhold costs: Sullivan v. Allen, 1 O. L. R. 53. Con. Rule. 1036; H. & L., p. 1263. Form of Bond: H. & L. Forms, 1186. Allowance of Bond: sec. 19, *post*.

16. Con. Rule 1037 (1); H. & L., p. 1264. Forms: see H. & L., forms 1186-1188.

17. Con. Rule 1038.

18. Con. Rule 1039.

19. Con. Rule 1040; H. & L., p. 1265.

20. Con. Rule 1041; H. & L., p. 1265.

21. Con. Rule 1042, 1043.

22. Con. Rule 1044 (1); H. & L., p. 1266. Delivery of statement of claim: see Winch v. Traviss, 18 P. R. 102.

23. Con. Rule 1045; H. & L., p. 1266-7.

24. Con. Rule 1046; H. & L., p. 1267.

25. Con. Rule 1047; H. & L., p. 1268-71. The right to make a motion to be discharged from custody on the merits, being founded on Con. Rule 1047, which itself is founded on a succession of statutes, is entirely confined to the case of an order for arrest made before judgment, and does not extend to a *ca. sa.*, unless there has been concealment or perversion of material facts: Kidd v. O'Connor, 43 U. C. R. 193; Bank of Montreal v. Campbell, 2 U. C. L. J. N. S. 18; Gossling v. McBride, 17 P. R. 585; Merchants Bank v. Sussex, 4 O. L. R. 524. The debtor in such a case can only be discharged under this Act: see H. & L. notes, pp. 1273 to 1276. An appeal lies to the undoubted jurisdiction of the Court to set aside in its discretion orders made by the wilful concealment or perversion of material facts: Merchants Bank v. Sussex, 4 O. L. R. 524. Appeal on new material from the discretion of the Judge who made the order in such application having for its object the setting aside of the order and writ must fail: Damar v. Busby, 5 P. R. 356 at p. 389; Merchants Bank v. Sussex, 4 O. L. R. 524. Where defendant was arrested under an order in the nature of a *ca. re.* and was released by giving bail by deposit of a sum of money with the Sheriff, he had not thereby waived his right to relief under C. R. 1047, and the material filed being such that the order should not have been made, the sum deposited was ordered to be returned to him: Adams v. Sutherland, 10 O. L. R. 645. Appeal: Onus: Beam v. Beatty, 2 O. L. R. 362. What is necessary to succeed in action for malicious arrest under civil process: Fichet v. Watson, 22 O. L. R. 40.

26. Con. Rule 1048; H. & L., p. 1271.

27. Con. Rule 1049, 1050; H. & L., p. 1272, 1273.

28.—(1), (2) R. S. O. 1897, ch. 80, sec. 8.

28—(3) Con. Rule 874; H. & L., p. 1126. Where a debtor is in custody under a *Ca. Sa.* the Court cannot make an order for his discharge, except under the Act: Gossling v. McBride, 17 P. R. 585. See provisions of this Act for discharge of debtor from custody, secs. 51-58 *post*. Assignment for benefit of creditors: see McEachern v. Gordon, 18 P. R. 459. A concurrent writ of *ca. sa.* cannot be issued after the original writ with which it is concurrent has expired by a lapse of time: see sec. 7. It was held that attachment lies against a receiver for default in compliance with an order to pay money into Court. This was not for the purpose of recovering or enforcing payment of a civil debt, but to punish an officer of the Court who had disobeyed its order. A specific order should be made to pay over the balance: Fawkes v. Griffin, 18 P. R. 48.

29. Con. Rule 1052; H. & L., p. 1274: see Proctor v. McKenzie, 11 A. R. 846.

30. Con. Rule 1053; H. & L., p. 1275.

31. Con. Rule 1054.

32. Con. Rule 1055; H. & L., p. 1275.

33. Con. Rule 1029. "Convenient house" to be selected by sheriff now: H. & L., p. 1260.

34. R. S. O. 1897, ch. 80, sec. 13.

35. Dealing with bond: Should remain on the records of the Court and in proper case an *exoneratur* entered thereon: Beam v. Beatty, 2 O. L. R. 362: Con. Rule 1030; H. & L., p. 1260.

36. R. S. O. 1897, ch. 80, sec. 15.

37. R. S. O. 1897, ch. 80, sec. 16.

38. R. S. O. 1897, ch. 80, sec. 17.

39. R. S. O. 1897, ch. 80, sec. 18.

40. R. S. O. 1897, ch. 80, sec. 19.

41. R. S. O. 1897, ch. 80, sec. 21, Am.

42. R. S. O. 1897, ch. 80, secs. 22, 23.

43. R. S. O. 1897, ch. 80, sec. 24; Con. Rules 1031, 1032; H. & L., pp. 1261, 1262. Form of assignment of bond: H. & L. forms, 1185.

44. Con. Rule 1033; H. & L., p. 1262: see 1913 Rule 574.

45. Con. Rule 1035: see 4 Anne, ch. 16, sec. 20; H. & L., p. 1263.

47. R. S. O. 1897, ch. 80, sec. 25.

48. R. S. O. 1897, ch. 80, secs. 26, 27.

49. R. S. O. 1897, ch. 80, secs. 30-31.

50. R. S. O. 1897, ch. 80, sec. 32.

51. R. S. O. 1897, ch. 81, sec. 8. A defendant arrested and imprisoned under a *ca. sa.* is a debtor in close custody under this Act: Hay v. Paterson, 11 P. R. 114. *Supersedeas*: see Wheatley v. Sharpe, 8 P. R. 307.

52. R. S. O. 1897, ch. 81, sec. 8.

53. R. S. O. 1897, ch. 81, sec. 9. The expression "if the matter thereof is deemed satisfactory," referring to the examination of the debtor means "if he fully and credibly gives the information called for by *viva voce* questions." The object of the statute is to test the verity of the debtor, and if it truly appears that his affidavit is correct he should be discharged from custody, although his manner of dealing with his property may have been unsatisfactory, for example, by having fraudulently disposed of his property: Peoples Loan v. Dale, 18 P. R. 338; McDougall v. McKinnon, 9 O. W. R. 689; Wallis v.

Harper & Gibson, 3 P. R. 50. It is the duty of the debtor to give information. It is not enough to say that he does not know, or does not remember, if he have the means at hand to qualify himself to explain: Foster v. Van Wormer, 2 P. R. 597. An order of a County Judge discharging a defendant from arrest under *ca. sa.*, is not in its nature final, and is not appealable: Gallagher v. Gallagher, 31 O. R. 172.

54. R. S. O. 1897, ch. 81, sec. 11.

55. R. S. O. 1897, ch. 81, sec. 12.

56. R. S. O. 1897, ch. 81, sec. 13. Attachment: release of debtor by mistake of gaoler without order: Court has no jurisdiction to allow a further writ of attachment to issue against him for the same offence: Church's Trustees v. Hibbard, 1902, 2 Ch. 784.

57. R. S. O. 1897, ch. 81, sec. 14.

58. Con. Rule 899; H. & L., p. 1135.

60. R. S. O. 1897, ch. 81, sec. 15. Forms prescribed by the former Rules 874, 899, 1021-1057: see Order for arrest (Con. Rule 1021); H. & L., form 1183. Bail to Sheriff (Con. Rule 1023); H. & L., form 1184. Assignment of bail bond (Con. Rule 1031; H. & L., form 1185. Security in action by defendant (Con. Rule 1036); H. & L. form 1186. Form of bond and affidavits: Forms 200, 201, 202; H. & L. forms 1186-1188.

CHAPTER 84.

The Ontario Habeas Corpus Act.

2. The Supreme Court of Ontario has no jurisdiction to issue a writ of *habeas corpus* directed to a person who is outside the jurisdiction of the Court: R. v. Pinckney, 1904, 2 K. B. 84. A person confined or restrained of his liberty is limited to one writ of *habeas corpus* to be granted by a Judge of the Supreme Court, returnable before himself or another Judge in Chambers or a Divisional Court, with a right of appeal under sec. 8, which is final; and, where no such appeal is taken, the judgment which might have been appealed becomes final, and may be pleaded as *res judicata*: Taylor v. Scott, 30 O. R. 475; Re Harper, 23 O. R. 63. See H. & L., notes, pp. 40-41, 122 Con. Rule 366; H. & L. notes, p. 572; 1913 Rule 207. A "Court of record" means the Superior Courts of record, and does not include a Magistrate's Court: R. v. Gibson, 29 O. R. 660. On the return to a *habeas corpus* where warrant shews jurisdiction, a Judge cannot try on affidavit evidence the question where the alleged offence was committed: R. v. Defries, 25 O. R. 645. It is a fatal objection to a writ if the prisoner is in custody by virtue of a conviction or order of a Court of record: R. v. St. Denis, 8 P. R. 16; R. v. Murray, 28 O. R. 549. In such case a writ should not issue, but if it does, the prisoner should be remanded to gaol. His remedy, if any, is by way of review on a reserved case: R. v. Harrison, 10 O. W. R. 35. Where the defendant was in custody under a writ of attachment and a motion was pending for his discharge on the return of a writ of *habeas corpus*, a fiat or order that he be brought before the Court for the purpose of moving in person for his discharge from custody was refused, for, if the sheriff obeyed such an order (which he would not be bound to do), the defendant would not be in proper and legal custody: Roberts v. Donovan, 16 P. R. 457. An order made by a Judge of a County Court in Chambers for the commitment to close custody of a party to an action for default of appearance to be re-examined as a judgment debtor is "process"

within the exception in the section. A writ of *habeas corpus* granted was quashed as improvidently issued: Re Anderson and Vanstone, 16 P. R. 243. A warrant is "process:" Re Stickney, 13 O. W. R. 1203. If a prisoner, who has applied for a writ of *habeas corpus*, escapes after the issue of such writ and pending the argument on its return, and thus puts an end to his detention, he waives all right which he might have had under the writ, and no order can afterwards be made for his release, even though he afterwards come into the custody of the same Sheriff. The Court is not precluded from granting him another writ when there has not been an adjudication on the merits: Re Bartells, 15 O. L. R. 205. Application to Divisional Court for second writ: R. v. Miller, 14 O. W. R. 202, 19 O. L. R. 125, 288. Issue of second writ: R. v. Robinson, 10 O. W. R. 338; Re Bartells, 15 O. L. R. 205. Power of Court to award costs to Crown: R. v. Leach, 12 O. W. R. 1016, 1026, 13 O. W. R. 86, 17 O. L. R. 643 at 670. Application of Act on appeals under Liquor License Act: R. v. Leach, 21 O. W. R. 919. Jurisdiction of Divisional Court: Liquor License appeals: see Re Harper, 23 O. R. 63, Re Teasdale, 20 O. L. R. 382; R. v. Graves, 1 O. W. N. 973. Security for costs may be ordered in *habeas corpus* proceedings and may cover past as well as future costs: Re Frederick Kenna, 4 O. W. N. 1395, 5 O. W. N. 40, 25 O. W. R. 35. Power of Judges of Supreme Court of Canada to issue writs of *habeas corpus*, see Re Sproule, 11 S. C. R. 140; Re Trepanier, 12 S. C. R. 111. Jurisdiction of Supreme Court of Canada as to *habeas corpus* in criminal matters: Re Boucher, Cas. Dig. 180. See also Re Smart Infants, 16 S. C. R. 396; Ex p. James v. Macdonald, 27 S. C. R. 683; Re Lazier, 29 S. C. R. 630. As to *habeas corpus* generally: see Dig. Ont. Case Law, col. 2995, 3004.

6. The very language of this section would seem to require, when papers have been returned pursuant to the *certiorari* that the Court should look into them, and if it finds the conviction bad and insufficient to justify the commitment or the evidence and depositions inadequate to sustain the conviction, order the discharge of the prisoner. In England the return of a conviction, regular in form and on its face valid

and sufficient, is, unless there be a question of jurisdiction, a conclusive answer to a motion for discharge on *habeas corpus*: R. v. Farrell, 10 O. W. R. 791, 15 O. L. R. 100. On the return of *habeas corpus* for the discharge of a prisoner under a conviction, regular on its face, the Court will not re-hear the case, or weigh the evidence or sit in appeal, but will examine the depositions to see if there is evidence to sustain the conviction: R. v. Farrell, 10 O. W. R. 791, 15 O. L. R. 100. See also R. v. Masier, 4 P. R. 64; R. v. St. Clair, 27 A. R. 308; R. v. Brisbois, 15 O. L. R. 264, 10 O. W. R. 869. Where a prisoner is discharged as of right, there is no power to impose a condition as to not bringing an action because of illegal detention. The provisions in the Code and in the Ontario Statutes, as to protecting Magistrates, do not apply to *habeas corpus* where everything is left as it stands when the prisoner is discharged: R. v. Lowery, 10 O. W. R. 755, 15 O. L. R. 182. Method of review of decision of Commissioner under Children's Protection Act: Re Kenna, 4 O. W. N. 1395, 5 O. W. N. 392; Re Maher, 4 O. W. N. 1009, 28 O. L. R. 419; Re Granger, 28 O. R. 555.

7. Sections 7 and 6 are not intended to apply to criminal cases where no preliminary examination has taken place: R. v. Defries, 25 O. R. 645. However illegal or unwarranted the original caption, if the prisoner is rightly and properly detained and the warrant returned to the writ of *habeas corpus* shews such lawful detention the Court will not grant the discharge: Reg. v. Whitesides, 8 O. L. R. 622, where difference between civil and criminal proceedings is pointed out. Parties allowed to examine each other for discovery before hearing after return to writ of *habeas corpus*: Re Smart Infants, 12 P. R. 2. Sections 1120 and 1132 of the Criminal Code overcome technical objections based on defects in warrants of commitment: R. v. Macdonald, 21 O. L. R. 38. Where writ issues for production of child with view to its future custody, practice on return of writ and evidence that may be taken: see Re Kenna, 4 O. W. N. 1395, 5 O. W. N. 392.

8. See Taylor v. Scott, 30 O. R. 475; Re Harper, 23 O. R. 63. As to propriety of granting bail in extradition

proceedings otherwise than *de die in diem* pending the hearing of a motion for *habeas corpus* on an appeal: see Re Watts, 3 O. L. R. 279. Effect of this section on R. S. O. 1914, ch. 215, sec. 113: see R. v. Robinson, 10 O. W. R. 338. A special right of appeal is given to the Crown under R. S. O. 1914, ch. 215, sec. 113. In such a case the provisions of this section are inapplicable: R. v. Reid, 12 O. W. R. 819, 17 O. L. R. 578. See Judicature Act, R. S. O. 1914, ch. 56, sec. (2) (*i*).

9. See Habeas Corpus Act, 31 Chas. II. ch. 2, R. S. O. 1897, vol. iii. p. xxxvi. Action for £500 penalty under 31 Car. 2, sec. 5: see Arscott v. Lilley, 11 O. R. 153, 14 A. R. 297; R. v. Arscott, 9 O. R. 541 (R. S. O. 1897, Vol. III., Pt. iii, p. xxxix).

CHAPTER 85.

The Consitutional Questions Act.

2. See Judicature Act, R. S. O. 1914, ch. 56, secs. 26 (2*t*), 33; H. & L., notes, p. 48. The Supreme Court of Canada had no jurisdiction to entertain an appeal from the opinion of a provincial Court upon a reference made by the Lieutenant-Governor in Council under a provincial statute authorizing him to refer to the Court any matter he thinks fit, and although the statute provides that such opinion shall be deemed an opinion of the Court: Union Colliery v. Atty. Gen. of British Columbia, 27 S. C. R. 637. As to questions which should be put under this chapter, and to the difficulties and dangers of hypothetical questions and the worthlessness of speculative opinions thereon: see Atty. Gen. for Ontario v. Hamilton Street Ry., 1903, A. C. 524. See for examples of cases submitted: Atty.-Gen. for Canada v. Atty-Gen. for Ontario, 20 O. R. 222, 19 A. R. 31, 23 S. C. R. 458; Re Provincial Fisheries, 26 S. C. R. 444; Re Assignments and Preferences Act, 1894, A. C. 189; Re Queen's Counsel, 23 A. R. 792, 1898, A. C. 247; Re Local Option, 18 A. R. 572, 24 S. C. R. 145, 170, 1896, A. C. 348; Re The Lords' Day Act, 1 O. W. R.

312, 1903, A. C. 524; Re Ontario Medical Act, 8 O. W. R. 766, 13 O. L. R. 501; Re Bread Sales Act, 23 O. L. R. 238. Case stated as to meaning and effect of 8 Edw. VII. ch. 54, sec. 11: Re Liquor License Act, 5 O. W. N. 225. Refer also to Atty.-Gen. Ontario v. Hamilton Street Ry., 1903, A. C. 524; Atty. Gen. for Ontario v. Atty. Gen. for Canada, 1896, A. C. 348; Re Provincial Fisheries, 26 S. C. R. 444; Re References by Governor General in Council, 43 S. C. R. 536. Cases stated and transmitted by the Judges of County Courts under special Acts, (*e.g.*, The Assessment Act, The Voters' Lists Act), do not stand on the same footing as questions referred by the Lieutenant-Governor in Council under this Act: Re Knox, 12 O. W. R. 499; Re Norfolk Voters' Lists, 15 O. L. R. 108, 10 O. W. R. 743 (where the Court declined to answer the questions submitted). And even in cases under this Act the Court may not answer every kind of question submitted: Re Ontario Medical Act, 13 O. L. R. 501, 8 O. W. R. 766.

8. See Judicature Act, secs. 26 (2t), 33.

CHAPTER 86.

The Damage by Flooding Act.

4. A suitor may, if he chooses, pursue his ordinary remedy instead of proceeding before a Stipendiary Magistrate: Blair v. Chew, 21 C. L. T. 404. But by doing so he incurs the risk of being deprived of his costs by the Judge who tries the action: Nealy v. Peter, 4 O. L. R. 293. But the Judge may award him full costs: Neely v. Parry Sound River Imp. Co., 8 O. L. R. 129.

CHAPTER 87.

The Justices of the Peace Act.

Refer to Crankshaw (Can.), Practical Guide to Police Magistrates and Justices of the Peace; Seager (Can.), Practical Guide for Justices of the Peace; Stone, Justices' Manual.

5. Constitutionality: The right of Provincial Legislatures to legislate in relation to the administration of justice, includes a right to make provision for the appointment of Justices of the Peace and Police Magistrates: Reg. v. Bennett, 1 O. R. 445, 2 Cart. 634.

11. The interest of a Justice of the Peace in property in respect of which he qualifies discussed: sufficiency of the estate or interest mentioned in the section: see Weir v. Smyth, 19 A. R. 433. The Court refused to quash a conviction under the Canada Temperance Act, on the ground that the convicting magistrate had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception of the section: R. v. Hodgins, 12 O. R. 367.

12. Objection to qualification of Magistrate, because of his failure to take oath: public acquiescence will not avail to make the adjudication binding: Ex parte Mamville, 1 Can. Cr. Cas. 528. But where his qualification has not been contested at the time of the trial, the judgment is that of a Judge *de facto*, and binding: Ex parte Curry, 1 Can. Crim. Cas. 532: see Ex parte Gaynor and Grieve, 9 Can. Crim. Cas. 252; R. v. Mackay, 1 D. L. R. 481.

20. Liability of Police Magistrate acting *ex officio* as Justice of the Peace, to make returns: Hunt v. Shaver, 22 A. R. 202. Time for return being made: sufficiency: Longway *qui tam* v. Avison, 8 O. R. 357; McLellan v. Brown, 12 C. P. 542. The Justice of the Peace is liable to a separate penalty for each conviction not returned: statutes reviewed: see Darragh q. t. v. Paterson, 25 C. P. 529: see also Donagh

v. Longworth, 8 C. P. 437. The returns must be made on or before the second Tuesday in March, June, September and December respectively following the dates of the convictions: Corsant *q. t.* v. Taylor, 23 C. P. 607. An order for payment of money under the Master and Servant Act, is not a conviction which it is necessary to make a return of: Ranney v. Jones, 21 U. C. R. 370. What amounts to a sufficient return: Ball v. Fraser, 18 U. C. R. 100; see also cases Ont. Dig. Case Law, cols. 3724-3728.

31. Form of action under former section: the defendant having in fact made a conviction, he could not object that the plaintiff's declaration did not shew he had jurisdiction to convict: Bagley *q. t.* v. Curtis, 15 C. P. 366: see also Drake v. Preston, 34 U. C. R. 257. No right of action vests in the plaintiff until the action is brought: Masson v. Mossop, 29 U. C. R. 500. Venue: see Con. Rule 529; H. & L. notes, p. 735; 1913 Rule 245.

36. When the Justice of the Peace is not entitled to any fee whatever, the action under this section for a penalty does not lie. The action provided, is for wilfully receiving a larger amount of fees than the Justice of the Peace is entitled to: McGillivray v. Muir, 6 O. L. R. 154. The question whether the fees were received "wilfully" or not is a question of fact for the tribunal trying the action: Brashier v. Jackson, 6 M. & W. 549. Where there is no statute authorizing the taking of a fee for an indictable offence, the Justice of the Peace, who takes such a fee cannot be sued for a penalty, for none is attached: Bowman v. Blyth, 7 El. & Bl. 26. In such a case the Justice might be indicted for extortion under the Criminal Code: see R. v. Tisdale, 20 U. C. R. 272.

CHAPTER 88.

The Police Magistrates Act.

Refer to Crankshaw (Can.), Practice and Guide to Police Magistrates and Justices of the Peace; Seager (Can.), Practical Guide for Justices of the Peace; stone, Justices' Manual; Atkinson's Magistrates Annual Practice; Paley on Convictions.

2. Constitutionality: Right of Province to appoint Police Magistrates: R. v. Bennett, 1 O. R. 445, 2 Cart. 634; R. v. Lee, 15 O. R. 353; Richardson v. Ransom, 10 O. R. 387, 4 Cart. 630; R. v. Richardson, 8 O. R. 651; R. v. Reno, 4 P. R. 281, 1 Cart. 810.

3. The plaintiff was appointed by the Provincial Government, of its own motion, Police Magistrate without salary, under section 8. The plaintiff then demanded a salary under this section (b), which was for a time conceded, but at first reduced and then withdrawn altogether, by resolution of council. The council had the right to do so: Ellis v. Toronto Junction, 28 O. R. 55, 24 A. R. 192. The salary of a Police Magistrate cannot be seized or attached: Central Bank v. Ellis, 20 A. R. 364.

8. The effective act of appointment is the Order in Council, not the Commission: R. v. Reedy 18 O. L. R. 1. see Ellis v. Toronto Junction, 28 O. R. 55, 24 A. R. 192, note to sec. 3, *supra*.

10. A Police Magistrate who has once undertaken a case must continue: Re Holman and Rea, 27 O. L. R. 432.

13. The salary of a Police Magistrate cannot be seized or attached, on grounds of public policy, he being the holder of "an office which is a public judicial office:" Central Bank v. Ellis, 20 A. R. 364. And it makes no difference if he is appointed by resolution, under this section: Lee v. Ellis, 8 O. W. R. 396.

14. Effect on jurisdiction of Justice of Peace, where police Magistrate is appointed for a portion of district: R. v. Reedy, 13 O. W. R. 265, 18 O. L. R. 1.

17. But see Ellis v. Toronto Junction, 28 O. R. 55, 24 A. R. 192, note to sec. 3, *supra*.

18. A Police Magistrate appointed for a town, notwithstanding he has jurisdiction as a Justice of the Peace for the whole county, has no jurisdiction to act at the trial of an offence committed in another town, for which there is a Police Magistrate, except at general sessions, or in case of the illness, absence, or at the request of such other Police Magistrate: R. v. Holmes, 14 O. L. R. 124. In case of request, his jurisdiction is unquestioned: R. v. Farrell, 10 O. W. R. 790, 15 O. L. R. 100. The jurisdiction of a Police Magistrate for a county was not superseded by the appointment of another Police Magistrate for that county, whose commission did not appoint him "in the place and stead" of the former Magistrate: R. v. Spellman, 8 O. W. R. 700, 13 O. L. R. 43. The section does not limit the territorial jurisdiction of County Magistrates, but prohibits them from acting "in any case for any town" (the limitation being as to cases, and not as to place), only when not requested, and when the Police Magistrate is not absent. Therefore in any case arising in a county outside of a city, a county Justice having jurisdiction while sitting in the county, may adjudicate while sitting in the city: R. v. Riley, 12 P. R. 98. The words "Justice or Justices" in R. S. O. 1897, ch. 245, sec. 118 (6), did not include a Police Magistrate: R. v. Smith, 11 O. L. R. 279, but see present section, R. S. O. 1914, ch. 215, sec. 118 (6), where the word "magistrate is used, as to the meaning of which see ch. 215, sec. 2 (k). What amounts to "request," and how it must appear: R. v. Akers, 1 O. W. N. 585, 780, 15 O. W. R. 679, 21 O. L. R. 187.

23. It is sufficient if a suitable room or chamber is provided in any building belonging to the municipality, although by doing so, the hours for the transaction of police business may be limited: Mitchell v. Pembroke, 31 O. R. 348. Liability for stationery extending beyond a year: Mitchell v. Pembroke, 31 O. R. 348.

24. A prosecution under R. S. O. 1914, ch. 215, may be had (sec. 86), before a Police Magistrate, even though

a Stipendiary Magistrate may be appointed for the district: R. v. Irwin, 11 O. W. R. 728, 16 O. L. R. 454. An offence under the Liquor License Act, committed in the township of Barton was properly disposed of before the Police Magistrate of Hamilton, both being in the County of Wentworth: R. v. Gully, 21 O. R. 219: see also Reg. v. Sharp, 5 P. R. 135; R. v. Mikelham, 11 O. L. R. 366. Police Magistrate's jurisdiction: Holman v. Rea, 4 O. W. N. 207, 434, 23 O. W. R. 219, 428, 27 O. L. R. 432. The Police Magistrate has the powers of a Justice of the Peace, but when he acts, he acts as a Police Magistrate: Hunt v. Shaver, 22 A. R. 202; R. v. Reedy, 13 O. W. R. 265, 18 O. L. R. 1.

26. Jurisdiction of Justices of the Peace, sitting for Magistrate in absence of Magistrate: Reg. v. Gordon, 16 O. R. 64; Reg. v. Lynch, 19 O. R. 664. Once a Magistrate is seized of a prosecution, he has no power to discharge himself or request another Magistrate to act for him: R. v. McRae, 28 O. R. 569; Re Holman and Rea, 27 O. L. R. 432. What amounts to a request and how it must appear: R. v. Akers, 21 O. L. R. 187. Request gives jurisdiction: R. v. Farrell, 15 O. L. R. 100.

28. The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas, and, therefore, any Magistrate of this province has authority to enquire into offences committed on said lakes, although in American waters: R. v. Sharp, 5 P. R. 135; see, also, as to county jurisdiction extending into lakes: R. v. Mickleham, 11 O. L. R. 366, note to R. S. O. 1914, ch. 215, sec. 11. "When sitting elsewhere than within city or town for which he is Police Magistrate, though not divested of his individuality as a Police Magistrate, and in fact, exercising jurisdiction because he is a police magistrate, and, therefore, *ex officio* Justice of the Peace for the county, his powers and jurisdiction are merely those of two Justices of the Peace; and what two or more Justices of the Peace are not authorized to do, he may not do." *per* Anglin, J., R. v. Holmes, 9 O. W. R. 750, 14 O. L. R. 124. The city Police Magistrate is *ex officio* a Justice of the Peace for the county, and could as Police

Magistrate sitting alone, do anything that two Justices of the Peace sitting together, could do: R. v. Spellman, 13 O. L. R. 43; see also R. v. Smith, 11 O. L. R. 279. Jurisdiction under Master and Servant Act, R. S. O. 1914, ch. 144: Re O'Neill and Duncan Litho. Co., 13 O. W. R. 511. See R. v. Reedy, 13 O. W. R. 265, at p. 267, 18 O. L. R. 1, at p. 4.

31. Police Magistrate's jurisdiction and duty: Holman v. Rea, 4 O. W. N. 207, 434, 23 O. W. R. 219, 428, 27 O. L. R. 432.

34. Magistrate having once undertaken a case must continue to the end: Re Holman and Rea, 27 O. L. R. 432.

CHAPTER 89.

The Public Authorities' Protection Act.

Refer to Bicknell and Kappele, Practical Statutes, pp. 128-132.

3. The object of the Act is to protect those fulfilling a public duty, even though in the performance of it, they may act wrongfully or erroneously. Plaintiff must allege malice and lack of reasonable and probable cause. Where a person entitled to the protection of the Act, does something not imposed on him in the discharge of any public duty, this is not required: Kelly v. Barton, 26 O. R. 608, 22 A. R. 522, where cases are reviewed. Action under sec. 3, must charge malice and absence of reasonable and probable cause, and lies where the defendant is acting within his jurisdiction, but goes wrong. If the defendant acts without jurisdiction, under sec. 4 the claim need not contain these charges, and the plaintiff need not prove them in order to recover: Piggott v. French, 1 O. W. N. 715, 15 O. W. R. 852, 21 O. L. R. 87. Police Magistrate issuing warrant for arrest of witness on evidence insufficient to justify arrest: Gordon v. Denison, 24 O. R. 576, 22 A. R. 315; see also Mechiam v. Horne, 20 O. R. 267, where there was some excess of jurisdiction. The action is in tort: Corsant q. t. v. Taylor, 10 C. L. T. 320. Form of pleading:

Drake v. Preston, 34 U. C. R. 257. The action need not be *qui tam*: *Ib.* Plaintiff's costs: Stinson v. Guess, 1 C. L. T. 19, Brush v. Taggart, 16 C. P. 415. Pleading defence under this statute: Titchmarsh v. Graham, 13 O. W. R. 618. Constitutionality: Titchmarsh v. Graham, 14 O. W. R. 277.

4.—(1) "The distinction between the case of an official acting within the jurisdiction conferred on him by law, but blundering by the way, and an official acting without, or in excess, of his legal jurisdiction, is very clearly pointed out in the statute. By sec. 3, it is necessary to allege, and also to prove, malice and the absence of reasonable and probable cause. By sec. 4, it is not." *Per* Curiam: Moriarity v. Harris, 10 O. L. R. 610, at p. 613, where cases are reviewed. See also Polly v. Fordham, 1904, 20 Times L. R. 639. Justice of the Peace not acting *bona fide*: Cummins v. Moore, 37 U. C. R. 130.

4.—(4) Second warrant: *Habeas corpus*: see Arscott v. Lilley, 11 O. R. 153, 14 A. R. 297.

5. Orders requiring a Justice of the Peace to do any Act relating to the duties of his office under this section, are not final, but are appealable, and should be heard before a Judge in Court, and not before a Divisional Court: R. v. Meehan, 3 O. L. R. 361. A mandamus lies to a Police Magistrate to compel him to consider and deal with an application for an information for voting in more than one ward at a municipal election by general vote: Re R. v. Meehan, 3 O. L. R. 567.

6. Motion for order nisi: Re Rex v. Graham, Ex p. Titchmarsh, 2 O. W. N. 326, 463, 17 O. W. R. 660, 1058.

7. Where a Magistrate had jurisdiction, and his conviction was set aside on the ground that certain omissions rendered the warrant defective on its face, the Magistrate was held entitled to protection and security for costs: Titchmarsh v. Graham, 14 O. W. R. 619, 690, 1043, 1 O. W. N. 27, 208.

8. Order for protection conditioned on payment of costs of *habeas corpus* application: R. v. Robinson, 10 O.

W. R. 338. When a prisoner is entitled to his discharge under a writ of *habeas corpus* by reason of no offence being disclosed in the material under which he was committed, such discharge cannot be made conditional on no action being brought against the Magistrate: R. v. Lowery, 15 O. L. R. 182.

9. As to what is a case within this section, and when application should be made: see Webb v. Spears, 15 P. R. 232.

12. Where Justices have a general jurisdiction over the subject-matter upon which they have issued a warrant of commitment to the gaoler, though their proceedings are erroneous, the gaoler is not liable. *Secus* if the proceedings be wholly void: Ferguson v. Adams, 5 U. C. R. 194. When a Constable is entitled to the protection of this statute: Alderich v. Humphrey, 29 O. R. 427. Constable executing a warrant in good faith, outside of the territorial jurisdiction of the Magistrate issuing it, and without having the warrant backed: Alderich v. Humphrey, 29 O. R. 457. Assault by Police Constable under circumstances outside his official authority: Moriarity v. Harris, 8 O. L. R. 251, 10 O. L. R. 610. Police Constable searching plaintiff's dwelling for liquor: question whether acting *bona fide* in discharge of his duty: Bell v. Lott, 9 O. L. R. 15. Constable executing warrant protected: Gaul v. Ellice, 3 O. L. R. 438. Police Sergeant laying information: Eaves v. Nesbitt, 1 O. L. R. 244. Action against Constable: Robinson v. Morris, 19 O. L. R. 633, 14 O. W. R. 1001; and see R. S. O. 1914, ch. 94, notes.

13.—(1) Operation of English Public Authorities Protection Act, 1893, discussed: see Pearson v. Dublin Corporation, 1907, A. C. 351. Under the English statute (Public Authorities Protection Act, 1893), where a municipal council acquire and operate a tramway under statutory powers, negligence on the part of their servants is a neglect or default in the execution of a public duty or authority, and consequently action must be commenced within 6 months. The English Act expressly applies to any alleged neglect or default in the execution of any statutory duty or authority: see Parker v. London County Council,

1904, 2 K. B. 501 (but see sec. 17 of this Act). "Done in the execution of his office" includes medical superintendent of a public hospital: Pye v. Toronto, 9 O. W. R. 632. Where the defendant holds a public office, the pleadings must be looked to to ascertain whether he is sued in that capacity: Parkes v. Baker, 17 P. R. 345; Lane v. Clinkinbroomer, 3 O. W. R. 613. See also Logan v. Hurlburt, 23 A. R. 628. Acts done while not fulfilling a public duty: McDonald v. Dickenson, 25 O. R. 45, 21 A. R. 485. A school trustee sued for act done in his corporate capacity: see Spry v. Mumby, 11 C, P. 285. Breach by guardians of a union of a provate contract entered into by them in the performance of their public duties is not within the English Act: Sharpington v. Fulham Guardians, 1904, 2 Ch. 449. Protection of public officer for unlawful innocent act: Piggott v. French, 21 O. L. R. 87. Where an official has acted without jurisdiction: Sinden v. Brown, 17 A. R. 173; McGuiness v. Dafoe, 23 A. R. 704. Where act is of nature and description within his general official authorization: McGuiness v. Dafoe, 23 A. R. 704: see also Friel v. Ferguson, 15 C. P. 584. Bailiff, in action for seizure and sacrifice of plaintiff's goods: Pearson v. Ruttan, 15 C. P. 79. Action against tax collector: Spry v. Mumby, 11 C. P. 285; Howard v. Harrington, 20 A. R. 175. Where action is for an omission, not an act done: Harrison v. Brega, 30 U. C. R. 324; Harrold v. Simcoe, 16 C. P. 43. Action for mandamus to compel license commissioners and inspectors to perform their duties, and for damages, etc.: Haslam v. Schnarr, 30 O. R. 89; but see also Leeson v. Dufferin, 19 O. R. 67. Action against a Division Court Clerk for money received under a judgment: Dale v. Cool, 6 C. P. 544; McLeish v. Howard, 3 A. R. 503. Action against license commissioners: McDonnel v. Grey, 1 O. W. N. 527. Protection extended to Inspector, etc., seizing liquor where no conviction: see R. S. O. 1914, ch. 215, sec. 133. An action for negligently supplying water impregnated with sand, and thereby injuring the plaintiffs elevator, is one of breach of contract: Scottish Ontario v. Toronto, 24 A. R. 208. Protection of pathmaster: Stalker v. Dunwich, 15 O. R. 342. Registrar (to recover excess fees): Ross v. McLay, 40 U. C. R. 83; Co. Bruce v. McLay, 11 A.

R. 477. Wrongfully registering documents: Ontario Industrial Loan v. Lindsey, 3 O. R. 66. Vexatious action: Rochford v. Brown, 25 O. L. R. 206. Where principal object of the action is to obtain an injunction: Campbell v. Wallaceburg, 14 O. W. R. 473. Action not brought within six months: Gaul v. Ellice, 3 O. L. R. 438. Time for commencement of action: see Hanns v. Johnston, 3 O. R. 100. Pleading statutory defence: Denny v. Bennett, 44 W. R. 333.

13.—(3) Successful defendant entitled to his costs as between solicitor and client: see Ing Kon v. Archibald, 17 O. L. R. 484. See also Arscott v. Lilley, 14 A. R. 283; Bostock v. Ramsay, 1900, 1 Q. B. 357, 1900, 2 Q. B. 616.

16.—(1) Security for costs: The statute is not *ultra vires*, or, if so, is practically re-enacted by Criminal Code, secs. 1131 and 1148: Titchmarsh v. Graham, 14 O. W. R. 277. Who come within the provisions of the Act: see Lewis v. Dalby, 3 O. L. R. 301; Eaves v. Nesbitt, 1 O. L. R. 244; Kelly v. Barton, 26 O. R. 608, 22 A. R. 522; Paley on Convictions, 7th ed., p. 77. See sec. 3 notes. See Con. Rule 1198: Special application necessary—order not obtained on *præcipe*: H. & L. notes, p. 1437; 1913 Rules 373, 374. As to orders for security for costs in actions against Justices, etc.: see H. & L., notes, p. 1432. For form of order: see Thompson v. Williamson, 16 P. R. 368; Ashcroft v. Tyson, 17 P. R. 42. Where action is tort in respect of unofficial act: Fritz v. Jelfs, 4 O. W. N. 1271, 1408, 24 O. W. R. 610, 807; Meredith v. Slemin, 4 O. W. N. 885, 1038, 24 O. W. R. 155, 315.

16.—(2) Security furnished by plaintiff: what he must shew: Burns v. Loughrie, 1 O. W. N. 805. The affidavit is a prerequisite, and must shew: (1) The nature of the action; (2) The nature of the defence; (3) That the plaintiff is not possessed of property sufficient to answer the costs of the action; and (4) either, (a) that the defendant has a good defence on the merits, or (b) that the grounds of the action are frivolous. The words "on the merits" are essential. As to both the alternatives 4 (a) and 4 (b) the affidavit must set out the facts: Robinson v. Morris, 11 O. W. R. 361, 559, 15 O. L. R. 649. Where a magistrate has jurisdiction and his warrant is set

aside for omissions, rendering it defective on its face, he is entitled to security for costs and protection under sec. 7, *ante*: Titchmarsh v. Graham, 14 O. W. R. 619, 1 O. W. N. 27. While the defendant must apply on notice and affidavit, that does not preclude him from invoking the aid of Con. Rule 419 (1913 Rule 228), to examine the plaintiff: Lowry v. Wood, 12 O. W. R. 855. The manner in which a County Court Judge exercises his jurisdiction under this section is not a matter for prohibition, but for his own discretion: Re Hill and Telford, 12 O. W. R. 1090.

17. The Act does not apply to a municipal corporation: Glynn v. Niagara Falls, 5 O. W. N. 285. Actions against municipal corporations: Hodgins v. Huron, 3 A. & E. 169; McCarthy v. Vespra, 16 P. R. 416; Scottish Ontario v. Toronto, 24 A. R. 208 (sec. 13 *ante*, note). Actions against municipal corporations for anything done under a by-law, etc., invalid in whole or in part, see R. S. O. 1914, ch. 192, sec. 349.

CHAPTER 90.

The Ontario Summary Convictions Act.

Crankshaw, Criminal Code; Tremeear, Criminal Code Annotated; Snow, Annotated Criminal Code; Paley on Convictions; Magistrates' Annual Practice; Stone's Justices' Manual.

3. Jurisdiction of Justice of the Peace out of sessions to try misdemeanours is statutory: R. v. Carter, 5 O. R. 651. See Judicature Act, 1897, ch. 51, secs. 49, 50 (*h*); H. & L., notes, p. 40; R. S. O. 1914, ch. 56, sec. 26 (2) (*h*).

4. Part XV. of the code deals with Summary Convictions.
705: *Interpretation.*
706: *Application.*
707-709: *Jurisdiction*: *Certiorari* in case of conviction made by a Magistrate without jurisdiction: where the offence for which a conviction is made is found not to come within the statute defining the offence or

the municipal by-law defining the offence is *ultra vires* of the statute on which it is based there is such absence of jurisdiction as warrants the issue of a *certiorari*: R. v. St. Pierre, 4 O. L. R. 76. Where it did not appear on the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting Justices of the Peace, but upon the depositions it was clear that it was, the conviction was sustained: R. v. Perrin, 16 O. R. 446. Right of defendant to writ of *certiorari*: R. v. Cook, 12 O. W. R. 829, 18 O. L. R. 415. R. v. Renaud, 18 O. L. R. 420.

710: *Information and Complaint.*

711-713: *Summons and Warrant.*

714-722: *Trial.*

By the Criminal Code, secs. 721 (3) and 638 the Magistrate is required to put the evidence taken by him in writing, and authenticate it by his signature. The witness need not sign: sec. 721 (5). In convictions under the Liquor License Act, in addition to the practice under the Criminal Code introduced by this section R. S. O. 1914 ch. 215 sec. 87, directly provides that in all cases the evidence of the witnesses examined shall be reduced to writing, read over and signed by the witness, unless a sworn stenographer takes it down. As to taking down evidence: see R. v. Brisbois, 10 O. W. R. 869; R. v. Farrell, 10 O. W. R. 790, 15 O. L. R. 100. Proceedings under Criminal Code, sec. 718 (before the present Act): R. v. Coote, 2 O. W. N. 6, 229, 22 O. L. R. 269. Enlargement: adjournment commencement of hearing: Code, secs. 708, 722: R. v. Miller, 19 O. L. R. 125, 288.

723-725: *Defects and Objections.*

Conviction on a charge not formulated is bad, even though the evidence and adjudication establish an offence: R. v. Mines, 25 O. R. 577. As to whether the provisions as to amendment of proceedings before Justices of the Peace applicable to prosecutions under Provincial Acts apply to proceedings under the Liquor License Act, 1902, but only to summary proceedings before Justices: see R. v. Foster, 5 O. L. R. 624, and (contra) R. v. Rudolph, 1 O. W. N. 1057. Uncertainty as to date, place, etc., could be cured upon the facts in evidence: R. v. Myers, 6 O. L. R. 120. Defects regarded as irregularities: see

R. v. Collier, 12 P. R. 316. Excess of jurisdiction: costs: distress: R. v. Elliott, 12 O. R. 524. Where defendant took many objections and the merits were against him: R. v. Lynch, 12 O. R. 372. See also R. v. Whitesides, 8 O. L. R. 622.

726-740: *Adjudication.*

The provision in sec. 734 as to dismissal a bar in certain cases where assault charged is *intra vires*: Flick v. Brisbois, 26 O. R. 423; but not where there was an unauthorized change in the offence charged: Miller v. Lea, 25 A. R. 428; see also Nevills v. Ballard, 28 O. R. 588. Section 739 of the code applies to convictions in matters within the jurisdiction of the province: award of distress for nonpayment of fine: cases before and after the enactment of this clause considered: R. v. Reid, 14 O. W. R. 71, 153. Proceedings under sec. 685, 726-727 of the code: see R. v. Dagenais, 23 O. L. R. 667.

741-747: *Enforcing Adjudication.*

Where the maximum penalty under a statute was imposed and in addition the conviction provided for distress in default of payments, the conviction was quashed, the defect not being cured by the then statutory provisions: R. v. Logan, 16 O. R. 335; R. v. Sparham, 8 O. R. 570. Distress provided in a by-law may be merely a means of collecting the penalty and not as part of the punishment: R. v. Flory, 17 O. R. 715.

748: *Sureties to keep the peace*: amount must be fixed: Re Doe, Q. R. 2 Q. B. 600.

749-760: *Appeal*: see sec. 10, notes.

761-769: *Stating a case.* The Act, R. S. O. 1914, ch. 90 provides for appeal. The magistrate cannot state a case: R. v. Robert Simpson Co., 28 O. R. 231: unless constitutionality of statute is in question: see sec. 11, notes. As to stated cases and hearing: see R. v. Dom. Bowling Club, 19 O. L. R. 107. A question of admissibility of evidence cannot form part of a stated case, *ibid.* An application to a Magistrate to state a case in regard to a prosecution under an Ontario statute should be made within a reasonable time: R. v. Ferguson, 12 O. L. R. 411, 8 O. W. R. 306. As to effect of stating case: see R. v. Boultbee, 23 U. C. R. 457. See R. ex rel. Brown v. R. Simpson Co., 28 O. R. 231, as to law prior to amendment of 1901. Jurisdiction to hear case stated: R. v. Henry,

19 O. L. R. 494, 1 O. W. N. 567. Sections 761-9 of the Criminal Code cover the matter of a magistrate stating a case: R. v. Harvey, 1 O. W. N. 1002.
1121: *Convictions affirmed or amended on appeal*: see R. v. Whitesides, 8 O. L. R. 622.
1124: *Conviction or warrant in cases of certiorari, etc.*: see notes to secs 709-709, *ante*.
1125: *Irregularities*.
1142: *Time limit*. Where no time is specially limited for laying complaint: R. v. McKinnon, 3 O. L. R. 508.

5. See *e.g.*: R. v. Boomer, 10 O. W. R. 978, 15 O. L. R. 321; R. v. White, 21 C. P. 354; and R. S. O. 1914, ch. 215, sec. 50; and Form 6, Nos. 5 and 6 to that Act.

6. "Penalty:" meaning considered: R. v. Leach, 17 O. L. R. 643. Penalty: distress in default of payment: R. v. Reid, 14 O. W. R. 71, 153.

7. A charge of fifty cents for drawing up a conviction under the Liquor License Act is authorized by this section: R. v. Excell, 20 O. R. 633. In a conviction under the Master and Servant Act there is power to award imprisonment in default of payment, and by this section that power covers costs as well as the fine: R. v. Lewis, 5 O. L. R. 509. Costs of "Conveying to prison:" (see wording of former sec. 89 R. S. O. 1897, ch. 245), R. v. Whitney, 2 O. W. N. 1491, 19 O. W. R. 888. Distress: imprisonment: R. v. Degan, 12 O. W. R. 1029, 17 O. L. R. 366. The omission to ascertain the costs and insert the amount in the conviction is only an irregularity and may afterwards be rectified: R. v. Irwin, R. v. Pettit, 11 O. W. R. 728, 730, 16 O. L. R. 454.

9.—(1) In line 3 before "any," insert "in". 4 Geo. V. ch. 2, Schedule (21).

10. The Legislature of this province in plain words, adopting the practice of the Courts of the United States (by the amendment of 1912) has prohibited *certiorari* in all cases in which an appeal giving adequate relief lies against convictions and orders made under provincial enactments: R. v. Keenan, 28 O. L. R. 441. Appeal in case of conviction under Public School Act for refusal to act as trustee: see R. v. Tucker, 10 O. L. R. 506. Payment of

fine does not bar the right of appeal when payment is made contemporaneously with expressions of intention to appeal and under pain of distress: R. v. Tucker, 10 O. L. R. 506. Recognizance to appear at the general sessions and "enter an appeal:" R. v. Tucker, 10 O. L. R. 506. Upon the allowance of such appeal repayment of fine and costs and payment of the costs of the appeal are properly awarded: R. v. Tucker, 10 O. L. R. 506. As to amendment of sentence on appeal: McLellan v. McKinnon, 1 O. R. 219. Return of amended conviction by Justice: Re Ryer and Plows, 46 U. C. R. 206; R. v. Smith, 35 U. C. R. 518. Condition attaching to order quashing conviction: R. v. Moringstar, 11 O. L. R. 318. Effect where right of appeal given: R. v. Cook, 18 O. L. R. 415, 12 O. W. R. 829. Adequate remedy by appeal: R. v. Renaud, 18 O. L. R. 420, 13 O. W. R. 1090. And see where want of jurisdiction: R. v. St. Pierre, 4 O. L. R. 76. Where a conviction is affirmed on appeal, *certiorari* will be only for want or excess of jurisdiction and not for refusal to admit evidence, even if such refusal is erroneous in law: R. v. Dunning, 14 O. R. 52. Subpœna to person in another province to compel attendance on appeal to quarter sessions: R. v. McDonald, 2 Can. C. C. 64. Appeal from judgment of *autrefois acquit*: R. v. Bombardier, 11 Can. C. C. 216. Discretion as to costs cannot be reviewed: R. v. McIntosh, 28 O. R. 603. The order referred to in the section formerly did not include an order of dismissal: R v. Toronto Public School Board, 31 O. R. 457; Re Murphy and Cornish, 8 P. R. 420. A provincial statute authorizing a Judge of one county to preside at the general sessions in another county held *ultra vires*: Gibson v. McDonald, 7 O. R. 401. As to new evidence on appeal: see R. v. Washington, 46 U. C. R. 221. Application of sec. 4, and procedure on appeal: R. v. Keenan, 4 O. W. N. 1034, 28 O. L. R. 441. As to appeals from convictions under the Liquor License Act: see R. v. Coote, 16 O. W. R. 903, 17 O. W. R. 470, 2 O. W. N. 6, 229, 22 O. L. R. 269, and R. S. O. 1914, ch. 215, sec. 110 notes.

10.—(3) Adequate relief by appeal: R. v. Keenan, 4 O. W. N. 1034, 28 O. L. R. 441; R. v. Renaud, 18 O. L. R. 420.

11.—(1) The Attorney General certified his opinion that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the B. N. A. Act, and the appeal was brought on. It plainly appeared that the appeal involved no such question, and the certificate appeared to have been granted inadvertently. The appeal was quashed with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action: Reg. v. Reid, 26 A. R. 181. Appeal on certificate of the Atty. Gen. from the judgment of general sessions: R. v. Maher, 10 O. L. R. 102. Case stated when the constitutional validity of a statute is involved, and not when the decision depends merely on whether the statute is applicable or not: R. v. Toronto Railway, 26 A. R. 491. Nor when the constitutional validity of some statute other than the one under which the Justice has acted, such as a statute regulating procedure or evidence is collaterally attacked: R. v. Edwards, 19 A. R. 706. Question of constitutional validity of Medical Act, R. S. O. 1914, ch. 161: see R. v. Hill, 15 O. L. R. 406, 11 O. W. R. 20. Jurisdiction of Court of Appeal to hear an appeal on a case stated under this Act for contravention of a provincial statute: R. v. Henry, 20 O. L. R. 494, 1 O. W. N. 567.

11.—(6) As to Rules of the High Court applicable to convictions under Provincial Statutes: see Holmested & Langton (3rd ed.) Judicature Act, sec. 25 p. 13. See also p. 1454, notes.

CHAPTER 91.

The Crown Attorneys' Act.

7,—Crown Attorney defendant in action against Magistrate for false imprisonment: Titchmarsh v. Graham, 15 O. W. R. 139, 1 O. W. R. 367, 418. Place for office of Clerk of Peace and Crown Attorney: Rodd v. Essex, 19 O. L. R. 659.

8.—(*c*) It is the right of everyone to make a complaint with the view to the institution of criminal proceedings, and also, under certain circumstances, to prefer

a bill of indictment, yet the prosecutor is no party to the prosecution, nor, indeed, bound by any judgment that may be made in it. He may with the consent of the proper authorities proceed in the name of the Sovereign, but, against the will of both parties, he has no power over or voice in the proceedings, *per* Meredith, J.: R. v. Gilmore, 6 O. L. R. 286.

CHAPTER 92.

The Coroners' Act.

Refer to Johnson on Coroners (Can.); Boys on Coroners (Can.); Jervis on Coroners.

6. Doctor who attended deceased not competent to hold inquest: Re Haney & Mead, 34 C. L. T. 330.

7. When an inquest should be held: see Re Hull, 9 Q. B. D. 692. Territorial jurisdiction: see R. v. Berry, 9 P. R. 123. In issuing his warrant the coroner is acting in a ministerial capacity. Proceedings on default in obeying summons: Re Anderson and Kinrade, 18 O. L. R. 362, 13 O. W. R. 1082. It is an indictable offence to dispose of the body before the coroner's jury sits: R. v. Clark, 1 Salk. 377. Burning a dead body with intent to prevent an inquest: R. v. Stephenson, 13 Q. B. D. 331.

15. A coroner's Court is a criminal Court: Garnett v. Ferrand, 6 B. & C. 611; R. v. Herford, 3 E. & E. 115. Thomas v. Chirton, 2 B. & S. 475; R. v. Hammond, 29 O. R. 211. Subsequent use of depositions on trial: R. v. Hendershott, 26 O. R. 678; R. v. Williams, 28 O. R. 583; R. v. Hammond, 29 O. R. 211. A barrister cannot insist upon being present at a coroner's inquest and upon examining and cross-examining witnesses, and can maintain no action against the coroner for excluding him: Agnew v. Stewart, 21 U. C. R. 396. A coroner's inquest held on Sunday is invalid: Re Cooper, 5 P. R. 256. It is not improper for the County Crown Attorney acting for the prosecution to enter the jury-room after the jury have arrived at their verdict where the object is to advise

the jury as to the proper language to be used in drawing up their verdict: R. v. Sanderson, 15 O. R. 106.

16. The coroner should not, without the consent of the Crown Attorney, direct a *post mortem* examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold the inquest and gave the direction as a proceeding incident to it. The provision is directory, and, in any event, does not render an act done by a surgeon in good faith under the direction of the coroner unlawful because the coroner had neglected to obtain the prescribed consent. A *post mortem* may be held before impannelling a jury: that is a matter of procedure in the discretion of the coroner. Having determined that an inquest should be held, the coroner has power to summon medical witnesses and direct them to hold a *post mortem*: Davidson v. Garrett, 30 O. R. 653.

17. Where a coroner summoned a second medical man as witness and to perform a *post mortem* but it was not shewn that such practitioner had been summoned to attend in accordance with the statute, a mandamus to the coroner to make his order on the County Treasurer was refused: Re Harbottle and Wilson, 30 U. C. R. 314. A medical witness during two inquests held on 52 persons and occupying several days was held entitled to $5 per day for each day's attendance (not for each body), together with his mileage: Re Askin and Charteris, 13 U. C. R. 498.

20. A constable may be a juror: a juror may be a witness: R. v. Winegarner, 17 O. R. 208.

28. Investigation of fires by coroner: fees: Re Fergus and Cooley, 18 U. C. R. 341.

35. A warrant to apprehend issued by a coroner could not formerly be validly executed out of his county: Re Anderson & Kinrade, 18 O. L. R. 362, 13 O. W. R. 1082.

CHAPTER 93.

THE DOMINION COMMISSIONERS OF POLICE ACT.

CHAPTER 94.

THE CONSTABLES' ACT.

3. Liability of municipality for negligent performance by a constable of his duty: see McKenzie v. Chilliwack, 15 B. C. R. 256; Hesketh v. Toronto, 25 A. R. 449; Winterbotham v. London Police Commissioners, 1 O. L. R. 549, 2 O. L. R. 105; Pease v. Moosomin, 5 Terr. L. R. 207; Gaul v. Ellice, 3 O. L. R. 438; McCleave v. Moncton, 32 S. C. R. 106; Tremblay v. Quebec, 7 Can. Cr. Cas. 343; Nettleton v. Prescott, 16 O. L. R. 538.

Protection of constable as a public officer: R. v. Ritter, 8 Can. Cr. Cas. 31; Moriarty v. Harris, 8 O. L. R. 251, 10 O. L. R. 610. Railway constable: Thomas v. C. P. R., 14 O. L. R. 55. See R. S. O. 1914, ch. 89, sec. 12, notes.

CHAPTER 95.

THE POLICE CONSTABLES' BAIL ACT.

CHAPTER 96.

THE ADMINISTRATION OF JUSTICE EXPENSES ACT.

3. Payment of certain fees for services rendered in former years will not prevent the charges being disputed in subsequent years: Askin v. London, 1 U. C. R. 292. Enforcing payment of fees for returns: Re Mack and Board of Audit, 2 O. W. N. 1413, 3 O. W. N. 282, 19 O. W. R. 740, 20 O. W. R. 454, 25 O. L. R. 121. Schedule of fees to Clerk of the Peace: see R. S. O. 1914, p. 1143; In re Dartnell, 26 U. C. R. 430; In re Poussett, 22 U. C. R. 412; In Re Fenton, 31 C. P. 31; In Re Stanton, 3 O. R. 86, as to discussion of various tariff items, and when mandamus will lie to the Board of Audit.

4. Salary of Clerk of Peace "in lieu of all fees:" Subsequent statute providing fees: see Pringle v. McDonald, 10 U. C. R. 254. If the Clerk accepts a salary in lieu of all fees, he is entitled only to such salary: Askin v. London, 1 U. C. R. 292.

8. Where the Clerk, at the request of the Justices or the municipality or the county auditors, renders services for which he is not bound to render, and for which no fee is allowed, although he might not be able to sue for his charges, yet when they have been duly audited and paid, the municipality cannot recover them, and the same rule applies in case of disbursements, stationery, etc.: Lambton v. Poussett, 21 U. C. R. 472. The section, making it penal to receive more than the legal fee for services performed by the Clerk of the Peace, does not apply to services or disbursements not properly belonging to his office. The enactment is not confined to fees demanded of individuals for public services. The penalty does not interfere with the right to reclaim fees received contrary to the Act: *Ib.* Where the fees are within the Act and have been received contrary thereto they may be recovered back as money illegally received, although the accounts have been audited and passed: *Ib.*

11. The gist of this section is to empower the Warden and County Crown Attorney to authorize a constable or other person to perform special services not within the ordinary tariff, and which they think necessary to detect crime or to capture persons thought to have committed serious crimes, and to pledge the credit of the county for such special services, whether the account is certified by the Warden and County Crown Attorney as required by the section or not: Sills v. Lennox and Addington, 31 O. R. 512.

16. History of legislation: payment of fees: Re Mack and Board of Audit, etc., 25 O. L. R. 121.

20. Mandamus: Re Mack and Board of Audit, etc., 25 O. L. R. 121.

22. Audit: see In re Poussett and Lambton, 22 U. C. R. 80; In re Sheriff of Lincoln, 34 U. C. R. 1; Lambton v. Poussett, 21 U. C. R. 472.

41. Liability of Province for fees for returns by inspectors of prisons: Re Mack and Stormont, 2 O. W. N. 1413, 19 O. W. R. 740.

CHAPTER 97.

The Crown Witnesses Act.

CHAPTER 98.

The Estreats Act.

2. A recognizance of bail is taken in open Court by the Clerk of the Court addressing the parties being then before him in open Court, by name, and stating the substance of the recognizance; and the verbal acknowledgment of the parties is sufficient without more: Re Talbot's Bail, 23 O. R. 65. The estreat roll was sufficiently signed by the Clerk when he signed the affidavit at the foot of it: *Ib.* What is

sufficient evidence of forfeiture of the recognizance: *Ib.*

3. The proceedings to collect a debt due to the Crown under a forfeited recognizance are civil and not criminal, and the writ following the form given in the Act is not open to objection: Re Talbot's Bail, 23 O. R. 65.

7. The provision requiring a written order of the Judge for the estreating or putting in process of a recognizance applies only to recognizances to appear to prosecute, to give evidence, to answer for common assault or articles of the peace, and does not apply to a recognizance whereby the bail become bound for the appearance of their principal to stand trial on an indictment: Re Talbot's Bail, 23 O. R. 65.

11. It is no ground for discharging the estreat of a recognizance to appear as witness that the Magistrate did not give him notice when he was to appear: R. v. Thorpe H. T., 6 Vict.; R. v. Schram, 2 U. C. R. 91; but otherwise when the Magistrate misinformed him: R. v. Mayer, 14 U. C. R. 621. The Court will not interfere after return of the writ and payment of the estreat: R. v. Le Clerc, 4 Vict. Grounds for discharging the estreat: R. v. Matthews, 6 O. S. 152. Discharge of estreat on terms where there was misunderstanding: R. v. McLeod, 24 U. C. R. 458. The sheriff is entitled to poundage: R. v. Vinning, H. T. 3 Vic. Although the recognizance was expressed to be joint and several by the prisoner and his sureties and was acknowledged by the sureties alone, and the prisoner discharged without getting his acknowledgment, the sureties were held liable: Rastall v. Atty.-Gen., 17 Gr. 1, 18 Gr. 138.

CHAPTER 99.

THE FINES AND FORFEITURES ACT.

6. Where the defendant was liable for $400 penalty under sec. 94 (5) of R. S. O. 1897, ch. 9 (The Election Act) for not having taken the oath of qualification required to be taken by agents voting under certificate, but, as he had not been asked to take the oath, and the plaintiff was present, and did not object, the provisions of this Act were applied, and the penalty reduced to $40: Smith v. Carey, 5 O. L. R. 203; Carey v. Smith, 5 O. L. R. 209. What is a penalty within the meaning of this Act—and what a mere liability which will not be relieved against: see Boucher v. Capital Brewing Co., 9 O. L. R. 266. Relief from penalties: Webb v. Box, 20 O. L. R. 220, 15 O. W. R. 423. Remission of penalty under partnership Registration Act: Dixon v. Georgas Bros, 4 O. W. N. 462, 23 O. W. R. 524. See the provisions of R. S. O. 1914, ch. 56, sec. 19.

CHAPTER 100.

THE NIAGARA FALLS MAGISTRATES' ACT.

CHAPTER 101.

THE PROPERTY AND CIVIL RIGHTS ACT.

1. English statutes are in force in Ontario under four main provisions (*a*) 32 Geo. III., ch. 1, recited in preamble of this Act: see R. S. O. 1897, ch. 111, whereby in matters of property and civil right, resort is had to the laws of England, as they stood on 15th October, 1792. (*b*) Chancery Act, 1837, 7 Wm. IV.: see Judicature Act, R. S. O. 1897, ch. 51, sec. 26, introducing the jurisdiction of chancery and rules of decision as of 4th March, 1837. (*c*) Where

no adequate remedy exists at law: as of 10th June, 1857: see Judicature Act, R. S. O. 1897, ch. 51, sec. 28 *e.g.*, under this head the Trustees' Relief Act, 11 & 12 Vict. (*d*) Statutes expressly stated to be in force throughout the British Empire, *e.g.*, the Merchants Shipping Act. See also Armour, Real Property, p. 25.

2. The common law of England relative to property and civil rights, as introduced into this province in 1792, and now enacted by this section, except in so far as repealed by Imperial Legislation having force in this Province or by Provincial enactments is the rule for the decision of the same: Keewatin v. Kenora, 16 O. L. R. 184, 11 O. W. R. 266. Decisions of the House of Lords are binding on the Courts of this Province: Trimble v. Hill, 1879, 5 App. Cas. 342, at p. 344.

As to Imperial Statutes in force in Ontario: see R. S. O. 1897, Vol. III., where are set out:

1. Constitutional Acts, pp. 7-20.
2. Certain Imperial Statutes of general practical utility in force in Ontario *ex proprio vigore*, pp. 21-35.
3. The Habeas Corpus Act, 36.
4. A table of Imperial Statutes in force in Canada at the end of 1901, *ex proprio vigore*, p. 43: (see also, Black v. Imperial Book Co., 8 O. L. R. 9).

At page 3899 of the same volume, is a Schedule "A" of Imperial Acts, relating to property and civil rights appearing to be in force in Ontario at the end of 1897 by virtue of Provincial legislation, and repealed (within Ontario) from the day Vol. III. of the R. S. O. 1897, took effect. At p. 3903 is Schedule B., shewing Imperial Acts consolidated in R. S. O. 1897, Vol. III. At p. 3914, is Schedule C. of Imperial Acts in force, and not repealed, revised or consolidated. See also R. S. O. 1914, Vol. 3, where, in Appendix A, are set out certain Acts and parts of Acts not repealed by R. S. O. 1914, and in force in Ontario subject thereto. These include Magna Charta; St. Marlbridge, 52 Hen. III., ch. 1; The Statute of Monopolies; The Act Respecting Champerty, 33 Ed. I.; The Statutes De Donis Conditionalibus, Quia Emptores, etc., and the Statutes of Uses.

CHAPTER 102.

The Statute of Frauds.

Refer to Agnew on the Statute of Frauds; Leake, Pollock, Smith, Addison, Chitty, Anson on Contracts; Benjamin on Sale; Roscoe's Nisi Prius; Bicknell and Kappele, Practical Statutes, pp. 304-309; Dart, Vendors and Purchasers, etc., etc.

2. See the preamble to 29 Car. 2, ch. 3, as set out in R. S. O. 1897, ch. 338, sec. 2: see also R. S. O. 1897, ch. 119, sec. 7, R. S. O. 1914, ch. 109, sec. 9. Occupation under lease void under the Statute of Frauds: Doe d. Rigge v. Bell, 2 Smith's L. C. 119.

3. See 29 Car. 2, ch. 3, sec. 3; R. S. O. 1897, ch. 338, sec. 4: see R. S. O. 1897, ch. 119, secs. 3, 7; R. S. O. 1914, ch. 109, secs. 4, 9. The law in England and in Ontario is the same as to surrender of leases: Mickleborough v. Strathy, 23 O. L. R. 33.

4. See 29 Car. 2, ch. 3, sec. 2.

5. R. S. O. 1897, ch. 338, sec. 5; 29 Car. 2, ch. 3, sec. 4. *Promise to answer for the debt, etc., of any other person.* For discussion of cases on the 4th section of the Statute of Frauds, and especially on this clause, see Birkmyr v. Darnell, 1 Smith L. C., 11th edn., p. 299. What is a sufficient signature under the Statute of Frauds: Wain v. Warlters, 1 Smith L. C. 323. What amounts to a promise to answer for the debt of another: Davys v. Buswell, 1913, 2 K. B. 47. Engagement to pay debt of another: Young v. Milne, 1 O. W. N. 460, 20 O. L. R. 366. Agreement to answer for default of another: Isle of Coves v. Williscroft, 2 O. W. N. 558, 18 O. W. R. 344. Promise to answer for liability of another: Simpson v. Dolan, 16 O. L. R. 459. Services rendered to a third person: Halliwell v. Zwick, 13 O. W. R. 1. Guarantee of payment of notes by president of company: insolvency of guarantor, proof of claim where notes mature after date of assignment: Clapperton v. Mutchmor, 30 O. R. 595. Guaranty: novation:

Bailey v. Gillies, 4 O. L. R. 182. A promise made by a third person to a creditor to pay or see paid a debt due to him by the debtor, whether such promise is absolute or conditional is within the statute: Beattie v. Dinnick, 27 O. R. 285. Guarantee: indemnity: see Harburg India Rubber Comb Co., 1902, 1 K. B. 778: see also Fraser v. Heaslip, 4 W. L. R. 520 (Man.); Sulin v. Jarvinen, 5 W. L. R. 189 (B.C.); Boorstein v. Moffatt, 36 N. S. R. 81; Allen v. Shehyn, 35 N. B. R. 635; Trotter v. McKinnon, 42 N. S. R. 406; Shea v. Lindsay, 20 Man. L. R. 208. Operation of Statute of Frauds in contracts of suretyship: see Dig. Ont. Case Law, col. 5700.

Consideration of marriage.

The principle applied in Forster v. Hale, 3 Ves. 696, 5 Ves. 308, and Dale v. Hamilton, 16 L. J. Ch. 126, 397, to contracts of partnership is also applicable to a marriage contract, and the defence of the Statute of Frauds will not avail: Re De Nicols: De Nicols v. Curlier, 1900, 2 Ch. 410. Ante-nuptial agreement not in writing: Finn v. St. Vincent de Paul, 22 O. L. R. 381. Promise to convey land on marriage: postponement on account of the insanity of one of the parties: Freel v. Royal, 10 O. W. R. 258.

Contract or sale of lands.

Interest in land: mining claim, part performance: Harrison v. Mobbs, 12 O. W. R. 465; Chevrier v. Trusts and Guarantee, 14 O. W. R. 101, 18 O. L. R. 547. Interest in lands and interest in the proceeds of sale of lands distinguished: see Corbett v. McNeil, 39 S. C. R. 608. A wife made a verbal contract with her husband, that if he would buy a certain house, she would make him a present of it. The husband bought the house which they occupied for several years, but the wife refused to pay the purchase price. It was held that an action could be maintained on the verbal contract, as it was not a contract or sale of an interest in or concerning lands within the section: Boston v. Boston, 1904, 1 K. B. 124. Where a defendant made a parol agreement for the purchase of land and a dwelling to be built by the plaintiff at an agreed price according to a plan approved, the defendant's conduct in visiting the works and inducing alterations was held to be of

such unequivocal nature as to imply the existence of an agreement, parol evidence of which was admissible, and the alterations amounted to a part performance, so as to prevent the defence of the Statute of Frauds: Dickenson v. Barrow, 1904, 2 Ch. 339. A definite oral bargain for the sale of land, good except for the Statute of Frauds, is sufficient consideration for a cheque drawn by the defendant upon a bank in favour of the plaintiff for part of the purchase money: Kinzie v. Harper, 15 O. L. R. 582. Acts constituting part performance: Bodwell v. McNiven, 5 O. L. R. 332. Part performance: possession: McLaughlin v. Mayhew, 6. O. L. R. 174. Part performance of father's parol agreement to convey farm to son in consideration of his working the farm and paying an annual rental during joint lives of father and mother, and son had carried out his obligations: Wilson v. Cameron, 5 O. W. N. 234, 25 O. W. R. 216. In consideration of taking care of her uncle and working his farm, the uncle agreed to give the farm to his niece. Though the niece entered into possession, it was held in an action brought after the uncle's death that her possession was not unequivocally referable to the agreement, and the statute was an answer to her claim: Coulter v. Elvin, 18 O. W. R. 99, 2 O. W. N. 678. Part performance of a parole agreement by conveying certain other lands: Meisner v. Meisner, 36 S. C. R. 34. Part performance of oral agreement for use of roadway: Fairweather v. Lloyd, 36 N. B. R. 548. Payment of a portion of purchase money not part performance: Gass v. Dickie, 7 E. L. R. 104. Part performance and acts of possession: see annotation, 2 D. L. R. 43. Agreement for lease: part performance: possession taken prior to and continued after agreement: Hodson v. Henland, 1896, 2 Ch. 428. Payment of increased rent as part performance: Miller v. Aldworth, 1899, 1 Ch. 622. Offer to sell or let: acceptance of offer to let: sufficient contract: Lever v. Koffler, 1901, 1 Ch. 543. Part performance: verbal agreement to demise and payment of rent, is not sufficient unless possession is taken: Thursby v. Eccles, 70 L. J. Q. B. 91. Occupation under lease void, under the Statute of Frauds: Doe d. Rigge v. Bell, 2 Smith's L. C. 119. A verbal agreement by a wife to keep her husband indemnified

in respect of the rent of a house is not an interest in lands within the statute: In re Banks: Weldon v. Banks, 58 S. J. 362. An agreement whereby an estate agent who had land for sale, and in order to induce a sale, guaranteed to forfeit $1,000 if the lands were not resold by a certain date was held an agreement not affecting lands and not within the statute: Crippen v. Hitchner, 18 W. L. R. 259. Where land was conveyed in consideration of a verbal promise to support the grantor's son for life, the grantee's promise was not a contract for the sale of lands or any interest in lands, and could be proved by parole evidence: Spencer v. Spencer, 24 W. L. R. 420, 11 D. L. R. 801; see also Smith v. Ernest, 22 Man. L. R. 363; Morgan v. Griffith, L. R. 6 Ex. 170. Although part of a contract for purchase of land may not be binding under the statute, another part of it, if in the alternative and distinct from the agreement to purchase, *e.g.*, that either party will pay the other a named sum, if he does not fulfill his part of the agreement, may be enforced: Mercier v. Campbell, 14 O. L. R. 639. The decision in Mercier v. Campbell, 14 O. L. R. 639, commented on: 46 C. L. T. 273, 433, 583, quoting articles from Law Quarterly Review and Law Times. A partnership may be formed by parol agreement notwithstanding it is to deal in lands, the Statute of Frauds not applying to such a case: McNerhanie v. Archibald, 29 S. C. R. 564. Application of the Statute of Frauds in making of contract for sale of land: see Dig. Ont. Case Law, col. 7152. In what cases the statute applies, col. 7153. Memorandum to satisfy the statute, col. 7167.

Agreement not to be performed within a year. Contract of hiring: application of Statute of Frauds: see Harper v. Davies, 45 U. C. R. 442; Booth v. Prittie, 6 A. R. 680. General hiring and hiring for a year: see Bain v. Anderson, 27 O. R. 369, 24 A. R. 296, 28 S. C. R. 481. Contract of hiring of farm labourer for year: servant leaving employment before expiration of term: effect of Statute of Frauds: position of claim of *quantum meruit*: Collins v. Smith, 11 O. W. R. 350. A memorandum in writing of an agreement for service must shew the date at which the service is to begin to satisfy the statute: and also some definition of the nature of the service:

Re Alexander's Timber Co., 70 L. J. Ch. 767. An agreement for a year's service to commence "tomorrow," is an agreement not to be performed within a year: Smith v. Gold Coast, etc., Lim., 1903, 1 K. B. 538. "Within a year," a sub-contract to employ a salesman so long as the employer's contract with a third person remains in force, that contract being terminable at any time, is not within the statute: Glenn v. Rudd, 3 O. L. R. 422. Contract containing provision for determining it within a year: Hanan v. Ehrlich, 1911, 2 K. B. 1056, 1912, A. C. 39. Possible performance within a year: Reeve v. Jennings, 1910, 2 K. B. 522. Where lands were conveyed in consideration of the grantee's verbal promise to support the grantor's son, the grantee's contract was not within the statute, for it would not necessarily by its terms, endure beyond a year: Spencer v. Spencer, 24 W. L. R. 420, 11 D. L. R. 801, and see Slater v. Smith, 10 U. C. R. 630; McGregor v. McGregor, 21 Q. B. D. 424. A hiring at "$700 to be increased per year until $1,000 is reached," is within the statute: Fairgrieve v. O'Mullin, 40 N. S. R. 215. A contract of service for a period of more than a year terminable at any time on 6 months notice on either side, is within the statute: Hanan v. Erlich (1912), A. C. 39. Agreement for service: time of commencement: Elliott v. Roberts, 107 L. T. 18; Curtis v. B. U. R. T. Co., 28 T. L. R. 585. Contracts not to be performed within a year: see article 48 C. L. J. 413.

Memorandum in writing:

Memorandum of contract: auctioneer's authority to sign where there is a mistake: Van Praagh v. Everidge, 1903, 1 Ch. 434. Auctioneer's entry of name of purchaser: Dewar v. Mintoff (1912), 2 K. B. 373. Signature by agent: document signed by agent recognizing terms of agreement made by his principal may be sufficient though the agent was not authorized to sign the document as a record of the agreement: Griffiths Cycle Corporation v. Humber & Co., 1899, 2 Q. B. 414. A Sheriff selling lands as assignee for creditors under R. S. O. 134, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds: McIntyre v. Faubert, 26 O. R.

427. The travelling salesman of a wholesale dealer is presumably not authorized by the customer to sign a contract for the customer as purchaser: this is not rebutted by the salesman actually signing in the customers presence and handing the latter a duplicate: Imperial Cap Co. v. Cohen, 11 O. L. R. 382. Authority of agent: McWilliam v. Sovereign Bank, 14 O. W. R. 561. When the vendor's name was not disclosed in a contract for the sale of land, but it was signed "P. W. Black, agent," it was held insufficient to satisfy the statute: Bradley v. Elliott, 11 O. L. R. 398. See also as to contract signed by agent and effect where terms of agency exceeded: Maybury v. O'Brien, 25 O. L. R. 229, 26 O. L. R. 628, 6 D. L. R. 268. Offer to purchase land made to vendor's agent: agent accepting on behalf of principal: sufficient: Filby v. Hounsell (1896), 2 Ch. 737; Selkirk Land and Inv. Co. v. Robinson, 25 W. L. R. 392. Agent need not be authorized in writing. Writing the purchaser's name near the beginning of an agreement for sale may be sufficient though the agreement is signed by the vendor only: McIlcride v. Mills, 16 Man. L. R. 276; McMillan v. Bentley, 16 Gr. 387; Evans v. Hoare (1892), 1 Q. B. 592; Schneider v. Norris, 2 M. & S. 286. Signing by agents for owner: Rossiter v. Miller, 3 App. Cas. 1140. Contract signed by agent "subject to approval by owner," and, it being shewn that the owner subsequently approved, the contract was enforceable: Colney v. Paterson, 20 W. L. R. 722. Memorandum in writing signed by defendant, as vendor, but not shewing name of plaintiff, or his agent as purchaser: Eckroyd v. Rodgers, 24 W. L. R. 318, 11 D. L. R. 626. See also Keighley Maxsted & Co. v. Durant (1901) A. C. 210. Signature of party followed by words shewing him to be agent: see annotation 2 D. L. R. 99. Note or memorandum in writing: see Cox v. Hoare, 95 L. T. 121, 96 L. T. 719. Memorandum to satisfy, 4th section of Statute of Frauds: Bailey v. Dawson, 20 O. W. R. 908, 3 O. W. N. 560. Contract by letters: destruction of the letters: Stuart v. Thomson, 23 O. R. 503. Contract for sale of land: insufficiency of parol evidence: McKinnon v. Harris, 14 O. W. R. 876, 1 O. W. N. 101. Chattel mortgage executed in blank: Wade v. Bell Engine Co., 16 O. W. R.

636. Contract evidenced by letters: Hussey v. Horne-Payne, 3 App. Cas. 316; Lloy v. Wells, 21 W. L. R. 50. Option and cheque with terms differing, held not a sufficient memorandum: Pearson v. O'Brien, 18 W. L. R. 563, 20 W. L. R. 510. Writing not containing the purchaser's name, but acknowledging cheque on account, but cheque not the cheque of purchaser or his agent: not a sufficient memorandum: Grant v. Reid, 16 Man. L. R. 527. Letter containing name of one party only, but enclosed in envelope addressed to other party sufficient: Pearce v. Gardner (1897), 1 Q. B. 688. Omission of terms of payment of purchase money: Rogers v. Hewer, 8 D. L. R. 288, 22 W. L. R. 807; Green v. Stevenson, 9 O. L. R. 671; Martin v. Pycroft, 2 DeG. M. & G. 785. Terms of bargain incompletely set out in a receipt. Defendant proved additional parol terms which constituted a successful defence under the statute: Green v. Stevenson, 9 O. L. R. 671. A letter repudiating sale may, along with a receipt, satisfy the statute: Berry v. Scott, 3 W. L. R. 84, 4 W. L. R. 282. Transfer in blank: cheque in part payment supplying the name of the purchaser: not open to contradict acknowledgment in transfer of receipt of whole purchase money: Taylor v. Grant, 6 Terr. L. R. 353. A contract for the purchase of lands, incomplete in not containing express provisions for the payment of the principal of a mortgage to be given, will not be specifically enforced: Reynolds v. Foster, 4 O. W. N. 694, 9 D. L. R. 836, 23 O. W. R. 933; nor where the letter relied on did not definitely fix the amounts of the deferred payments, nor the times at which they were to be made: McInnes Farms v. McKenzie, 23 W. L. R. 863. See Gibb v. McMahon, 9 O. L. R. 522, 37 S. C. R. 362; Hussey v. Horne-Payne, 4 App. Cas. 311; Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 645; Fenske v. Farbacher, 21 W. L. R. 53. Where there is a valid agreement to satisfy the statute, specific performance of it may be decreed, though at the time of contracting, the parties verbally agreed on subsidiary conditions, and collateral terms for conveniently carrying out the written agreement: Anderson v. Douglas, 18 Man. L. R. 254. Circumstances creating a novation on new consideration where former contract within the statute: Bailey v. Gillies, 4 O. L. R.

182. Where the expressed terms impossible of performance and terms were omitted: Manley v. Mackintosh, 10 B. C. R. 84. "24 acres of land at T," is sufficient description of the vendor's lands at T. to make extrinsic evidence admissible: Plant v. Browne, 1897, 2 Ch. 281. Sufficiency of description: Shardlow v. Cotterill, 20 Ch. D. 90; Caisley v. Stewart, 18 W. L. R. 420; Lewis v. Hughes, 4 W. L. R. 269. Incorrect surplus description may be rejected: Foster v. Anderson, 16 O. L. R. 562. Purchaser described as "you," and not named: payment of purchase money admitted by vendor: held sufficient description: Carr v. Lynch, 1900, 1 Ch. 613. "Vendor" is not a sufficient description of one of the contracting parties. The memorandum must contain either their names or a sufficient description: Potter v. Duffield, L. R. 18 Eq. 4; Williams v. Jordan, 6 Ch. D. 517; White v. Tomalin, 19 O. R. 513; Maber v. Penkalski, 24 C. L. T. 407. Oral modification of contracts required by the Statute of Frauds to be in writing: see article 49 C. L. T. 567. See also reference to Benjamin on Sale, *post* sec. 12 note.

Pleading:

As to pleading the statute: See Pullen v. Snelus, 40 L. T. N. S. 363, where it was held that the plaintiff is entitled to know which section of the statute the defendant means to rely on: but see James v. Smith (1891), 1 Ch. 384, where it was held that no particular section need be specified, and if the wrong section is specified, leave to amend may be refused. See also Brunning v. Odhams, 75 L. T. 602. Oral contract: admission in pleading: see Annotation, 2 D. L. R. 637. Pleading Statute of Frauds: see Con. Rule 271; H. & L. notes, p. 480-1, also Con. Rule 282; H. & L. notes, p. 488; 1913 Rules 143, 154. Odgers on Pleading, pp. 97, 163, 215.

6. See R. S. O. 1897, ch. 146, sec. 8: see De Colyar, 3rd ed., p. 164: see Union Bank v. Clark, 12 O. W. R. 532.

7. See R. S. O. 1897, ch. 146, sec. 6; see Imperial Act, 9 Geo. IV., ch. 14 sec. 5, which however does not authorize ratification by agent. If an infant avails himself of the right he has to avoid a contract which he has entered into, and on the

faith of which he has obtained goods, he is bound to restore those which he has in his possession at the time he so repudiates. The effect of repudiating is to revest the property in the vendor: London Mfg. Co. v. Milmine, 14 O. L. R. 532, 15 O. L. R. 53, 532. Infant not liable for fraudulent misrepresentation, that he is of full age: Jewell v. Broad, 19 O. L. R. 1, 20 O. L. R. 176. Acceptance of bill of exchange after infant attains full age, for a debt contracted during infancy: Belfast Banking Co. v. Doherty, 4 L. R. Ir. 124. Breach after attaining full age, of agreement not to solicit customers entered into during infancy: Brown v. Harper, 68 L. T. 488. New promise: Re Foulkes, 69 L. T. 183; Smith v. King, 1892, 2 Q. B. 543. Ratification by continued payment of instalments of purchase money: Whittingham v. Murphy, 60 L. T. 956. The Act applies to promise of marriage: Coxhead v. Mullis, 3 C. P. D. 439: see Ditcham v. Worrall, 5 C. P. D. 410; Northcote v. Doughty, 4 C. P. D. 385; Holmes v. Brierley, 36 W. R. 795. Appointment of agent by infant: void appointment incapable of ratification: Johannson v. Gudmundson, 11 W. L. R. 176 (Man.). Conditional ratification: Lynch v. Ellis, 7 E. L. R. 14 (P.E.I.). Ratification of bond: Beam v. Beatty, 4 O. L. R. 554 What amounts to a ratification within the statute: see Harris v. Hall, 1 Ex. 122; Mawson v. Blane, 10 Ex. 206; Rowe v. Hopwood, L. R. 4 Q. B. 1; Re Hodson, 1894, 2 Ch. 421; Maccord v. Osborne, 1 C. P. D. 568; London Mfg. Co. v. Milmine, 14 O. L. R. 532, 15 O. L. R. 53, 532. Contracts of infants: see 42 Can. Law Journal, p. 129.

8. See R. S. O. 1897, ch. 146, sec. 7. If a person induces another to accept bills on behalf of a third person, not for the purpose of obtaining further credit from that person, but to obtain payment of a debt due himself, the case is outside the statute: Clydesdale Bank v. Paton, 1896, A. C. 381. An incorporated company is a " person " within the meaning of this section, and not liable for representation as to credit of another person not signed by it, but by its agent: Hirst v. West Riding Banking Co., 1901, 2 K. B. 560. Estoppel of company by act of its secretary: see Bishop v. Balkis Consolidated, 25 Q. B. D. 512.

9. See R. S. O. 1897, ch. 338, sec. 6; 29 Car. 2, ch. 3, sec. 7. What amounts to intention on part of deceased to declare himself trustee: Re Cozens, Green v. Brisley, 1913, 2 Ch. 478. The Statute of Frauds does not prevent proof of a fraud. It is a fraud for a person to whom land is conveyed as a trustee to deny the trust and claim the land as his own: Rochefaucauld v. Bowstead, 1897, 1 Ch. 195; Kaul v. Trusts and Guarantee Co., 12 O. W. R. 301, at p. 306. Where land was conveyed in consideration of a promise by the grantee to support the grantor's son, if the transaction amounted to the creation of an express trust this section of the statute could not be invoked to enable the defendant to perpetuate the fraud and refuse to perform the trust: Spencer v. Spencer, 24 W. L. R. 420, 11 D. L. R. 801. See Re Duke of Marlborough (1894), 2 Ch. 292; Smith v. Ernst, 22 Man. L. R., at pp. 377-8; Gordon v. Handford, 16 Man. L. R. 292. See Judicature Act, 1897, ch. 51, sec. 26 (2); H. & L. notes, pp. 15-16; R. S. O. 1914, ch. 56, sec. 16 (*a*).

10. See R. S. O. 1897, ch. 338, sec. 7, 29 Car. 2, ch. 3, sec. 8.

11. See R. S. O. 1897, ch. 338, sec. 8, 29 Car. 2, ch. 3 sec. 9.

12. See R. S. O. 1897, ch. 146, sec. 9, ch. 338, sec. 12, 29 Car. 2, ch. 3, sec. 16 (17 Ruffhead's Edn.). For discussion of cases and policy of this enactment, see article in the Law Quarterly Review, vol. 1, p. 1, by Sir Frederick Pollock and Mr. Justice Stephen. The "17th section" of the Statute of Frauds is fully discussed in Benjamin on Sale, 4th Edn., pp. 93, *et seq.* What contracts are within the statute: Lord Tenterden's Act: "Value" and "Price:" distinction between "sales" and "work and labour done": furnishing chattel to be affixed to freehold: rule in Lee v. Griffin, 1 B. & S. 272: Benjamin, pp. 93-110. What are goods, wares and merchandise: choses in action are not: where growing crop is to be severed before property passes, it is an executory agreement for the sale of goods within Lord Tenterden's Act: where property passes before severance from the soil, then, if *fructus naturales*, the "4th

section" (*ante*, sec. 5), applies, but if *fructus industriales*, "17th section" applies: are *fructus industriales* "goods," while growing: sale of tenant's fixtures: crops not yet sown: Benjamin, pp. 111-129. What is a contract for the "price" or the "value" of £10: several articles sold on one occasion: auction sales of several lots: uncertain value: different contracts for a single consideration: Benjamin, pp. 130-132. Construction of the words "except the buyer shall accept part of the goods so sold and actually receive the same:" what is an acceptance: what is an actual receipt: Benjamin, pp. 133-171. "Or give something in earnest to bind the bargain or in part payment:" agreement to set off debt as part payment: goods supplied "on account" of a debt: board and lodging supplied in part payment: giving a bill or note on account: Benjamin, pp. 172-178. "Or that some memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized:" evidence admissible and not: what is a "note or memorandum in writing:" what is a sufficient note of the bargain made: what signature is required and how made: who are agents authorized to sign, and how brokers' contracts are evidenced: Benjamin, pp. 179-272. This section, unlike sec. 5 *supra*, affects the validity of the contract. Can a sale, valid under sec. 12 be invalid under sec. 5: Prested Miners Co. v. Garner, 1910, 2 K. B. 766, 1911, 1 K. B. 425. A writing containing all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds may be used for that purpose though it repudiates the sale: Haubner v. Martin, 22 A. R. 468, 26 S. C. R. 142. A contract for the sale of goods is incomplete, where though the price is stated, the contract shews on its face that the time for payment is left for further negotiation. The fact that possession is taken does not necessarily affect the rights of the parties: House v. Brown, 15 O. L. R. 500. Effect of statute on jurisdiction of Division Court, where plaintiff and defendant resident in different counties: Re Taylor and Reid, 13 O. L. R. 205. In an action for damages for conversion of goods the plaintiff must prove an unquestionable title in himself. If it appears that such title is

based on a contract, the defendant may successfully urge that such contract is void under the Statute of Frauds though no such defence is pleaded: Kent v. Ellis, 31 S. C. R. 110. Contract for sale of flour. Letter signed by plaintiff, entry in defendants books: Nasmith Co. v. Brown, etc., Co., 9 O. L. R. 21. Order for goods: agency: correspondence: Imperial Cap Co. v. Cohen, 11 O. L. R. 382. See National Malleable Casting Co. v. Smith's Falls Malleable Casting Co., 14 O. L. R. 22. What amounts to acceptance:

1. Delivery to buyer for testing or approbation insufficient: House v. Brown, 14 O. L. R. 500.
2. Delivery to carrier may be sufficient if buyer must accept when delivered: Bigelow v. Craigellachie, 37 S. C. R. 55. Otherwise if buyer may reject: Norman v. Phillips, 14 M. & W. 277.
3. Resale by buyer before delivery is acceptance: Robinson v. Gordon, 23 U. C. R. 143.
4. Resale by buyer while goods in customs is sufficient: Tower v. Tudhope, 37 U. C. R. 200.
5. Order to engrave name on plate sufficient: Walker v. Boulton, 3 O. S. 252.

A contract for the sale of goods, not in writing, signed by the party to be charged, and not to be performed within a year, is unenforcable, notwithstanding acceptance by the buyer of part of the goods sold: Prested Miners Gas, etc., Co. v. Garner (1911), 1 K. B. 425.

Note the wording of this section, which is composed partly of 29 Car. 2, ch. 3, sec. 17, and partly of 9 Geo. IV., ch. 14, sec. 7 per R. S. O. 1897, ch. 146, sec. 9 (now repealed), as affecting the question of "value" in Lord Tenterden's Act, and the line of cases interpreting "price" in the original Act. See also the (Eng.) Sale of Goods Act (1893), sec. 4, where the 17th section of the Statute of Frauds and Lord Tenterden's Act are also amalgamated. Generally: what contracts within the Statute of Frauds: see Dig. Ont. Case Law. col. 6229. Acceptance and receipt, col. 6231. Note or memorandum, col. 6324. Part payment, col. 6236.

CHAPTER 103.

The Mortmain and Charitable Uses Act.

Refer to (Bristowe's) Tudor's Charitable Trusts; Bourchier-Chilcott on Mortmain; White and Tudor's Leading Cases; Lewin on Trusts; Jarman on Wills; Story's Equity; Bicknell and Kappele, Practical Statutes, pp. 573-4.

1. The statute 55 Vict., ch. 20, which was subsequently R. S. O. 1897, 112, was based upon the English Act of 1891. The Act of 1902, 2 Edw. VII., ch. 2, also known as R. S. O. 1897, ch. 333, was based upon the earlier English Act of 1888. But by sec. 1 of the Act of 1902, it was provided that that Act should be read as part of ch. 112: the result being to put the two Ontario Acts practically in the same position as the two English Acts: Re Barrett, 10 O. L. R. 337, where the history and position of legislation on this subject are discussed. See also Re Kinny, 6 O. L. R. 454; and as to the corresponding English Acts of 1888 and 1891: Re Hume (1895), 1 Ch. 422. For history of legislation in Ontario: see Armour, Real Property, pp. 278-286: see Bristowe on the English Mortmain Act:. The Mortmain Act is to be strictly construed: Philpott v. St. George's Hospital, 6 H. of L. Cas. 338.

2.—(1*a*) "Assurance:" Re Kinny, 6 O. L. R. 459; Re Barrett, 10 O. L. R. 337; Madill v. McConnell, 16 O. L. R. 314, 17 O. L. R. 209; Re Battershall, 10 O. W. R. 933; and see notes to secs. 6 and 10.

2.—(1*c*) Meaning of "personal estate arising from or connected with land": see Re Barrett, 10 O. L. R. 337: Re Johnson, 5 O. L. R. 459; In re Brown, 32 O. R. 323; Manning v. Robinson, 29 O. R. 483: See Re Wilkinson, 1902, 1 Ch. 841. Meaning of "land": see Re Barrett, 10 O. L. R. 337. Includes leaseholds: Re Kershair, 37 Ch. D. 674.

2.—(2) A bequest to provide luxuries for the inmates of the county poor house, is a good charitable bequest:

In re Brown, 32 O. R. 323. A provision postponing the sale of lands left for charitable purposes is invalid unless the period is postponed by the Court: *Ib.* Meaning of "protestant charitable institutions:" Manning v. Robinson, 29 O. R. 483. A devise to a bishop in trust for his diocese is not a devise to a charitable use: Re McCauley, 28 O. R. 610. The fact that an archbishop was trustee to distribute the fund was held insufficient to shew that all the purposes of the testator were charitable in view of the law: Re Davidson; Minty v. Bourne, 1909, 1 Ch. 567. "Emigration" is not a charitable use: Re Sidney; Hingston v. Sidney, 1908, 1 Ch. 488. Gift "for the good of religion:" Dunne v. Byrne, 1912, A. C. 407. As to gifts to religious associations for other than charitable purposes: see R. S. O. 1897, ch. 307, sec. 24, notes to R. S. O. 1914, ch. 286, sec. 20 and Article, 48 C. L. T. 406. A good charitable bequest is not subject to the law against perpetuities: In re Clarke, 1901, 2 Ch. 110. Devise of lands to be sold and the proceeds used to advance the principles of the Reformed Presbyterian Church is a good charitable bequest: Re Johnson, 5 O. L. R. 459. A bequest for missions is a charitable use: Toronto General Trusts Co. v. Wilson, 26 O. R. 673; Madill v. McConnell, 11 O. W. R. 345, 16 O. L. R. 314, 17 O. L. R. 209. Voluntary schools: Re Beard, 1904, 1 Ch. 270. National schools: Re Blunts Trust, 1904, 2 Ch. 767. Benefit of inhabitants: Re Mann, 1903, 1 Ch. 232; Re Sandbach School, 1901, 2 Ch. 317. Widows and neglected children in a congregation: Re Kinny, 6 O. L. R. 459. Inn of Chancery: voluntary association: Smith v. Kerr, 1902, 1 Ch. 774. Gifts for religious purposes: see Re Barrett, 10 O. L. R. 337; Re Archer, 9 O. W. R. 652, 14 O. L. R. 374, at p. 377. Gift to a congregation of Hicksite friends to be applied in charitable purposes as they may direct: Re Huyck, 10 O. L. R. 480. A bequest for religious purposes is *prima facie* a bequest for charitable purposes: White v. White, 1893, 2 Ch. 41, 62 L. J. Ch. 342; Arnott v. Arnott, 1906, 1 Ir. R. 127. A bequest for "charitable, educational or other institutions of the town of K." is a valid charitable gift: Dolan v. Macdermot, L. R. 5 Eq. 60, L. R. 3 Ch. 676; Re Allen, Hargreaves v. Taylor, 1905, 2 Ch. 400, 74 L. J. Ch. 593. A bequest to bell-ringers to ring a

peal each year in commemoration of the restoration of the Monarchy: Re Pardoe, McLaughlin v. Atty. Gen., 1906, 2 Ch. 184. Such charitable and benevolent institutions as A. shall determine: Blair v. Duncan, 1902, A. C. 37; Grimond v. Grimond, 1905, A. C. 124. Non-existing charity: Re Clergy Society, 2 K. & J. 615; Re Davis, 1902, 2 Ch. 876. Repair of a churchyard: Re Douglas, 1905, 1 Ch. 279. Officers' library: Re Good, 1905, 2 Ch. 60. See Re Ryland; Re Sidebottam; Re Wilkinson, *infra*, sec. 6. A devise of real estate to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use:" Re McCaulay, 28 O. R. 610. A bequest "for such objects of benevolence and liberality as the trustee in his own discretion shall most approve," is not a charitable legacy: Morice v. Bishop of Durham, 9 Ves. 399, 10 Ves. 521. Bequest of residue to trustees to apply "to such benevolent and charitable purposes as they think proper," is not void for uncertainty: Miller v. Rowan, 5 Cl. & Fin. 99. See also Re Jarman's Estate, 8 Ch. Div. 584; Philpott v. St. George's Hospital, 6 H. of L. Cases 338; Re Hewett's Estate, 53 L. T. Ch. 132. A bequest of money for paying for masses for the repose of the testator's soul is not invalid in Ontario as a superstitious use: Elmsley v. Madden, 18 Gr. 386: Armour, R. P., p. 282.

3. See Madill v. McConnell, 16 O. L. R. 314, 17 O. L. R. 209. "Land shall not be assured, etc." A devise of lands in Toronto by a testator dying in 1891, "to promote and aid U. S. citizens of African descent" was held a charitable devise, and void under 9 Geo. II. ch. 36. The fact that the trust was to be executed in a foreign country made no difference: Lewis v. Doerle, 28 O. R. 412, 25 A. R. 206; See also as to 9 Geo. II. ch. 36: Sills v. Warner, 27 O. R. 266; Macdonell v. Purcell, 23 S. C. R. 101; Whitby v. Liscombe, 23 Gr. 1; Doe d. Anderson v. Todd, 2 U. C. R. 82. A provision for divesting under a will is not rendered of no avail by the fact that the gift over is void by the Statutes of Mortmain: Robinson v. Wood, 27 L. J. Ch. 726; Re Archer, 14 O. L. R. 374. "Under the authority . . . of a statute:" see R. S. O. 1914, ch. 203, sec. 12; Re Battershall, 10 O. W. R. 933, at p. 939. Alienation in mortmain, *e.g.*, to a corporation not empowered to hold lands, is voidable only

and not void: McDiarmid v. Hughes, 16 O. R. 570, 4 Cart. 701; Euclid Ave. Trusts v. Hohs, 18 O. W. R. 787, 19 O. W. R. 991, 23 O. L. R. 377, 24 O. L. R. 447. Power of corporations to hold land: London and Canadian v. Graham, 16 O. R. 329; McDiarmid v. Hughes, 16 O. R. 570, 4 Cart. 701, and see R. S. O. 1914, ch. 178, sec. 26, and notes.

6. This section does not apply to wills, but only to assurances *inter vivos*: Re Barrett, 10 O. L. R. 337; In re Hume Forbes v. Hume, 1895, 1 Ch. 422. The provisions of the Georgian Mortmain Act, 1736 (9 Geo. II. ch. 36) are reproduced in the Mortmain Act, and still apply to conveyances *inter vivos* of land and personal estate directed to be laid out in land for charitable purposes. One of the provisions so reproduced is that the assurance must be without any power of revocation, etc. This provision has been relaxed from time to time (24 Vic. ch. 9, 27 Vic. ch. 13, sec. 4), and the relaxations are reproduced by two clauses: sub-secs. 4, 5: Enc. Laws Eng., art. "Charities," p. 463. The word "assurance" refers to a deed, not to a will, thus leaving R. S. O. 1897 ch. 112, sec. 4 untouched. Under that section a devise in favour of charity is good, though made within six months before the testator's death: Re Kinny, 6 O. L. R. 459; Re Barrett, 10 O. L. R. 337. As to six months limitation in R. S. O. 1897, ch. 307, sec. 24, which is held to be repealed by R. S. O. 1897, ch. 112, sec. 4: see Re Barrett, 10 O. L. R. 337. As to "assurance" including "will:" see re Battershall, 10 O. W. R. 933, at p. 939; Madill v. McConnell, 11 O. W. R. 345, 16 O. L. R. 314, 17 O. L. R. 209; and see *ante*, sec. 2 (1) (*a*). Bequest of mixed property to missions: Madill v. McConnell, 16 O. L. R. 314, 17 O. L. R. 209; Toronto General Trusts Co. v. Wilson, 26 O. R. 673. Fund out of which charitable legacies payable: Re Harris, Harris v. Harris, 1912, 2 Ch. 241. Gift of land to charity under English statutes, and of personal estate arising from land: see Cocks v. Manners, L. R. 12 Eq. 574; Re Sidebottom, 1902, 2 Ch. 389; Re Delany, 1902, 2 Ch. 642; Re Good, 1905, 2 Ch. 60; Re Ryland, 1903, 1 Ch. 467.

8.—(2) This statute does not affect the operation of the revised statute as to public parks: Re Battershall, 10 O. W. R. 933; R. S. O. 1914, ch. 203, sec. 12.

10. It is no matter if the will was made before the 14th April, 1892: Re Bridger, 1894, 1 Ch. 297, 1893, 1 Ch. 44: See Re Archer, 14 O. L. R. 377. "Land:" Devise of land on trust for sale personal estate arising from land: Re Sidebottom, 1902, 2 Ch. 389; Re Wilkinson, 1902, 1 Ch. 841. Trust for sale: "land:" Re Ryland, 1903, 1 Ch. 467. This section repeals the six months limitation in R. S. O. 1897, ch. 307, sec. 24: Re Barrett, 10 O. L. R. 337; Madill v. McConnell, 16 O. L. R. 314, 17 O. L. R. 209; see also Baker v. Sutton, 1 Keene 224, at p. 232; Townsend v. Carus, 3 Ha. 257; Thorton v. Howe, 31 Beav. 14. This section unaffected by sec. 7 of the Act of 1902: Re Kinny, 6 O. L. R. 459. Validity of devise to church of "rents and profits" of lands: Thomas v. McTear, 14 O. W. R. 386.

11. Personal estate to be laid out in purchase of land: Re Sutton, 1901, 2 Ch. 640.

14. Legislation permitting societies to take gifts in mortmain: Re Youart, 10 O. W. R. 373.

14.—(2) After "Act" in line 2, insert "by:" 4 Geo. V. ch. 2, Schedule 22.

CHAPTER 104.

The Escheats Act.

2. Escheat a feudal survival: see Atty. Gen. v. O'Reilly, 26 Gr. 126, 6 A. R. 576, 5 S. C. R. 538, 8 App. Cas. 767. Although sec. 102 of the B. N. A. Act invests the general public revenues in the Dominion, yet by sec. 109 the casual revenue arising from lands escheated to the Crown after Confederation was reserved to the Province, being a "royalty" within the meaning of sec. 109: Atty. Gen. v. O'Reilly; Atty. Gen. v. Mercer, 8 App. Cas. 767. See Armour on Real Property, pp. 267, 268. No escheat of equitable estate: on failure of heirs use vests in the person having the seizin: see Re Reycraft, 20 O. L. R. 437.

4. See Atty. Gen. for Canada v. Atty. Gen. for Ontario, Quebec and Nova Scotia, 1898, A. C. 700.

CHAPTER 105.

The Fraudulent Conveyances Act.

Refer to May on Fraudulent Conveyances; Bicknell and Kappele, Practical Statutes, pp. 370-371.

1. Legislation. (1) 1377: 50 Edw. III. ch. 6. (2) 1488: 3 Henry VII. ch. 4. (3) 1571: 13 Eliz. ch. 5; see secs. 3, 4, 5. (4) 1585: 27 Eliz. ch. 4; see secs. 7, 8, 9. (5) 1845: Insolvency Act (repealed). (6) 1872: 35 Vic. ch. 1; see secs. 6, 10, 11. See also The Assignments and Preferences Act, R. S. O. 1914, ch. 134, and the Dominion Winding-up Act, R. S. O. 144.

3. Intent to . . . defraud. "A conjoint wrongful purpose that must be proved:" Derry v. Peek, 14 A. C. 337. This wrongful purpose may be inferred *inter al.* from: (*a*) a voluntary conveyance which defeats a creditor; (*b*) Grantee's knowledge of grantor's insolvency; (*c*) Some other benefit to grantor than the mere consideration for the transfer, *e.g.*: Mulcahy v. Archibald, 28 S. C. R. at p. 529; Middleton v. Pollock, 2 Ch. D. 104; (*d*) Secrecy and absence of corroborative evidence of good faith: Morton v. Mehan, 5 A. R. 207; (*e*) Relationship, haste, inadequacy, etc.

Creditors protected may be: 1. Generally all who have a legal demand on the grantor: May 163. 2. Simple contract creditors when suing on behalf of themselves and all other creditors: Longeway v. Mitchell, 17 Gr. 170; Colver v. Swayzie, 26 Gr. 395; Oliver v. McLaughlin, 24 O. R. 41. 3. Secured creditors not fully secured: Sun Life v. Elliott, 31 S. C. R. 91; Crombie v. Young, 26 O. R. 194. 4 Claimants under an implied contract of indemnity: Oliver v. McLaughlin, 24 O. R. 41. 5. Judgment and execution creditors: Sawyers v. Linton, 23 Gr. 43; Manley v. Young, 3 O. W. N. 400. 6. Assignees for benefit of creditors and sheriff: Lumsden v. Scott, 4 O. R. 323. 7. Subsequent creditors where by the transfer the debtor denudes himself of all property available for

creditors: Sun Life v. Elliott, 31 S. C. R. 91; Struther v. Glennie, 14 O. R. 726; Ottawa Wine Vaults Co. v. McGuire, 24 O. L. R. 591, 27 O. L. R. 319, 48 S. C. R. 44.

"The purchaser must have notice not only of the debt, but of the covin—the fraudulent intention, for, if mere notice of debts were sufficient to avoid a sale, otherwise honest purchaser ought to have not only an abstract of the vendor's title. but an abstract of the vendor's circumstances, and he must be examined like a bankrupt: a conveyance, therefore, cannot be invalidated under this Act, where there is a *bona fide* purchaser:" May on Fraudulent Conveyances, 2nd ed., p. 79; In re Johnson, Golden v. Gillam, 1881, 20 Ch. D. 389. The Court must look at the whole circumstances surrounding the conveyance: Re Holland, 1902, 2 Ch. 360. A deed of arrangement is not necessarily void under 13 Eliz. ch. 5, either because it contains provisions in favour of a debtor or because a particular creditor is intentionally excluded from its operation: Maskelyne v. Smith, 1902, 2 K. B. 158. A settlement of equitable reversionary personalty may be a settlement within the scope of 13 Eliz. ch. 5, since a creditor may reach such property by a charging order (see R. S. O. 1914, ch. 56, sec. 140), or by appointment of a receiver by way of equitable execution: Ideal Bedding Co. v. Holland, 1907, 2 Ch. 157, and cases cited. Since choses in action became attachable, an assignment of them may be void under 13 Eliz. ch. 5, as tending to defeat, hinder or delay creditors. If the *effect*, not necessarily the *object*, of the assignment is to defeat, hinder or delay one particular creditor only, the assignment will be void under the statute: Edmunds v. Edmunds, 1904, P. 362. A voluntary conveyance by M. to his wife denuded him of the greater part of his available assets, and was made to protect the property conveyed against future creditors, and therefore void as against them: Ottawa Wine Vaults v. McGuire, 24 O. L. R. 591, 27 O. L. R. 319, 48 S. C. R. 44. Conveyance, husband to wife, set aside as fraudulent: Canada Carriage Co. v. Lea, 11 O. L. R. 171, 14 O. W. R. 725, 1 O. W. N. 71. A voluntary conveyance of land is void though the vendor

was solvent when it was made, if it results in denuding him of all his property and rendering him insolvent thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance without first realizing his security: Sun Life v. Elliott, 31 S. C. R. 91. Where a husband made a voluntary settlement of half his assets on his wife just before entering into a considerable speculation in oil lands, it was held that property so held by the wife was available for creditors: Alexander Oil Co. v. Cook, 14 O. W. R. 604, 1 O. W. N. 22. See also Mackay v. Douglas, L. R. 14 Eq. 106; Ex p. Russell L. R. 19 Ch. D. 588; Webb v. Hamilton, 12 O. W. R. 380; Darland v. Chadsey, 14 O. W. R. 129; Jones v. McGrath, 16 O. R. 617. Where a debtor conveyed all his real estate on trust to sell and pay debts and as to any ultimate surplus in trust for his wife, it was held in a suit by a subsequent purchaser for value at a sale in execution of the grantor's interest in some of the lands that the deed of conveyance was not void as intended to defeat or delay creditors, and that not being fraudulent in fact, it was not fraudulent in law under 13 Eliz. ch. 5: Godfrey v. Poole, 57 L. J. P. C. 78, 13 App. Cas. 497. Intent to hinder and delay: Stecher v. Ontario Seed Co., 22 O. L. R. 577. Intent to defeat claims for damages: see Watson v. Gordanier, 11 O. W. R. 62. Right of creditors to follow profits: Fraudulent conveyances: 1 D. L. R. 841. See H. & L. notes. pp. 1242-1254.

5. Unless the marriage be a mere fraudulent contrivance for defeating creditors, the Courts will uphold a settlement of the husband's property made previous to and in consideration of an honest marriage, notwithstanding the embarrassed circumstances of the husband, even where the wife has contracted the marriage with full knowledge of the husband's embarrassments: May on Fraudulent Conveyances, 2nd ed., p. 332. Assignment of judgment debt in consideration of an antecedent debt owing to assignee: forbearance and subsequent advances as consideration: Glegg v. Bromley. 1912. 3 K. B. 474. Consideration: see Re Ridler, 22 Ch. D. 81; Ottawa v. McGuire, 24 O. L. R. 591, 4 O. W. N. 318, 27 O. L. R. 319, 48 S. C. R. 44. Letter accepting proposal of marriage on condition of property being settled: suspicious circumstances: Fallis v.

Wilson, 15 O. L. R. 55. Where the settlement was voluntary: see Thompson v. Gore, 12 O. R. 651; and the woman implicated in the fraud: Bulmer v. Hunter, L. R. 8 Eq. 46; Colombine v. Penhall, 1 Sm. & Giff. 228. Post nuptial settlement: Re Holland; Gregg v. Holland, 1902, 2 Ch. 360.

6. It having been held that the statute 13 Eliz. ch. 5 (secs. 3, 4, 5 *ante*) did not apply where there was valuable consideration and intention to vest the property in the transferee, even though there was fraudulent intent, the Act 35 Vic. ch. 11 was passed, now represented by this section and secs. 10, 11 *post*: see Smith v. Moffatt, 28 U. C. R. 486; Cameron v. Cusack, 17 A. R. 489; Gurofsky v. Harris, 27 O. R. 201, 23 A. R. 717; McDonald v. Horan, 12 O. W. R. 1151. Nor did 13 Eliz. ch. 5 apply to fraudulent preferences: Gurofsky v, Harris, 27 O. R. 201, 23 A. R. 717. Nor to the case of a purchaser defrauded by a voluntary conveyance.

The Provincial Act merely provides that a valuable consideration and intent to pass the interest of the grantee shall not prevent the application of 13 Eliz. ch. 5, secs. 1 and 2, unless the property was acquired *bona fide* and without notice or knowledge on the part of the purchaser of any fraud or intended fraud by the vendor: Gurofsky v. Harris, 27 O. R. 201-206, 23 A. R. 717. The cases which caused the passing of the declaratory section were *inter al.*: Smith v. Morton, 27 U. C. R. 195, 28 U. C. R. 486, and Dalglish v. McCarthy, 19 Gr. 578. In these cases sales made with intent to defeat creditors, but *bona fide*, intended to pass the property and for good consideration actually paid, were upheld, following the English case, Wood v. Dixie, 7 Q. B. 892. Although no similar declaratory Act has been passed in England, it is now held there that a fraudulent intent to which the purchaser is a party will override all enquiring into the consideration: see Ex parte Chaplin, 26 Ch. D. 319. A similar result has been reached elsewhere, *e.g.*: Cummings v. McDonald, 24 S. C. R. 321, on appeal from Nova Scotia. A creditor's assignee, not himself a creditor cannot maintain an action to set aside a voluntary transfer or conveyance made by the debtor prior to the assignment under which he claims: Lumsden v. Scott, 4 O. R. 323.

A plaintiff suing in tort is not a creditor within the meaning of the statute as to preferences: Gurofsky v. Harris, 27 O. R. 201, 23 A. R. 717; Ashley v. Brown, 17 A. R. 500. The statute gives effect as against subsequent purchasers to prior voluntary conveyances executed in good faith and to them only. A voluntary conveyance to a wife for the purpose of protecting property from creditors was held not good as against a subsequent mortgage to a creditor: Richardson v. Armitage, 18 Gr. 512. Where a debtor makes a payment believing in good faith and reasonably that he is, though he in fact is not legally bound to make it, such payment is not a fraudulent preference: McDonald v. Curran, 14 O. W. R. 838, 15 O. W. R. 218, 1 O. W. N. 121, 389. It may be noted that 13 Eliz. ch. 5, sec. 2 is omitted from the present Act. This was the penalty section. Under it an action by the party aggrieved to recover a moiety of the penalty imposed might be joined with an action to set aside a fraudulent transfer: Miller v. McTaggert, 20 O. R. 617. The penalty and forfeiture clauses also affected the question of production: see Con. Rule 464, H. & L. notes, p. 679. Summary inquiries in aid of execution: H. & L. notes, pp. 1242-1245. Refer to Armour on Titles, p. 97. See R. S. O. 1914, ch. 134, sec. 5 and cases noted.

7. This section and secs. 8 and 9 represent 27 Eliz. ch. 4, the object being to avoid voluntary or revocable conveyances made to defraud purchasers and mortgagees from grantor in good faith. The statute did not extend to personal property (as to which see the Chattel Mortgage Act), nor to conveyances made for good consideration and *bona fide* (see secs. 8 and 9), nor to voluntary conveyances, if a purchaser has bought in good faith and for value from the grantee, and such purchaser has registered his deed before any new conveyance from the original grantor (see secs. 10 and 11). See Volunteers and Purchasers: Armour on Titles, p. 97.

9. A voluntary conveyance under 27 Eliz. ch. 4 is voidable only, and is good and valid until avoided: Harper v. Culbert, 5 O. R. 152. Absence of power of revocation in a voluntary settlement not ground for setting it aside: Hillock v. Britton, 29 Gr. 490. Reformation of mortgage: when not voluntary so as to

exclude reformation: Bank of Toronto v. Irwin, 28 Gr. 397. A judgment creditor not a purchaser for value within 27 Eliz. ch. 4: Gillespie v. Van Egmondt, 6 Gr. 533. Special facts: see Doe d. Spafford v. Breckenridge, 1 C. P. 492.

CHAPTER 106.

The Powers of Attorney Act.

Refer to Evans on Principal and Agent; Bythewood and Jarman Conveyancing, Vol. IV.; Bicknell and Kappele, Practical Statutes, p. 300.

1. Subject to the statutory provisions, the law with regard to the revocation of a power of attorney and the determination of the attorney's authority is the same as the law with regard to the revocation and determination of the authority of agents generally. Powers of attorney are construed strictly, and give such authority only as they confer expressly or by necessary implication: Bryant v. La Banque du People, [1893] App. Cas. 170. See Conveyancing Act (Imp.) (1882), secs. 8, 9, 47. When registered, provision for registration in other offices: see R. S. O. 1897, ch. 136, sec. 53; R. S. O. 1914, ch. 124, sec. 44. Provisions as to registration of instruments executed by power of attorney: R. S. O. 1897, ch. 136, sec. 62; R. S. O. 1914, ch. 124, sec. 49. As to powers of attorney charging commission: see R. S. O. 1897, ch. 136, sec. 88; R. S. O. 1914, ch. 124, sec. 76 Married women may appoint: R. S. O. 1897, ch. 165, sec. 2; R. S. O. 1914, ch. 150, sec. 3. Registration of powers of attorney: see R. S. O. 1897, ch. 136, secs. 2, 60, 63; R. S. O. 1914, ch. 124, secs. 2, 47, 50. As to powers of attorney given for value: comments on this statute and matters affecting powers of attorney relating to conveyances of land: see Armour on Titles, p. 118 *et seq.*

CHAPTER 107.

The Swarms of Bees Act.

3. Liability of owner of bees for damage done by them: Lucas v. Pettit, 8 O. W. R. 315.

CHAPTER 108.

The Aliens Real Property Act.

1. "Transmit," thereby enabling aliens to make wills: see R. S. O. 1897, ch. 128, sec. 10, and notes; R. S. O. 1914, ch. 120, sec. 9. For remarks on this Act: see Armour, Real Property, p. 269, 270. An alien may not hold shares in a British ship. For cases before the Act: see Dig. Ont. Cas. Law, col. 18. Alienage in ejectment: see Iler v. Elliott, 32 U. C. R. 434; Rumrell v. Henderson, 22 C. P. 180. Aliens: property and civil rights of non-residents in province: see 9 D. L. R. 346.

CHAPTER 109.

The Law and Transfer of Property Act.

Refer to Armour on Titles; Armour on Real Property; Bicknell and Kappele, Practical Statutes, pp. 587-593; Hunter, Real Property Statutes; White and Tudor's Leading Cases; Smith's Leading Cases; Williams Conveyancing Statutes; Goodeve Real Property; Sugden on Powers; Fearne on Contingent Remainders; Warren, Choses in Action; Kehoe, Choses in Action; Bateman on Auctioneers, etc., etc.

2.—(*b*) Land: Compare the definition of this term in various statutes. As to what will pass under a conveyance of land: see Winfield v. Fowlie, 14 O. R. 102; Miles v. Ankatell, 29 O. R. 21, 25 A. R. 458, and notes to sec. 15 *infra*.

3. Freehold estates other than immediate and consequently not accompanied by possession are not within the enactment, as they lay in grant before it: see Armour on Real Property, pp. 87, 221-223, and as to grants, pp. 341-343. Estates cannot usually be created in chattels analogous to estates in lands: Woodmeston v. Walker, 2 Russ. & My. 197; McFarlane v. Henderson, 16 O. L. R. at p. 176. Life interest in chattels: Williams, Personal Property, 363

et seq. No life estate possible in things *quae usu consumuntur*: Re Tuck, 10 O. L. R. 309.

4. Dowress conveying a greater estate than for her own life: Armour on Real Property, p. 125. Life tenant: *Ib.*, p. 160, 161; and as to conveyance by feoffment: *Ib.*, pp. 336-340.

5.—(1) "In fee," "in fee simple," no words of limitation: see In re Ethel and Mitchell and Buller's Contract, 1901, 1 Ch. 945. See Armour on Real Property, pp. 324-325, 327-329.

5.—(2) See Burch v. Flummerfelt, 14 O. W. R. 929, 1 O. W. N. 133.

5.—(3) Prior to the Act an equitable estate could not be created without words of interitance: Dearberg v. Letchford, 72 L. T. 489; Lovate v. Whiston, 1894, 1 Ch. 661. Compare the provision as to wills: R. S. O. 1897, ch. 128, sec. 30; R. S. O. 1914, ch. 120, sec. 31. See Armour on Real Property, pp. 106-107.

7. At common law the parties were estopped by the receipt in the body of the deed, but in equity it might be shewn that the money was unpaid, and after the Judicature Act this rule prevailed: but see R. S. O. 1897, ch. 136, sec. 98; R. S. O. 1914, ch. 124, sec. 73, as to effect of registration. The section is not to be restricted to claims on alleged vendor's liens and the like: see Jones v. McGrath (2), 16 O. R. 617. An assignee of a mortgage takes subject to the equities between the original parties: Wilson v. Kyle, 28 Gr. 104. The word "conveyance" in this section includes "mortgage:" see sec. 2 (a): See R. S. O. 1897, ch. 121, sec. 33; R. S. O. 1914, ch. 112, sec. 12. See Armour on Titles, pp. 85, 95 112. Armour, Real Property, pp. 323-324. To constitute a receipt there must be express words acknowledging the receipt of the consideration money: Reuner v. Tolley, 68 L. T. 815. Without this the purchaser must pay the expense of proving that there is no vendor's lien for unpaid purchase money, should he insist upon such proof: Re Scott and Alvarez, 1895, 1 Ch. 596. Receipt in deed: purchaser for value without notice: Lloyds Bank v. Bullock, 1896, 2 Ch. 192.

9. Partition: see Armour on Real Property, pp. 252, 346-7. Leases required by law to be in writing: see R. S. O. 1897, ch. 338, secs. 2, 3; R. S. O. 1914, ch. 102, secs. 2, 3, 4. While not good as a lease because not by deed, such a lease may be good as an agreement, and specific performance of it decreed: Walsh v. Lonsdale, 21 Ch. D. 9; Lowther v. Heaver, 41 Ch. D. 264; Armour on Real Property, pp. 137, 185-6. Position of tenant to compel performance of agreement for lease: possession under parole demise. Rule at law and in equity: Rogers v. National Drug and Chemical Co., 23 O. L. R. 234, 24 O. L. R. 486. Surrenders: see R. S. O. 1914, ch. 102, secs. 2, 3, 4, notes; Armour on Real Property, pp. 349-351; Gault v. Sheppard, 14 A. R. 209; Mickleborough v. Strathy, 23 O. L. R. 33.

10. Does not extend to entry for condition broken, but only to entry where there has been disseizin, though both are covered by R. S. O. 1897, ch, 128 sec. 10; R. S. O. 1914, ch. 120, sec. 9; Armour on Real Property, p. 156, and cases there referred. As to entry for condition broken: see R. S. O. 1897, ch. 330, secs. 12, 13; 32 Henry VIII. ch. 34; R. S. O. 1914, ch. 155, sec. 4 *et seq.* As to estates tail: see Armour on Real Property, p. 104, 487 *et seq.* Executory interests: see R. S. O. 1897, ch. 128, sec. 10; R. S. O. 1914, ch. 120, sec. 9, and Armour on Real Property, p. 233. Possibility coupled with an interest, *e.g.*, inchoate right of dower or a devise to the survivor of several persons. As to reversion expectant on dissolution of corporation: see Armour on Real Property, p. 270. Reversions and vested remainders: Armour on Real Property, pp. 293-4. Contingent interests: Armour on Real Property, p. 226 *et seq.* Anything that can be conveyed under this section can be sold by the sheriff: see Execution Act, R. S. O. 1914, ch. 80; Armour on Titles, p. 390; Bicknell D. C. Act, p. 402. As to interest not within the section: see Little v. Hawkins, 19 Gr. 268. In an action under 32 Henry VIII. ch. 9, sec. 2, against a buyer of a right of entry the onus is on the plaintiff to prove not only that the title purchased was bad but also that the purchaser knew it to be fictitious. The mere fact that the right purchased was barred by the Statute of Limitations does not necessarily

render the title " pretenced " within the meaning of the Statute 32 Henry VIII. ch. 9: Kennedy v. Lyell, 15 Q. B. D. 491, (32 Henry VIII. ch. 9, was repealed in Ontario by S. L. R. Act, 1902). A grant of lands to which the grantor has a title in fact, but of which he has never been in possession, and on which he has only a right of entry, is valid, even though at the time of grant litigation is pending as to the title: Jenkins v. Jones, 9 Q. B. D. 128. A tenant at will has no interest as defined by this section: Re Clarkson & Wishart, 27 O. L. R. 70, 3 O. W. N. 1645. See, however, this case in P. C., where held that interest under mining certificate not a tenancy at will: 24 O. W. R. 937; (1912), A. C. 828. See the provisions of R. S. O. 1914, ch. 195, sec. 180, as to rights of entry adverse to tax purchaser.

11. Former objection to the use of the word " grant:" see Armour on Real Property, pp. 342, 482.

13. A testator by his will devised certain land to two sisters, naming them, and also gave them his residuary estate. As to the lands, it was held that they would have taken as tenants in common, and therefore as to the deceased sister's share there was a lapse, and it was undisposed of, but as to the personalty, they would have taken as joint tenants, and the survivor took the whole: Re Gamble, 13 O. L. R. 299. Heirs also take as tenants in common: see R. S. O. 1897, ch. 127, sec. 56; R. S. O. 1914, ch. 119, sec. 18. Executors and trustees still take as joint tenants. The effect of the statute is to create a tenancy in common only in cases where there would have been a joint tenancy: Re Shaver & Hart, 31 U. C. R. 603. For exposition of law relating to estates in joint tenancy and estates in common: see Armour, R. P., 239. Cases: see Dig. Ont. Case. Law, col. 2227 to 2232. At common law it seems that a corporation and a natural person can hold lands only as tenants in common and not as joint tenants. This has been altered in England, 62 and 63 Vict., ch. 20. Difficulty may arise here over the appointment of a corporation as trustee jointly with an individual: Re Thompson, Thompson v. Alexander, 1905, 1 Ch. 229. In England co-heirs take as joint tenants: Owen v. Gibbons, 1902, 1 Ch. 636: see R. S. O. 1897, ch. 127, sec.

26. Devise to two persons as joint tenants: Re Gignac and Denis, 16 O. W. R. 965, 2 O. W. N. 40. Variance between grant and *habendum*: Re Fingerhut and Barnick, 17 O. W. R. 730, 2 O. W. N. 372.

14. Section 13 refers only to lands granted, etc., and not to lands acquired by possession where joint possessors took as joint tenants, and not as tenants in common prior to this section: McKinnon v. Spence, 20 O. L. R. 57, at 65: Re Livingstone, 2 O. L. R. 381, and notes R. S. O. 1914, ch. 75, sec. 12.

15. The general words of the section are intended to pass easements and privileges legally appendant and appurtenant to the property conveyed, but will not pass an easement in navigable waters, which is a matter of public law, nor will it confer upon a grantee any right to insist on the grantor limiting the use of premises retained by him to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant to the knowledge of the grantee: Hamilton Steamboat Co. v. Mackay, 10 O. W. R. 295. The rule that a man may not derogate from his grant is a legal and not an equitable rule and not founded on any implied covenant. It operates to bind persons claiming through the grantor even though they are *bona fide* purchasers without notice: Cable v. Bryant, 1908, 1 Ch. 259. Where a parcel of land is accurately described by metes and bounds the general words will not pass lands with buildings thereon, not embraced in the specific description, merely because the buildings were previously used and occupied with the property described: Hill v. Broadbent, 25 O. R. 159. Right of way: circumstances under which severance having taken place, a right-of-way was not included in the words of the section: Maughan v. Casci, 5 O. R. 518. "Trees": Wrongful removal of timber from lands: Subsequent *bona fide* sale: Faulkner v. Greer, 14 O. L. R. 360. "Way:" Duty of grantor to define the right of way he is granting: Burney v. Moore, 4 O. W. N. 173. Way of necessity: how acquired and how lost: see 49 C. L. J. 398. What amounts to "way," "appurtenance," "held," etc., within the meaning of the section: Sinclair v. Peters, 23 O. W. R. 441, 48 S. C. R. 57. Right to fence

a right of way on both sides, and put gate at highway entrance: Ross v. McLaren, 2 O. W. N. 861, 18 O. W. R. 818. "Lights:" The rules settled by the Courts as to interference with ancient lights, are not applicable to a case where the plaintiff's rights depend on a prior conveyance from the common owner of his lot and the adjoining one, the plaintiff being entitled to receive such access of light through his windows, as they had at the time of the severance of his lot from that owned by the defendants: Simpson v. Eaton, 15 O. L. R. 161, 10 O. W. R. 151, 569: see Ellis v. White, 11 O. W. R. 181; Ruetsch v. Spry, 14 O. L. R. 233, 9 O. W. R. 696. Grant of right, express or implied: derogation: building agreement: injury to light: Quicke v. Chapman, 1903, 1 Ch. 659. A grantee of a new house is not entitled to all of the light actually falling on the windows of the house, where that would be inconsistent with the intention to be implied from the circumstances at the time of the grant and known to the grantee: Godwin v. Schweppes Lim., 1902, 1 Ch. 926: see also Pollard v. Gare, 1 Ch. 834; Broomfield v. Williams, 1897, 1 Ch. 602. "Easements:" Effect of tax sale on easements: Essery v. Bell, 13 O. W. R. 395. The right to air through a defined aperture is an easement which can be granted: Cable v. Bryant, 1908, 1 Ch. 259. Passing of right to dam back water though not expressly mentioned: Cain v. Pearce, 1 O. W. N. 1133, 2 O. W. N. 887. "Appurtenances:" see Fraser v. Mutchmoor, 8 O. L. R., at p. 616. See R. S. O. 1914, ch. 115, Schedule B. cl. 3, notes, as to what is included in short forms grant.

16. Reservation in conveyance of metals, minerals, and oils, does not include natural gas: Barnard Argue Roth v. Alexandra Oil., etc., Co., 22 O. L. R. 319, 25 O. L. R. 93, 23 O. W. R. 90, 1912, A. C. 864. Nature of interest of certificated holder of mining claim before patent: Reilly v. Doucette, 2 O. W. N. 1053; Re Clarkson and Wishart, 27 O. L. R. 70; (1913), A. C. 828.

18. Surface rights: Coniagas v. Cobalt, 13 O. W. R. 333, 15 O. W. R. 761, 20 O. L. R. 622.

20. As to grants to individuals and Corporations jointly: see Re Thompson, 1905, 1 Ch. 229, note to sec. 13. See Armour, R. P., pp. 371-2.

21. A certificate of *lis pendens* is not an incumbrance within the meaning of this section: Molsons Bank v. Eager, 10 O. L. R. 452. Where an applicant is not entitled to pay money into Court under this section, he may nevertheless be entitled to an interpleader order under Con. Rule 1103 (1913 Rule 704): Molsons Bank v. Eager, 10 O. L. R. 452. An annuity is an incumbrance within the section. The Court directed that the lands subject to the annuity be sold, the purchase money being paid into Court, or a statutory mortgage given by the purchaser, the interest from which would produce a revenue slightly greater than the annuity: Re Dowd, 9 O. W. R. 746: see Bicknell v. Kappele, Stat. p. 590. Where a municipal corporation acquired the property of a company, which was subject to a mortgage made by the company for a large sum, and an application was made by the municipality for its greater convenience, the Court refused the payment of the money into Court to charge the company with the difference between the mortgage rate (5 per cent.), and the Court rate (3 per cent.), for the period the mortgage had to run, and to deduct the principal, interest and such bonus from the purchase money: Re Kingston Light, etc., Co., and Kingston, 8 O. L. R. 249: see Armour on Titles, pp. 150, 292-3, 388-9.

22. Liability of vendor conveying as beneficial owner to indemnify purchaser in respect of breach of implied covenant: effect of knowledge of purchaser: Great Western Railway v. Fisher (1905), 1 Ch. 316. Compare Short forms Act, R. S. O. 1897, ch. 124; R. S. O. 1914, ch. 115, where the covenants, if made by more than one covenantor are joint, unless words are used to make them joint and several. The covenants are expressed to extend only to the covenantor's own acts, and herein differ from the Imperial Act, 44-45 Vict., sec. 7. Effect of implied joint covenant: see Merc. Amt. Act, R. S. O. 1914, ch. 133, sec. 6.

24. A mere power over the estate of another is not an estate: Earl of Devons' Case, 1896, 2 Ch. 562. Exercise of general powers; (*a*) by deed under this section; (*b*) by will: see R. S. O. 1914, ch. 120, secs. 13, 30; (*c*) In Equity: Re Walker, 1908, 1 Ch. 560. Armour, Real Property, p. 319; Cf. Imp. Act, 22-23

Vict., ch. 35, sec. 12. Where a power is exercised by will, the will must comply with the requirements of the Wills Act: R. S. O. 1914, ch. 120.

25. Imperial Act, 44-45 Vict., ch. 41, sec. 52: see Re Collard and Duckworth, 19 O. R. 735. Release of power of appointment by married woman over property, in which she has a life interest, subject to restraint on anticipation: Re Chisholm's Settlement, 1901, 2 Ch. 82.

29. Sections 29, 31, 32 are the "Statute of Marlbridge." Waste may also be punished by damages or by injunction: see Judicature Act, R. S. O., 1914, ch. 56 secs. 17, 18. Waste: Alterations in building: Holderness v. Lang, 11 O. R. 1. Clearing land: Lewis v. Godson, 15 O. R. 252; Saunders v. Breakie, 5 O. R. 603. Tapping trees: Campbell v. Shields, 44 U. C. R. 449. Boring for oil: Lancey v. Johnston, 29 Gr. 67. Mortgagor: Lumber cut off mortgaged premises: Scott v. Vosberg, 8 P. R. 336; McLeod v. Avey, 16 O. R. 365. Timber cut by tenant for life: Taylor v. Taylor, 5 O. S. 501; Weller v. Burnham, 11 U. C. R. 90; Saunders v. Breakie, 5 O. R. 603; Munsie v. Lindsay, 10 P. R. 173; Drake v. Wigle, 24 C. P. 405. Impeachment of tenant for life for waste: see also Clow v. Clow, 4 O. R. 355.

32. Yellowly v. Gower, 11 Exch. 274, which held that a tenant for years is liable for permissive waste, was rightly decided, and its authority has not been impugned by any subsequent case, or by the Judicature Act: Morris v. Cairncross, 14 O. L. R. 544, 9 O. W. R. 918. Effect of short forms covenants, and the exceptions in them considered: Morris v. Cairncross, 14 O. L. R. 544.

33. Release of part of lands charged with a rent charge and concurrence of owner of rent charge, who grants and quit claims all his interest in the premises, operates to release the moiety granted from all liability in respect of the rent charge, but does not convey the rent charge or any part of it to the grantees: Price v. John, 1905, 1 Ch. 744. See Armour, R. P., p. 83.

34. See Sugden on Powers. The effect of this section is discussed in judgment of Maclennan, J.A., in Thuresson v. Thuresson, 2 O. L. R. 637, at p. 643, and in dissenting judgments of Boyd, C., at p. 644, and Street J., at p. 649.

35. Contingent remainders: see Dig. Eng. Case Law XIV., col. 1567, *et seq.*: see also Contingent Remainders Act, 1877 (40-41 Vict. ch. 33). Remainders are construed as vested if possible: White v. Summers, 1908, 2 Ch. 256. As between contingent remainders and executory interests the Court favours construction as contingent remainders: Re Nash, 1910, 1 Ch. 1. Preservation of contingent remainder: Re Scott, 1911, 2 Ch. 374. See Armour, R. P. 226-229.

36. As to merger: see Armour, Real Property, pp. 235-6.

37. A purchaser made lasting improvements under the belief that he had acquired the fee, and then made a mortgage to a person who took in good faith under the same mistake of title. The purchaser had really acquired only the title of a life tenant. The mortgagee was held an " assign " within the section, and entitled to a lien, which he was entitled to enforce actively: McKibbon v. Williams, 24 A. R. 122. It seems that the section would not affect the Crown and if the title were in the Crown, when the improvements were made, the Crown's grantee would take free from any lien: Commissioners Queen Victoria N. F. Park v. Colt, 22 A. R. 1. In cases coming under this section, the amount by which the value of the land has been enhanced is to be allowed, not the cost or value of the improvements. *Ib.* The possessors are not chargeable with profits, but only a fair occupation rent. *Ib.* Where a person purchased a life estate, believing it to be the fee, and made improvements, he was entitled to a lien to the extent to which the value of the land was enhanced. He was held liable for *mesne* profits, and the one was set off against the other: Bullen v. Nesbitt, 10 O. W. R. 119. Where in administration proceedings, an heir being advised that he was a life tenant only, made a claim for improvements, the matter was referred back to the Master to report specially: (1) whether the applicant made the improvements in the

belief that the land was his own; (2) the particulars of the improvements; (3) the amount by which the value of the land was enhanced: Re Coneter, 10 O. W. R. 342. Where on the construction of a complicated devise, the vendor was found to have an estate *pur autre vie*, and not a fee simple, the purchasers who had entered under an agreement were ordered to give up possession, given a lien for lasting improvements and purchase moneys paid after being charged with a fair occupation rent: Young v. Denike, 2 O. L. R. 723. Where a person purchased land at a tax sale, and also took a conveyance from the mortgagor of the equity of redemption, and failed to establish that taxes were in arrear for which the land might rightly be sold, he had no valid claim for lasting improvements against a mortgagee seeking to foreclose, as he took subject to the mortgage, and was simply improving his own land: Hislop v. Joss, 3 O. L. R. 281. A person who purchased lands under the mistaken belief that the vendor took an estate tail under a will, when in reality he took an estate for life with remainder in fee to his children, was held entitled to a lien for lasting improvements, and the statute was held to apply to a mistake of title depending on a question of law. The point for determination is whether the person claiming for the improvements made them within the *bona fide* belief that the land was his own: Chandler v. Gibson, 2 O. L. R. 442. And even where the true owner sent the possessor a notice threatening action, but did not follow it up nor disclose how title was claimed—it not being obvious from the Registry—the possessor was entitled to a lien, being charged with occupation rent: Corbett v. Corbett, 8 O. W. R. 88, 12 O. L. R. 268. Husband's expenditure on wife's property: Till v. Till, 15 O. R. 133. Expenditure by purchaser under invalid sale by executors: Beaty v. Shaw, 14 A. R. 600. Improvements made under mistake of title are not to be allowed for as freely or as liberally as improvements by a mortgagee in possession: Munsie v. Lindsay, 10 P. R. 173. Method of computing enhanced value and of fixing occupation rent: Munsie v. Lindsay, 10 P. R. 173, 11 O. R. 520. Improvements by grantee where conveyance set aside for improvidence: Shanagan v. Shanagan, 7 O. R. 209. Deed obtained improperly: McGregor v. McGregor, 27 Gr. 470. No

occupation rent should be charged against one who has been in occupation under mistake of title in respect of the increased value thereof arising from improvements which are not allowed him: McGregor v. McGregor, 5 O. R. 617. What are improvements: a well and a rail fence:—held, evidence to go to a jury: Morton v. Lewis, 16 C. P. 485. Damages may be assessed for improvements made by defendant on land not his own, in consequence of an erroneous survey: Mozier v. Keegan, 13 C. P. 547. What amounts to an unskilful survey, which misleads: Doe d. Hare v. Potts, 5 U. C. R. 492; Doe d. Menle v. Campbell, 8 U. C. R. 19; Swanston v. Strong, 21 U. C. R. 279. There is no difference whether the survey is by public or private authority: Doe d. Gallagher v. McConnel, 6 O. S. 347; Campbell v. Ferguson, 4 C. P. 414; Hulton v. Trotter, 16 C. P. 367. Interest is allowed on enhanced value from time the money was expended: method of computation of enhanced value: Fawcett v. Burwell, 27 Gr. 445. Set off of rent: McCarthy v. Arbuckle, 31 C. P. 405. Manner of enforcing lien: Gummerson v. Bunting, 18 Gr. 516; O'Connor v. Dunn, 37 U. C. R. 430; McBride v. McNeil, 27 O. L. R. 390. Effect of statute where mortgagee purchased equity of redemption, and the sale was considered valid and acquiesced in by all parties for many years, although invalid on technical grounds: Skae v. Chapman, 21 Gr. 534. The belief of ownership must be a reasonable belief: Smith v. Gibson, 25 C. P. 248. Encroachment on neighbour's land: Ward v. Saunderson, 3 O. W. N. 802, 21 O. W. R. 254. Wall built on strip of land in dispute: belief of ownership: Parent v. Latimer, 17 O. W. R. 368, 2 O. W. N. 210, 1159, 19 O. W. R. 461. Improvements under mistake of title: Colonial Loan v. Longley, 13 O. W. R. 388. Lien for permanent improvements: Rose v. Parent, 2 O. W. N. 783, 18 O. W. R. 745; McBride v. McNeil, 4 O. W. N. 475. Lien for enhanced value: Patterson v. Dart, 2 O. W. N. 429, 17 O. W. R. 766, 3 O. W. N. 127, 20 O. W. R. 213, 24 O. L. R. 609. Lien of purchaser at tax sale for improvements and money expended: Richard v. Collins, 27 O. L. R. 390. Improvements made under mistake of title: see H. & L. notes, pp. 889 *et seq.* Armour on Titles, p. 429. As to improvements to chattels under mistake of title: see 42 C. L. J., p. 329.

38. Purchase of reversions: see Armour, R. P., pp. 237, 238.

39. The doctrine of constructive notice, and the defence of purchase for value without notice as applicable to this country, commented on: Henderson v. Graves, 2 E. & A. 9 (prior to the section). The defence of purchase for value without notice is not available against the Crown: Atty-Gen. v. McNulty, 11 Gr. 281, 581: see Con. Rule 276; H. & L. notes, p. 486, 1913 Rule 148.

40. As to consideration in conveyances to assignor's wife: see Jones v. McGrath, 16 O. R. 617; Whitehead v. Whitehead, 14 O. R. 621. Armour, R. P., p. 300; Armour on Titles, p. 379.

42. See the provisions of the Insurance Act, R. S. O. 1914, ch. 183, sec. 165.

49.—(1) The statute has not affected the principles of equitable assignment: Hughes v. Pumphouse Hotel Co., 1902, 2 K. B. 196; Elgie v. Edgar, 9 O. W. R. 614; Re McRae, 6 O. L. R. 238; Durham v. Roberts, 1898, 1 Q. B. 765; Alexander v. Steinhart, 1903, 2 K. B. 108; Lane v. Dungannon Driving Park Association, 22 O. R. 264; Quick v. South Colchester, 30 O. R. 614. Assignee may sue without joining assignor. But where the assignment is not "absolute:" see Mills v. Small, 14 O. L. R. 105. Bringing in assignor's as defendants to counterclaim: Sovereign Bank v. Parsons, 11 O. W. R. 845, 968, 18 O. L. R. 665. Assignment with secret defeasance: transferee again assigns absolutely to another who takes without notice: second transferee obtains a valid title: Quebec Bank v. Taggart, 27 O. R. 162. What is necessary for assignment of chose in action under this section, and under R. S. O. 1887, ch. 122, secs. 6-12: Rennie v. Quebec Bank, 1 O. L. R. 303. Notice to debtor: suffciency: McMillian v. Orillia Export Lumber Co., 6 O. L. R. 126. What is meant by an "absolute" assignment: Mills v. Small, 14 O. L. R. 105; Fairbanks v. Saunders, 9 O. W. R. 184. Distinction between assignment of the whole debt as security for a smaller sum and assignment of only sufficient of the debt to secure the smaller sum: Sovereign Bank v. International Portland Cement Co.,

14 O. L. R. 511. Parol assignment of book debts valid under R. S. O. 1887, ch. 122, sec. 7: assent of debtor not required: Trusts Corporation v. Rider, 27 O. R. 593, 24 A. R. 157. Validity of assignment of book debts as against another creditor in absence of notice given to debtor: Eby Blain v. Montreal Packing Co., 17 O. L. R. 292. What choses in action can be assigned under this provision: Cohen v. Webber, 24 O. L. R. 171. To constitute a good equitable assignment of a debt, all that is necessary is that the debtor should be given to understand that the debt has been made over to some third person, and if the debtor disregards such notice, he does so at his peril: Brandt v. Dunlop Rubber Co., 1905, A. C. 454, 74 L. J. K. B. 898. Notice of assignment given by executor of deceased second transferee of mortgage: see Bateman v. Hunt, 1904, 2 K. B. 530. Notice of assignment: Thomas v. Standard Bank, 1 O. W. N. 379, 548, 15 O. W. R. 188. What amounts to sufficient notice to debtor of assignment of chose in action: Denney v. Conklin, 1913, 3 K. B. 177. Where assignment is absolute in form, it is immaterial to the status of the plaintiff that he holds in trust: Colville v. Small, 22 O. L. R. 1. If on construction of the document, it appears to be an absolute assignment though subject to an equity of redemption express or implied, the consideration is immaterial: Hughes v. Pumphouse Hotel Co., 1902, 2 K. B. 190. An absolute assignment of mortgage even if it appears on the face of the instrument that it was given as collateral security for a debt of lesser amount is sufficient to come within the Act, as long as it did not purport to be by way of charge only: Mercantile Bank v. Evans, 1899, 2 Q. B. 613; Re Bland and Mohun, 5 O. W. N. 522. Right of mortgagor in possession subject to a lease made before the mortgage to sue, without adding the mortgagee and in his own name, for damages for breach of covenant to repair by lessee of mortgaged premises: Turner v. Walsh, 1909, 2 K. B. 484. Distress for rent by assignee of landlord: see Armour, Real Property, p. 79. Action by mortgagee: assignment of mortgage: substitution of assignee as plaintiff: Biggar v. Kemp, 12 O. W. R. 628, 700, 17 O. L. R. 360. Assignment of wages claim against company: Lee v. Friedman, 20 O. L. R. 49.

Set-off by defendant of debt assigned to him: Bennett v. White, 1910, 2 K. B. 1, 643. Fraud of debtor set-off as against the assignee: Stoddart v. Union Trust, 1912, 1 K. B. 181. Doubtful validity of assignment of part of claim: Seaman v. Canadian Stewart Co., 18 O. W. R. 56, 2 O. W. N. 576; Shipper v. Halloway, 1910, 2 K. B. 630; Forster v. Baker, 1910, 2 K. B. 626. An assignment was made in consideration of a covenant, that in case the assignee should be able to recover the debt he would pay the proceeds, less his costs to the assignor. This was not maintenance: Fitzroy v. Cave, 1905, 2 K. B. 364. Priorities as between verbal assignment and subsequent written assignment: Heyd v. Millar, 29 O. R. 735. A Sheriff cannot sell under execution the interest of a partner in a partnership, only in the tangible property of the partnership: Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541. A claim for damages is not an assignable chose in action: McCormack v. Toronto Ry., 13 O. L. R. 656, 8 O. W. R. 467. A right to compensation for damage arising by reason of a notice given by a railway under the Railway Act in respect of damage in the lawful exercise of the railway powers, is a chose in action within the meaning of this section, and capable of being assigned: Dawson v. Great Northern, 1905, 1 K. B. 260. Equitable assignment of choses in action: 10 D. L. R. 277.

49.—(1) In line 9, after "had," insert "not:" 4 Geo. V. ch. 2, Schedule (23).

49.—(2) Payment into Court under R. S. O. 1897, ch. 336, sec. 4 (and 2), by trustee *de son tort*: Re Preston, 13 O. L. R. 110: see Trustee Act, R. S. O. 1914, ch. 121, sec. 38.

51. Where by a mistake an auctioneer accepts a bid less than the reserved bid, the bidder has no action against the auctioneer, as the bid and acceptance are both conditional on the reserve price being reached: McManus v. Fortescue, 1907, 2 Q. B. 1. "Reserved price," "reserved bid:" see Gilliatt v. Gilliatt, L. R. 9 Eq. 60.

52. Where a sale is without reserve, and puffers are employed by the vendor, specific performance will not

be decreed: Meadows v. Tanner, 5 Madd. 34; Robinson v. Wall, 16 L. J. Ch. 401; Thornett v. Haines, 15 M. & W. 367. Declaration by auctioneer as to puffers: Woodward v. Miller, 15 L. J. Ch. 6. Puffers and reserved bidding: see Dig. Eng. Case Law I., col. 931 *et seq.* Claim for payment by puffer: Walker v. Gascoigne, 13 Vin. 543, pl. 13: Walker v. Nightengale, 4 Bro. P. C. 193.

53. See Mortimer v. Bell, 35 L. J. Ch. 25; Smith v. Clarke, 8 R. R. 359, 12 Ves. 477; Flint v. Woodin, 9 Hare 618.

55. See Armour on Titles, p. 43.

56. Right of purchaser before and after final order of foreclosure: Foresters v. Regg., 19 P. R. 254. "Purchaser" within the meaning of the section and cases: Hazel v. Wilkes, 1 O. W. N. 1096, 2 O. W. N. 131. As to conveyancing presumption that things rightly done: see Armour, Titles, p. 137. As to judicial sales and judicial titles: see Armour, Titles, p. 383.

CHAPTER 110.

The Accumulations Act.

1. This statute, formerly R. S. O. 1897, ch. 332, is commonly known as the Thellusson Act, and is based on the statute, 39 and 40 Geo. III., ch. 98, rendered necessary by the will of the testator upheld in Thellusson v. Woodford, 4 Ves. 227.

2.—(1) The general rule as to perpetuities may be stated as follows: Legal and equitable remainders and executory interest which are not so limited as necessarily to vest or fail of effect within lives in being and 21 years, are void for perpetuity: 2 Pres. 152; Re Frost, 43 Ch. D. 246; Sibley v. Ashforth, 1905, 1 Ch. 535. A child *en ventre sa mere* is to be treated as a life in being: Re Wilmer, 1903, 2 Ch. 411. See also Baker v. Stuart, 28 O. R. 439; Ferguson v. Ferguson, 39 U. C. R. 232, 1 A. R. 452, 2 S. C. R. 497; Meyers v. Hamilton Provident, 19 O. R. 358; Heron v. Walsh, 3 Gr. 606; Harrison v. Harrison, 7 O. L. R. 297; Harrison v. Spencer, 15 O. R. 692; Re Youart, 10 O. W. R. 373;

Re Travis: Frost v. Greatorex, 1900, 2 Ch. 541; Re Pope, 1901, 1 Ch. 64; Re Clutterbuck, 1901, 2 Ch. 285; Re Barones Llanover, 1903, 2 Ch. 330; Re Gardiner, 1901, 1 Ch. 697; Re Stephens, 1904, 1 Ch. 322; Re Heathcote, 1904, 1 Ch. 826. The rule against perpetuities does not apply to charities: Re Kinney, 6 O. L. R. 459. The gift of an annuity in perpetuity is invalid: Re Corbit, 5 O. W. R. 239. Contingent reversionary interest in deed may violate the rule against perpetuities. Re St. Patrick Market, 14 O. W. R. 794, 1 O. W. N. 92.

Direction for accumulation in foreign state: see Parkhurst v. Roy, 27 Gr. 361, 7 A. R. 614. Void accumulation clause: see Re Hughes, 1906, 2 Ch. 642. Disentailing assurance, cesser of accumulations: Re Trevanion, 1910, 2 Ch. 538. Distinction drawn between accumulation of income and savings out of income: Re Lindsay's Trustees, 1911, S. C. 584. Validity of provision in will directing a portion of the rents of leasehold property to be invested to create a fund against uncertain claims for delapidations: Re Hurlbatt, 1910, 2 Ch. 553, following Varlo v. Faden, 27 Beav. 255.

2.—(1*d*) A testator may validly direct accumulation during the minority of a person not born until after the testator's death: Re Cattell, Cattell v. Cattell, 1907, 1 Ch. 567.

3. "Provision for raising portions," held not within sec. 2 of the Thellusson Act: Mackay's Trustees v. Mackay, 1909, S. C. 139. "Provision for raising portions," within the meaning of the Thellusson Act, so as to exclude sec. 1: Colquhoun's Trusts v. Colquhoun, 1907, S. C. 346. Trust for accumulation to meet liability under a lease: Re Hurlbatt, 1910, 2 Ch. 553. Where debts or portions have been paid and satisfied out of a provision in a will for accumulation to recoup capital is not within the exceptions and cannot take effect after 21 years from the testator's death: Re Heathcote, Heathcote v. Trench, 1904, 1 Ch. 826.

4. See former section R. S. O. 1897, ch. 111, sec. 3 overruling Harrison v. Spencer, 15 O. R. 692. See Baker v. Stuart, 28 O. R. 439; Harrison v. Harrison, 7 O. L. R. 297.

CHAPTER 111.

The Petty Trespass Act.

5. The honest belief of a person charged with an offence under this section, that he had the right to do the act complained of is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief: R. v. Davey, 27 A. R. 508. The provision as to reasonable supposition of right is not extended to the Game Law: R. v. Harran, 3 O. W. N. 1107, 21 O. W. R. 951.

CHAPTER 112.

Mortgages of Real Estate.

Refer to Armour on Titles; Armour on Real Property; Hunter Mortgage Law of Ontario; Hunter on Power of Sale; Bicknell and Kappele, Practical Statutes, pp. 606-611; Hunter, Real Property Statutes; Fisher on Mortgages; Coote on Mortgages.

2.—(*c*) See Wood v. Curry, 12 O. W. R. 345.

3. Mortgagees in possession acquired by transfer a second mortgage on the same property, and sued covenantors in the first mortgage, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage, subject to the equities in other parties. It was held that the defendants were entitled to this, and that the plaintiffs could not tack the second mortgage to the first. Before action the defendants tendered the amount of the first mortgage and an assignment, but this the plaintiffs being mortgagees in possession, were not bound to give. Subsequently they offered to take a reconveyance, but the plaintiffs' misconduct in attempting to consolidate, was not such as to deprive them of costs: Stark v. Reid, 26 O. R. 257. Where the plaintiff, the mortgagor of certain

lands sold the same for an amount greater than the mortgage, the purchaser raising the excess by mortgage to the defendant, the original mortgagee, the plaintiff was entitled to an assignment of the mortgage made by him on his paying to the defendant merely the amount due thereon: Wheeler v. Brooke, 26 O. R. 96. Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which the sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under threat of action, paid the first mortgage and took an assignment of it. The sub-purchaser on being called on by the first mortgagors, and the first purchaser for indemnity against the first mortgage was held bound to pay it, and not entitled to an assignment of it without also paying the second mortgage: Thompson v. Warwick, 21 A. R. 637. The owner of land mortgaged it and then, reserving a life estate to himself conveyed it in fee subject to the mortgage. The grantee was not entitled on payment of the mortgage to an assignment of it to himself or his nominee except in such a way that it would remain an encumbrance on the remainder in fee vested in him: Leitch v. Leitch, 2 O. L. R. 233. Where a mortgagor of land sold his equity to various grantees one of whom agreed to pay off the mortgage and some of whom executed further mortgages on the land, the first mortgagee proceeding to foreclose and sue the mortgagor in his covenant, was held bound to execute an assignment of his mortgage to a nominee of the mortgagor who had advanced the money to pay off the mortgage, notwithstanding the subsequent incumbrances. Even if the redemption money had been that of the mortgagor himself it would have made no difference: Queen's College v. Claxton, 25 O. R. 282. The owner mortgaged to the plaintiff and then sold subject thereto, taking from the purchaser a second mortgage, which he assigned to the plaintiff. The purchaser then sold to the defendant, who, to obtain an extension of time on the first mortgage, covenanted to pay it, and then sold the property. The plaintiff in foreclosure claimed payment of the first mortgage on this covenant, but the defendant refused to pay it unless the plaintiff would assign

the mortgage to him. It was held that the plaintiff was not bound to assign unless the defendant paid off both mortgages: Muttlebury v. Taylor, 22 O. R. 312. No covenant can be insisted on, but the usual trustee covenant. The assignor is entitled to have the transaction fully set out and even collateral notes specified therein: Gooderham v. Traders Bank, 16 O. R. 438. Position of mortgagor asking reconveyance where title to land acquired against him under Statute of Limitations: Noble v. Noble, 25 O. L. R. 379, 27 O. L. R. 342. Application of section: Syms v. McGregor, 14 O. L. R. 748, 1 O. W. N. 94: see also Teevan v. Smith, 20 Ch. D. 724, at p. 730-1; Bythewood's Conv. Prec. 4th ed., Supp. 202; Anderson v. Elgey, 24 Ch. D. 567; Armour on Titles, p. 256-261, H. & L. notes, pp. 989, 990.

4. See Armour on Titles, pp. 108, 109, Armour, R. P., p. 187.

5. This section formerly appearing in the Judicature Act, does not confer on a mortgagor entitled to the receipt of the rents and profits of land on lease at the date of the mortgage, the rights of a legal assignee of the reversion so as to entitle him in his own right to recover possession of the land on a forfeiture for breach of covenant in the lease: Matthews v. Usher, 1900, 2 Q. B. 535. Right of mortgagor to sue lessee for breach of covenant to repair: Turner v. Walsh, 1909, 2 K. B. 484. Possession of mortgagor: redemise: trespass: Charbonneau v. McCusker, 17 O. W. R. 18, 2 O. W. N. 83, 22 O. L. R. 46. Possession of mortgagor: McMullen v. Free, unreported decision of Divisional Court, 8th Jan., 1887: see Charbonneau v. McCusker, 17 O. W. R. 18, 2 O. W. N. 83, 22 O. L. R. 46. Actions to protect property: see Armour, R. P., pp. 186-7.

6. See Holmested and Langton notes, pp. 976-978, and cases there cited: see also Armour, R. P., pp. 194-197.

7. When covenant implied: National Trust v. Brantford, 3 O. W. N. 1615, 4 O. W. N. 1341, 24 O. W. R. 787. A covenant by the assignor in an assignment of mortgage that the mortgage assigned is a good

and valid security does not mean that it is a sufficient security for the mortgage debt, but only that the mortgage is valid in law: Agricultural Savings v. Webb, 15 O. L. R. 213. Question whether an implied covenant in a mortgage is a covenant "-contained" in a mortgage within the meaning of R. S. O. 1914, ch. 75, sec. 49 (1*k*) and notes; Beatty v. Bailey, 26 O. L. R. 145, and see H. & L. notes, p. 586.

9. "This provision is a very singular one, and not to be extended beyond its letter . . . I certainly would not extend it to a person who was not a mortgagee at the time, but became so afterwards:" per Esten, V.-C.., Bank of Montreal v. Thompson, 9 Gr. 51. To make the Act apply there must be two mortgages, each forming a charge on the same property, and it had no application where the assignee *pro tanto* of a vendor's lien, holding in priority to the assignee of the remainder, subsequently took a conveyance of the land to himself: Finlayson v. Mills, 11 Gr. 218. Where a purchaser paid off prior incumbrances before the conveyance of land to him, he had no prior equitable charge under the circumstances, as their was no evidence of intention to preserve it: Armstrong v. Lye, 27 A. R. 287: see R. S. O. 1914, ch. 109, sec. 36; H. & L. notes, p. 64; Ont. Dig. Case Law, col. 4347, *et seq.*

10. Probate must be registered: see R. S. O. 1897, ch. 136, sec. 78; R. S. O. 1914, ch. 124, sec. 65: Re Taylor and Martyn, 14 O. L. R. 132. The registration of a certificate given by the survivor of several mortgagees upon payment in money of the mortgage debt effectually discharges the mortgage and revests the legal estate: Dilke v. Douglas, 26 Gr. 99, 5 A. R. 63: The statute only authorizes executors to convey the legal estate on payment of the mortgage debt. It does not authorize them to convey to a purchaser from themselves: Hunter v. Farr, 23 U. C. R. 324; Robinson v. Byers, 9 Gr. 572. A surviving executor cannot give a valid discharge of a mortgage which he himself has given to his co-executor to secure moneys owing to the decedent's estate: Beaty v. Shaw, 14 A. R. 600. A foreign administrator cannot effectually release a mortgage on land in this province. Payment to him and a release by the heirs are not sufficient to

entitle the owner to a certificate of title free from incumbrance under the Quieting Titles Act: In re Thorpe, 15 Gr. 76. One of several executors can execute a valid discharge of a mortgage: Ex p. Johnson, 6 P. R. 225, but see Armour on Titles, p. 263-4, where this case is discussed and considered unreliable. Note also on this point the present wording of R. S. O. 1914, ch. 124, sec. 62, as compared with R. S. O. 1897, ch. 136, sec. 76. Where the mortgagee appoints the mortgagor one of his executors, a discharge given by him alone of his own mortgage, is of doubtful validity: McPhadden v. Bacon, 13 Gr. 591: and see Bacon v. Shier, 16 Gr. 485. See Armour on Titles, pp. 263-4, 358-9; Armour, R. P., p. 213: and see R. S. O. 1897, ch. 129, secs. 16-25; R. S. O. 1914, ch. 121, secs. 43-47. Cases under the English Vendor and Purchaser Act, 1874, sec. 4 (Re Spradery's Mortgage, 14 Ch. D. 514; Re White's Mortgage, 51 L. J. Ch. 856; Re Brook's Mortgage, 46 L. J. Ch. 865); hold that the Act is confined to cases where the mortgage is paid off and the estate reconveyed. The legal personal representative cannot on receiving payment of the mortgage debt, convey the estate to a transferee. As to mortgages or advances on joint account: see R. S. O. 1914, ch. 133, sec. 4, and notes.

11. See Gray v. Richmond, 22 O. R. 256, as to what is money payable on an express or implied trust or for a limited purpose within the meaning of the section: see also McMillan v. McMillan, 21 Gr. 594; Moore v. Mellish, 3 O. R. 174.

13. See Edmonds v. Ham. Pro. & L. Society, 18 A. R. 347: considered in Armour, R. P. p. 204-5. Instructions to bailiff destraining under mortgage: see 45 C. L. J. 126.

14. Position of mortgagee as landlord claiming in assignment: see Munro v. Commercial Building, etc., Society, 36 U. C. R. 464; Hobbs v. Ontario Loan and Debenture Co., 18 S. C. R. 483, and see notes to R. S. O. 1914, ch. 155, secs. 38 and 40.

15. See Hill v Rowlands, 1897, 2 ch. 361; R. S. C. 127, sec. 7. See Armour, R. P., pp. 189-190.

19. See as to exercise of power of sale and rights and duties of mortgagee: R. S. O. 1914, ch. 117; Proviso 14 and notes.

21. Exercise of statutory power of sale by notice requiring payment three months hence: Baker v. Illingworth, 1908, 2 Ch. 20, Service on infant heirs: see notes to R. S. O. 1914, ch. 117, proviso 14.

22. Requisition demanding proof of service of notice of exercising power of sale: Life Interest &c., v. Hand in Hand, 1898, 2 Ch. 230. Constructive notice: Ware v. Egmont, 4 De. G. M. & G. 460; Bailey v. Barnes, 1894, 1 Ch. 25. Damages for improper exercise of power: Ames v. Higdon, 69 L. T. 292.

23. Disposal of surplus proceeds of sale under power of sale: Re Ferguson and Hill, 4 O. W. N. 1339; 24 O. W. R. 634. Payment out of Court of money paid in by mortgagee as surplus proceeds of mortgage sale: Weber v. Morris, 5 O. W. N. 166; 25 O. W. R. 123. Distribution of surplus: executions: Creditors Relief Act: Edmonton Mortgage Co. v. Gross, 18 W. L. R. 385.

29. After the Statute of Limitations has run against a mortgagor of lands, service of a notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem: Shaw v. Coulter, 11 O. L. R. 630. After the lapse of ten years, during which time a mortgagor's possession had not been interfered with, the assignee of the mortgage was restrained from taking sale proceedings: the intended sale was a "proceeding" under R. S. O. 1897, ch. 133, sec. 23; McDonald v. Grundy, 8 O. L. R. 113. (Note present wording of corresponding section, R. S. O. 1914, ch. 75, sec. 24). A mortgagee issued a writ and moved for speedy judgment against the mortgagor on the covenant, and, without leave, served notice of exercising power of sale but before the hearing of the motion, gave notice of the abandonment of the notice of sale and all costs in respect thereof. It was held that the effect of the notice was to give the defendant time, and the motion could not be entertained,

but the object of this section was fully attained by directing that the motion should stand over until after the expiration of thirty days mentioned in the notice: Lyon v. Ryerson, 17 P. R. 516. An advertisement of lands for sale is a "proceeding" within the meaning of the section and will be restrained by injunction: Smith v. Brown, 20 O. R. 165. Where a power of sale in a mortgage authorized a sale without notice and, after default, notice of sale was given exercisable forthwith, it was held that as there was no proviso for notice, the Act could not be invoked to restrain an action for possession brought immediately afterwards by the mortgagee without leave: Canada Permanent Bldg. Socy. v. Teeter, 19 O. R. 156. See Armour on Titles, pp. 415-6; Armour, R. P. p. 203. Printing and posting bills are "proceedings." Disbursements for Sheriff's certificate and searches in the Registry Office might have been incurred before notice, and are not proceedings: Re McArthur, 12 O. W. R. 177. Costs means solicitor's taxable costs: Re McArthur, 12 O. W. R. 177. Power of sale can be exercised after order for foreclosure *nisi*, only by leave of Court: Stevens v. Theatres Limited, 1903, 1 Ch. 857. As to application of this section: see H. & L. notes pp. 584-5.

30. No appeal lies from the taxation of a mortgagee's costs had under this section: Re Vanluven and Walker, 19 P. R. 216. Right of subsequent incumbrancer to have costs of first mortgagee taxed: see Re Cronyn, 8 P. R. 362; Re McDonald, 8 P. R. 88; Re Crerar, 8 P. R. 56. A Local Registrar who is not a Local Master has no jurisdiction to tax mortgagees costs of sale proceedings: Re Drinkwater and Kerr, 15 O. L. R. 76, 10 O. W. R. 511. Taxation of mortgagee's costs; see H. & L. notes, p. 1407.

CHAPTER 113.

THE ESTATES TAIL ACT.

2.—(*a*) "Actual tenant in tail:" see Armour, R. P., p. 487. Estates tail in chattels cannot usually be created. Absolute interest generally conferred: Fuller v. Anderson, 20 O. R. 424; Williams, Personal Property, p. 363.

3. Armour, R. P. p. 482.

4. For sections 1-8: see Armour, R. P. "Who may bar an entail," pp. 487-489. The lands of an infant, being an estate tail in possession can be sold under the provisions of R. S. O. 1914, ch. 153, secs. 5, 16 and 17; In re Gray, 26 O. R. 355. The words "Die without leaving living Issue" in a will do not give the meaning of an indefinite failure of issue, but estate tail that can be barred: Re Fraser and Bell, 21 O. R. 455. Words sufficient to bar an entail: Re Gold and Rowe, 4 O. W. R. 642, 23 O. W. R. 794. Whether estate tail well barred: Milbank v. Vane, 1893, 3 Ch. 79; Collier v. Walters, L. R. 17 Eq. 252; Schank v. Scott, 22 W. R. 513. Disentailing deeds: see Dig Eng. Case Law, VII. 27. Infant tenant in tail: interests of remaindermen: election on behalf of infant: direction to convey: Re Montagu, 1896, 1 Ch. 549. Fee simple deed by married woman: Re Drummond and Davies, 1891, 1 Ch. 524. All remainders and estates in defeasance of the estate tail are barred by the disentailing deed: Milbank v. Vane, 1893, 3 Ch. 79. A mere declaration of trust will not bar an entail: Green v. Paterson, 32 Ch. D. 95. Nor a conveyance which fails through the grantees disclaimer: Peacock v. Eastland, L. R. 10, Eq. 17. A prohibition against barring an entail is invalid: Dawkins v. Penrhyn, 6 Ch. D. 318, 4 App. Cas. 51. Bar by equitable tenant in tail: Green v. Paterson, 32 Ch. D. 95. Does a sale under execution bar an entail? See R. S. O. 1914, ch. 80, sec. 34, and ch. 109, sec. 10.

5. Grant of estate tail from the Crown: when not barrable: see Robinson v. Gifford, 1903, 1 Ch. 865.

6. See Armour, Real Property, p. 504.

8. A tenant in tail having mortgaged in fee by mortgage duly registered within 6 months, containing the usual proviso to be void on payment at a named date, but no discharge or reconveyance having been registered or made thereby barred the entail and converted the estate into a fee simple in favour of the owner as well as the mortgagee, by the mere execution and registration of the mortgage: Culbertson v. McCullough, 27 A. L. 459. The registration of a statutory discharge of a mortgage in fee reverts an estate in fee simple in the mortgagor: Lawlor v. Lawlor, 6 A. R. 312, 10 S. C. R. 194; Re Lawlor, 7 P. R. 242: See also re Dolsen, 4 Ch. Ch. 36. To avoid this effect it would be necessary to contract or stipulate for a resettlement in tail on the discharge of the mortgage: per Osler, J.A.: Culbertson v. McCullough, 27 A. R. 459. This is also the effect of Plomley v. Felton, 1888, 14 App. Cas. 61, which was a case, not of mere mortgage, but of a mortgage with a provision for a resettlement of the land or redemption on the original conditions and which provision the Court enforced. Where lands were devised to A. and to three heirs of his body lawfully, together with power to appoint one or more of such heirs to take the same, A. was held to have taken an estate tail, and there being no trust in favour of his children, mortgages executed by him took precedence of an appointment which he subsequently executed in their favour: Trust & Loan v. Fraser, 18 Gr. 19: see Armour, R. P. " Bar by mortgage," pp. 505-6. Specific performance as against a tenant in tail: see Graham v. Graham, 6 Gr. 372.

9. The owner of the prior life estate as protector: Re Dudson, 8 Ch. D. 628; Re Ainslie, 54 L. J. Ch. 8. Tenant in tail also protector to settlement: Re Wilmer, 1910, 2 Ch. 111. Protector appointed by settlor: see sec. 16. Protector: see Dig. Eng. Case Law, VII. 24. For secs. 10 to 22: see Armour, R. P., " Protector of the settlement," pp. 489-496.

11. Armour, R. P. p. 502.

16. Survivorship of office of protector: Cohen v. Bayley-Worthington, 1908, A. C. 97. Protector appointed by settlor: Bell v. Holtby, L. R. 15 Eq. 178; Clarke v. Chamberlin, 16 Ch. D. 176.

19. Consent of the protector: Re Drummond and Davie, 1891, 1 Ch. 524. Land was devised to trustees under an accumulation clause to pay annuities which was void after 21 years. On the determination of the trustees estate the land went to J. in tail with remainders over. After the 21 years the heir took the surplus rents during the life of the surviving annuitant. Held that the heir was not protector of the settlement, that there was no protector and a disentailing deed made by J. was effective: Re Hughes, 1906, 2 Ch. 642. See as to effect of Married Women's Property Act: Re Drummond and Davies, 1891, 1 Ch. 524. The express consent of the protector to the settlement is not necessary to bar an estate tail. Where the tenants in tail and the mother, who was protector to the settlement having an estate during widowhood in the land, joined in a mortgage in fee under the Short Forms Act to secure moneys to pay off legacies charged on the whole estate, including the mother's interest, her consent sufficiently appeared and the entail was barred: Ostrom v. Palmer, 3 A. R. 61; Armour, R. P., "How entail may be barred," pp. 496-500; "Consent of Protectors," p. 500-505; see also Ib. pp. 99-102.

21. In line 1, for "advice" read "device:" 4 Geo. V. ch. 2, Schedule (24).

26. "Disposition" not a technical word, but ordinary English word of wide meaning: Green v. Paterson, 32 Ch. D. 95; Carter v. Carter, 1896, 1 Ch. 62; Inrolment, 3 and 4 Wm. IV. ch. 74; Gibbons v. Snape, 32 Beav. 130, 1 DeG. J. & S. 621; Honywood v. Forster, 30 Beav.; Boyd v. Pawle, 14 L. T. 753; Morgan v. Morgan, L. R., 10 Eq. 99.

28. Specific performance: Bankers v. Small, 36 Ch. D. 716. Application to rectify deed: Hall-Dare v. Hall-Dare, 31 Ch. D. 251. Declaration of Trust: Carter v. Carter, 1896, 1 Ch. 62.

CHAPTER 114.

The Partition Act.

Note: The Partition Act, 1868, 31-32 Vic. ch. 40, and The Partition Act, 1876, 39-40 Vic. ch. 17, are edited: see "Walker on Partition."

1. History of legislation: see Ontario Power Co. v. Whattler, 7 O. L. R. 198.

2. For interpretation of the word "land" for the purposes of different statutes: see Armour, Real Property, p. 59.

3. Jurisdiction of Master in Chambers: see Con. Rule 42 (9); H. & L. notes, pp. 28, 37, 217; 1913 Rule 208.

4. Where an estate is vested in several persons as joint tenants or tenants in common, the entirety can be sold under an order of the Court in a partition suit, notwithstanding the dissent or disability of any person interested who is a party to the suit, his estate passing by vesting order: Basnett v. Moxon, L. R. 20 Eq. 182; Beckett v. Sutton, 19 Ch. D. 646. Partition by deed: see Re Frith & Osborne, 3 Ch. D. 618. Status of applicant: dowress: Devereaux v. Kearns, 11 P. R. 452; Fram v. Fram, 12 P. R. 185; Re Hewish, 17 O. R. 454. Mortgagee: Mulligan v. Hendershott, 17 P. R. 227; Laplante v. Scamen, 8 A. R. 577; McDougall v. McDougall, 14 Gr. 267. Remaindermen: Murcar v. Bolton, 5 O. R. 164. Tenant for life: Lalor v. Lalor, 9 P. R. 455; Fisken v. Ife, 28 O. R. 595. Trustee for sale: Keefer v. McKay, 29 Gr. 162. Interest in equity of redemption: Wood v. Hurl, 28 Gr. 146. Infants as parties: Tryon v. Peer, 13 Gr. 311; Brown v. Brown, 9 P. R. 245. Lessee for years: Fitzpatrick v. Wilson, 12 Gr. 440. See further as to parties: H. & L., notes, p. 1204. There must be some common title admitted in the land in question in the petitioner and respondents: Bennetto v. Bennetto, 6 P. R. 145. As to joint estates: see Armour on Real Property, pp. 239 *et seq.* Incidents of estates in common: see p. 252.

5. Courts are chary of interfering with administration by personal representative: see C. R. 954; 1913 Rule 612; Re McCully, 23 O. L. R. 156. "May take proceedings:" for procedure: see Con. Rules 956-958, 1913 Rules 212, 615, 616. As to writ: see H. & L. notes, p. 1203. Acting on agreement to partition: Wood v. Wood, 16 Gr. 471. Consent: In re Eastwood, 1 U. C. R. 3; In re Usher, 1 U. C. R. 527. Adverse title by possession: Hopkins v. Hopkins, 3 O. R. 223. Where party claims adversely, or where an infant seeks partition: see H. & L. notes, p. 1203, 1913 Rule 615. Partition is not granted of unpatented lands: Sale of lands at the instance of representatives of a deceased locatee: Abell v. Weir, 24 Gr. 464; Pride v. Rodger, 27 O. R. 320. A squatter's heirs should apply to the government: Jenkins v. Martin, 20 Gr. 613. Period of partition under will: see Murphy v. Mason, 22 Gr. 405. Where infant's lands are sold to effect a partition the infant's share retains its character as realty: Thompson v. McCaffrey, 6 P. R. 193. Minor coming of age setting aside partition: Merritt v. Shaw, 15 Gr. 321. Form of judgment: see C. R. form 158; see also Ontario Power Co. v. Whattler, 7 O. L. R. 198.

6. Absentee: guardian: see Re Hynes, Hodgins v. Andrews, 19 P. R. 217.

7. History of the statute law under which the Court has authority to direct a sale instead of a partition: C. R. form 158, considered: see Ontario Power Co. v. Whattler, 7 O. L. R. 198. As to parties, etc.: see notes to secs. 4, 5 *ante*. Partition and sale of Crown lands not decreed: Abell v. Weir, 24 Gr. 464; Pride v. Rodger, 27 O. R. 320. The heirs of squatters on Crown lands must apply to the Government—the Court will not order partition among them: Jenkins, v. Martin, 20 Gr. 613; note to sec. 5 *ante*. Partition to be made by the real representative: In re Foster, 1 Ch. Ch. 103. When sale ordered: number of claimants: In re Dennie, 10 U. C. R. 104. Nature of property requiring sale: Bennett v. Bennett, 8 Gr. 446. Outstanding term: Fitzpatrick v. Wilson, 12 Gr. 440. Property not susceptible of equal partition: sale beneficial: Stephen v. Hunter, 14 Gr. 541. Consideration of what is for benefit of infants

interested: Stephen v. Hunter, 14 Gr. 541. Infants' share when sold retains its character of realty: Thompson v. McCaffrey, 6 P. R. 193; see also H. & L. notes, p. 1205. Sale under registered judgment for alimony: position of dowress: Abbott v. Abbott, 3 O. W. N. 683, 21 O. W. R. 281. Sale in parcels—one unsold: procedure for confirmation: In re Westervelt, 10 U. C. L. J. 15. Allowance for improvements: see Wood v. Wood, 16 Gr. 471; Biehn v. Biehn, 18 Gr. 497; Hovey v. Ferguson, 18 Gr. 498; Foster v. Emmerson, 5 Gr. 185. Account of rents and profits and allowance for improvements: H. & L. notes, p. 1206. As to confirmation of the report and examination into it: see Dunn v. Dowling, 1 Ch. Ch. 365; see also O'Lone v. O'Lone, 2 Gr. 642. Apportionment of costs: Bernard v. Jarvis, 1 Ch. Ch. 24; Cartwright v. Diehl, 13 Gr. 360. Party and party costs are the rule as in other suits, and where any party is not *sui juris*, costs as between solicitor and client are not decreed, even by consent: Harkness v. Conmay, 12 Gr. 449. Unnnecessary suit: Carroll v. Carroll, 23 Gr. 438.

8. See Gleeson v. Byrne, 25 L. R. Ir. 361.

CHAPTER 115.

The Short Forms of Conveyances Act.

3. Where a covenant does not use the statutory words, no assistance can be had from this Act to extend its meaning to include assigns: Roche v. Allan, 2 O. W. N. 787, 913, 18 O. W. R. 749, 23 O. L. R. 300, 478. Adherence to statutory forms: Re Gilchrist, 11 O. R. 537; Clark v. Harvey, 16 O. R. 159; Barry v. Anderson, 18 A. R. 247; Roche v. Allan, 2 O. W. N. O. R. 537; Clark v. Harvey, 16 O. R. 159; Barry v. Anderson, 18 A. R. 247; Roche v. Allan, 2 O. W. N. 787, 913.

5. See Dewar v. Goodman, 1907, 1 K. B. 612; note to R. S. O. 1914, ch. 155, sec. 4.

Schedule "A."

A declaration inserted in the testing clause of a deed which purports to affect or qualify any of the provisions in the body of the deed has no legal effect: Blair v. Assets Co., 1896, A. C. 409. The operation of an ordinary short form deed conveying land to trustees considered: Seaton v. Lunney, 27 Gr. 169.

Schedule "B."

1. As to joint covenants: see Mercantile Amendment Act, R. S. O. 1914, ch. 133, sec. 6.

2. In a deed purporting to be under the Short Forms Act, the covenant was that the grantor had the right to convey, omitting the words "notwithstanding any act of the said covenantor." Although not in accordance with the statute, this was held to bind the covenantor as an absolute covenant that he was seized and had a right to convey in fee simple: McKay v. McKay, 31 C. P. 1; and see Brown v. v. O'Dwyer, 35 U. C. R. 354.

3. A conveyance made in pursuance of this Act of a lot according to a registered plan upon which a lane is laid out does not pass any interest in the lane when it has not been in fact opened on the land, and has not been used or enjoyed with the lot in question. Per Maclennan, J.A.: Bell v. Golding, 23 A. R. 485; and see notes to Registry Act, R. S. O. 1914, ch. 124, secs. 81, 84. The word "appurtenances" in the long form of this covenant does not cover *quasi* easements which have never existed or which have ceased to exist by reason of unity of ownership, such as right of access of light and air, and right to flow water, although the question does not seem to be free from doubt and difficulty: But where the owner of two tenements having actual use and enjoyment of certain lights and owning also adjoining land sells one, he cannot build on the adjoining land so as to obstruct or interrupt the enjoyment of those lights: Ruetsch v. Spry, 9 O. W. R. 696, 14 O. L. R. 233; see Harris v. Smith, 40 U. C. R. 33, at p. 39; see also Meighen v. Pacand, 40 S. C. R. 188;

R. S. O. 1914, ch. 109, sec. 15 and notes. As to easements which are included: see Edinburgh Life v. Barnhart, 17 C. P. 63.

4. Where A. being assignee of the judgment on which the execution was founded, purchased the equity of redemption sold under a *fi. fa.* lands against a mortgagor, conveyed the equity back to the mortgagor by a short forms conveyance and then assigned the unpaid balance of the judgment, it was held that the statutory covenants as to incumbrances and release of all claims contained in the conveyance to the mortgagor did not operate to release the judgment or the execution: Chittick v. Lowery, 6 O. L. R. 547. The clause refers to incumbrances, judgments or executions which affect the lands in contravention of the grantor's absolute ownership, issued or enforceable against the lands in his hands, and which, as against his vendee, he ought to pay: *Ib.*, p. 549.

5. Covenant for further assurance: see Reddy v. Strople, 44 S. C. R. 246.

8. See Chittick v. Lowery, 6 O. L. R. 547 *ante*, clause 4. Clause 8 had its origin in the abortive legislation of Lord Brougham in the English Short Forms Act of 1845, which, after remaining in disuse for many years, was repealed by sec. 71 of the Conveyancing Act of 1871: Chittick v. Lowrey, 6 O. L. R. 547, at p. 549.

CHAPTER 116.

The Short Forms of Leases Act.

5. Contract to renew lease: Effect on assigns: Alexander v. Herman, 21 O. W. R. 461, 3 O. W. N. 755. Covenants running with reversion: see R. S. O. 1914, ch. 155, secs. 4 *et seq.* Apportionment of condition of re-entry, ch. 155, sec. 8.

Schedule "A."

What is a sufficient reference to the Act to bring a lease within its provisions: see Davis v. Pitchers, 24 C. P. 516. Where the lessee was ejected by title paramount to the lessor he could not recover on an implied covenant in the word "demise," as it is controlled by the express covenant for quiet enjoyment which is limited to the acts of the lessor and those claiming under him: Davis v. Pitchers, 23 C. P. 516.

Schedule "B."

1. As to joint covenants: see Mercantile Amendment Act, R. S. O. 1914, ch. 133, sec. 6.

3. An ordinary lease under this Act containing the words "and to pay taxes" covers a special rate created by corporation by-law as well as all other taxes: Re Michie and Toronto, 11 C. P. 379. Where a tenant agrees to pay taxes on the land demised to him, the omission of his name from the assessment roll or the failure of the landlord to resort to the Court of Revision to have the omission rectified would not relieve him from his obligation: Janes v. O'Keefe, 26 O. R. 489, 23 A. R. 129. A covenant to pay taxes on the demised premises will not include the payment of taxes on buildings erected over a lane described as "north of the demised premises:" Janes v. O'Keefe, 26 O. R. 489, 23 A. R. 129. The covenant to pay all "taxes . . which now are or shall at any time be rated, etc.," refers to

the kinds of taxes, rates, etc., and not to the commencement of the tenancy. Consequently a tenant taking a lease in September did not have to pay any of the taxes for that year, as they had already been assessed against the landlord: McNaughton v. Wigg, 35 U. C. R. 111; but see Heydon v. Castle, 15 O. R. 257. The covenant includes local improvement rates and percentages added under the Assessment Act on amounts in arrear: Boulton v. Blake, 12 O. R. 532. A tenant became purchaser at a tax sale of the lands of which he was tenant, and in respect of which he had covenanted to pay the taxes for which the land was sold. In an action brought by the mortgagee, it was held that he could not hold title so acquired against his lessors: Heyden v. Castle, 15 O. R. 257; see Meehan v. Pears, 30 O. R. 433. Covenant to pay "all rates and taxes" payable in respect of the demised property includes water rates where the water service is installed at the time of the demise: Bourn v. Salmon & Co., 1907, 1 Ch. 616. And see now in Ontario, provisions of R. S. O. 1914, ch. 204, sec. 27. Construction of covenant to pay taxes: what are regular and ordinary taxes: St. Mary's Young Men's, etc., Society v. Albee, 43 S. C. R. 288. Covenant of lessor to pay taxes: increase consequent on sub-lease: Salaman v. Holford, 1909, 2 Ch. 64, 602. Covenant to pay taxes: see Foulger v. Arding, 1902, 1 K. B. 700; Surtees v. Woodhouse, 1903, 1 K. B. 396; Wise v. Rutson, 1899, 1 Q. B. 474; Baylis v. Jiggins, 1898, 2 Q. B. 315; Floyd v. Lyons, 1897, 1 Ch. 633. Repair of drains: Brett v. Rogers, 1897, 1 Q. B. 525; Farlow v. Stevenson, 1900, 1 Ch. 128. Liability: Re Warriner, 1903, 2 Ch. 367. See also Assessment Act, R. S. O. 1914, ch. 195, sec. 97, and Landlord and Tenant Act, ch. 155, sec. 27. When tenant's covenant to pay taxes includes drainage assessment: R. S. O. 1914, ch. 198, sec. 92.

4. Effect of this covenant "to keep the demised premises in good repair . . and all fixtures," etc., and covenant that the lessee may remove his fixtures: see Cronkhite v. Imperial Bank, 8 O. W. R. 18, 9 O. W. R. 326, 14 O. L. R. 270. Covenants 4, 7 and 9 considered: Statutory covenants 4 and 7

are qualified by the exception contained in statutory covenant 9 (*q.v.*): Morris v. Cairncross, 9 O. W. R. 918, 14 O. L. R. 544; Emmett v. Quinn, 7 A. R. 306; Delamalter v. Brown, 9 O. L. R. 351. Under this covenant the tenant is bound to repair the demised premises and all fixtures made or erected during the term which he had a right to make. The right to erect such fixtures exists to this extent, that they shall not diminish the value of the demised premises, nor increase the burden upon them as against the landlord, nor impair the evidence of title. The landlord's reversion not being injured by acts such as these, there is not waste and no forfeiture: Holderness v. Lang, 11 O. R. 1. Covenant to repair, and implied covenant by tenant not to commit waste: Defries v. Milne, 1913, 1 Ch. 98; but see Witham v. Kershaw, 1885, 16 Q. B. D. 613, 616. Notice by sanitary authority to construct outside drain: Howe v. Botwood, 1913, 2 K. B. 387. Effect of covenant by tenant to repair: Bornstein v. Weinberg, 4 O. W. N. 534, 27 O. L. R. 536. Natural decay of old building: Surcott v. Wakely, 1911, 1 K. B. 905. Damages for breach: Clare v. Dobson, 1911, 1 K. B. 35. Repairs voluntarily done by landlord and negligently executed by landlord's servants: injury to tenant's wife: non-liability of landlord: Malone v. Laskey, 1907, 2 K. B. 141. Duty of landlord to repair, and his liability to stranger injured on the premises: Marcille v. Donnelly, 1 O. W. N. 195. Covenants to repair: see art. 47 C. L. J. 733, 48 C. L. J. 8.

5. Effect of covenants in farm leases: Atkinson v. Farrell, 4 O. W. N. 73, 27 O. L. R. 204, 8 D. L. R. 582.

6. A covenant provided that the lessee was not to cut down timber "for any purpose whatever, except for firewood, but that the lessee is to have the privilege of using for any purpose all the lying down hardwood timber, cedar only excepted." This covenant restricted the statutory covenant but extended the common law right, which was limited to lying down dead timber. The covenant allowed the lessee to use all lying down hardwood timber, sound or unsound, subject to the exception as to cedar: Smellie v. Watson, 9 O L. R. 635.

7. See Crawford v. Brigg, 12 O. R. 8. Notice to repair: form: Holman v. Knox, 20 O. W. R. 121, 3 O. W. N. 151, 25 O. L. R. 588. See effect of this clause, in view of the provisions of the Settled Estates Act: Morris v. Cairncross, 14 O. L. R. 544, note to R. S. O. 1914, ch. 74, sec. 3.

8. The right of re-entry under this Act applies to the breach of negative as well as affirmative covenants, so that there is re-entry for breach of this covenant. The making of an agreement for the assignment of lease, the settlement of the terms, and the entry of the assignee, constitute sufficient breach; the actual making of the document of transfer is immaterial: McMahon v. Coyle, 5 O. L. R. 618; Toronto Hospital v. Denham, 31 C. P. 207; Eastern Telegraph Co. v. Dent, 1899, 1 Q. B. 835. Measure of damages for breach of covenant: The lessor was held entitled to a quarter's rent accruing due at the time of the breach, without deduction for rents realized by him during the quarter: Patching v. Smith, 28 O. R. 201; see Williams v. Earle, L. R. 3 Q. B. 739. The words "any person" in the long form of the covenant include the original lessee. Where an assignment has been made by him with consent, a re-assignment to him without a fresh consent is a breach of the covenant: Munro v. Waller, 28 O. R. 29. Where the landlord knew of the assignment and did not claim a forfeiture, but insisted on claiming rent from the lessee, the lessee was entitled to recover from the assignee what he was obliged to pay, although the consent of the lessor had not been procured: Brown v. Lennox, 22 A. R. 442. When a landlord gives a license to assign part of the demised premises, he may enter on the remainder for breach of the covenant, notwithstanding that the proviso for re-entry requires re-entry on the whole or a part in the name of the whole: Baldwin v. Wanzer, 22 O. R. 612. While acceptance of rent with knowledge of the breach will waive forfeiture, does it follow that the lessors are disentitled to rely on the breach as a ground for refusing to renew: Finch v. Underwood, 2 Ch. D. 310; see Fitzgerald v. Barbour, 17 O. L. R. 254. When persons become assignees of a lease with this

clause with leave, they become bound by the covenant and provision: Fitzgerald v. Barbour, 12 O. W. R. 807, 17 O. L. R. 254; and see sec. 5 *ante*. Assigning and sub-letting: see Varley v. Coppard, L. R. 7 C. P. 505; Bristol v. Westcott, 12 Ch. D. 461; Horsey v. Stieger, 1898, 2 Q. B. 264; Langton v. Hewson, 92 L. T. 805; Barrow v. Isaacs, 1891, 1 Q. B. 417; Fitzgerald v. Barbour, 11 O. W. R. 390, 12 O. W. R. 807, 17 O. L. R. 254. Liability of executors: consideration of this and covenant to repair: Crawford v. Brigg, 12 O. R. 8. Where an assignment was made by the administrator of lessee in spite of a covenant of the deceased not to assign, etc., the administrator was, by Richards, C.J., considered not bound by the covenant, because not named in it, but A. Wilson, J., inclined to think that the covenant was one concerning land which would bind the assigns though not named, but that the proviso for re-entry did not apply to it: Lee v. Lorsch, 37 U. C. R. 262. Where it is stipulated that leave to assign shall not be "unreasonably withheld": as to unreasonableness see Re Sparks Lease; Berger v. Jenkinson, 1905, 1 Ch. 456. Leave unreasonably withheld: Evans v. Levy, 1910, 1 Ch. 452. Proviso that leave to assign shall not be unreasonably withheld: Construction of this, in view of proposed assignment to a company: Jenkins v. Price, 1908, 1 Ch. 10. See provision that leave to assign not to be unreasonably withheld: R. S. O. 1914, ch. 155, sec. 23. Effect of assigning part of demised premises on covenant for renewal: C. P. R. v. Brown Milling Co., 18 O. L. R. 85, 42 S. C. R. 600. Assignment to co-partner breach of covenant: Fitzgerald v. Loveless (Barbour), 17 O. L. R. 254, 42 S. C. R. 254. Giving temporary permission to cross property not a breach of this covenant: Kinnear v. Shannon, 13 O. W. R. 502. Covenant not to assign: McEachern v. Colton, 1902, A. C. 104; Grove v. Portal, 1902, 1 Ch. 727; Harman v. Ainslie, 1904, 1 K. B. 698. Covenant not to assign, save to "a responsible and respectable person" does not extend to include a company: Willmott v. London Road Car Co., 1910, 1 Ch. 754. Breach of covenant against sub-letting: Curry v. Pennock, 4 O. W. N. 712, 1065, 23 O. W. R. 922, 24 O. W. R. 357, 10 D. L. R. 166, 548.

9. A lease under this Act contained a covenant to "leave the premises in good repair, ordinary wear and tear only excepted." It was held that the added words were not an exception or qualification within the meaning of the Act, and the covenant had to be construed as it stood, without the aid of the long form, and therefore, that the exception as to damage by fire did not apply: Delamatter v. Brown, 9 O. L. R. 351; see also Morris v. Cairncross, 9 O. W. R. 918, 14 O. L. R. 544, as to deviations from statutory form of this covenant and effect on conditions 3 and 6, which are qualified by the statutory exception in this covenant: also Emmett v. Quinn, 7 A. R. 306. The covenant to leave the demised premises in repair does not restrict the right of the tenant to remove his trade fixtures: Argles v. McMath, 26 O. R. 224, 23 A. R. 44. Destruction by fire: see Evans v. Skelton, 16 S. C. R. 637; Williams v. Tyas, 4 Gr. 533. Covenant to repair runs with the land, and an assignee of the term is only liable for breaches occurring previous to his assignment to another: Crawford v. Brigg, 12 O. R. 8. Covenant to leave in repair buildings to be erected by tenant. Right of grantee of lands to sue: Lucas v. McFee, 12 O. W. R. 939.

10. Where the determination of a lease depends upon an uncertain event such as an election to forfeit upon making an assignment for the benefit of creditors, a reasonable time must be allowed for the removal of trade fixtures after the election to forfeit: Argles v. McMath, 26 O. R. 224, 23 A. R. 44. A tenant when he renews his lease must be careful to preserve his rights to remove fixtures, and without express stipulation he may lose the right. Words of the proviso considered: Cronkhite v. Imperial Bank, 8 O. W. R. 18, 9 O. W. R. 326, 14 O. L. R. 270. Where a tenant surrenders his lease to his landlord a mortgagee or purchaser from the tenant has a right to remove fixtures within a reasonable time. This also applies in favour of debenture holders of a company which forfeits its lease by passing a winding-up resolution: Re Glasdir Copper Mines, 1904, 1 Ch. 819: A covenant to deliver up premises with all fixtures extends to all fixtures on the premises: Leschalles v. Woolf, 1908, 1 Ch. 641. Fixtures: see Lyon v. London City and

Midland Bank, 1903, 2 K. B. 135; Monti v. Barnes, 1901, 1 K. B. 205; Reynolds v. Ashby, 1904, A. C. 466; In re Hulse, Beattie v. Hulse, 1905, 1 Ch. 406; Leigh v. Taylor, 1902, A. C. 157.

11. "In case of fire:" see Accidental Fires Act, R. S. O. 1914, ch. 118.

12. Under a lease under this Act containing a covenant not to assign or sub-let without leave, when the lessor gives leave to assign part of the demised premises he may re-enter upon the remainder for breach of the covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole: Baldwin v. Wanzer, 22 O. R. 612. The right of re-entry exists for the breach of a negative as well as an affirmative covenant. There is a right of entry for breach of the covenant not to assign or sublet without leave: McMahon v. Coyle, 5 O. L. R. 618; Toronto Hospital v. Denham, 31 C. P. 207. The following additions to the statutory form did not exclude the application of the statute: Proviso for re-entry *by the said lessor* on non-payment of rent, *whether lawfully demanded or not*, or on non-performance of covenants, *or seizure or forfeiture of the said term for any of the causes aforesaid;* and the proviso extended to covenants after as well as before it in the lease: Crozier v. Tabb, 38 U. C. R. 54. Acquiescence in failure to observe terms of lease: Peterson Lake v. N. S. Silver Cobalt, 1 O. W. N. 619, 2 O. W. N. 970. Retraction of forfeiture: see Denison v. Maitland, 22 O. R. 166, note to R. S. O. 1914, ch. 155, sec. 20 (6). License to assign part: re-entry on remainder: see Baldwin v. Wanzer, 22 O. R. 612, note to R. S. O. 1914, ch. 155, sec. 24. Forfeiture for bankruptcy or assignment for benefit of creditors: R. S. O. 1914, ch. 155, sec. 20 (9), note. Power of Court to relieve against forfeiture: see R. S. O. 1914, ch. 155, sec. 20. Proviso for re-entry on default of performance of covenants is not limited to breaches of affirmative covenants: Harman v. Ainslie, 1904, 1 K. B. 698. What amounts to waiver of forfeiture: effect of payment and tender of rent and of bringing action and distress: Fenny v. Casson, 12 O. W. R. 404, 722. Breach

of condition for which the lessors are entitled to enter puts an end to a right of renewal provided for in the lease: Fitzgerald v. Barbour, 17 O. L. R. 254, 12 O. W. R. 807.

13. Quiet enjoyment: The effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the the act, but is not responsible for wrongful or negligent acts which he has not authorized: Sanderson v. Berwick, 13 Q. B. D. 547; Williams v. Gabriel, 1906, 1 K. B. 155, 75 L. J. K. B. 149. When the lessee was evicted by title paramount to the lessor, it was held that he could not recover as for breach of covenant for quiet enjoyment, which is limited to the acts of the lessor and those claiming under him: Davis v. Pitchers, 24 C. P. 516. Lessee entitled to continuation of existing light and ventilation as an appurtenance to the lands demised: Ellis v. White, 11 O. W. R. 184; see R. S. O. 1914, ch. 109, sec. 15; R. S. O. 1914, ch. 115, ch. 2, 3. Attempt by lessors to impose fee for entrance to park in which leased house is erected: Irving v. Grimsby Park Co., 11 O. W. R. 748. 16 O. L. R. 386. Quiet enjoyment: right to support and protection against subsidence: Markham v. Paget, 1908, 1 Ch. 697. Quiet enjoyment: Baynes v. Lloyd, 1895, 2 Q. B. 610; Jones v. Lavington, 1903, 1 K. B. 253. Nuisance on adjoining property: Davis v. Town Properties, 1903, 1 Ch. 797.

CHAPTER 117.

The Short Forms of Mortgages Act.

2. Lands, what included: Fixtures: see Woods v. Curry, 12 O. W. R. 345. In the absence of express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises, provided they are removed before the mortgagee takes possession; but this right of removal ceases when possession is taken by the mortgagee: Ellis v. Glover, 1908, 1 K. B. 388; Seeley v. Caldwell, 12 O. W. R. 1245; see also Stack v. Eaton, 4 O. L. R. 335. Chattels under hire, purchase agreement attached to the freehold; right of mortgagee as to: see Hobson v. Gorringe, 1897, 1 Ch. 182; Reynolds v. Ashby, 1903, 1 K. B. 87, 1904, A. C. 466; R. S. O. 1914, ch. 136, sec. 9 and notes.

4. The numbering is no essential part of the short form covenants and provisoes: Northly v. Trumenhiser, 30 U. C. R. 426.

Schedule "B."

1. Bar of dower: see notes to R. S. O. 1914, ch. 70, sec. 10.

2. Where it was impossible to give literal effect to all the parts of a mortgage, the defeasance clause being irreconcilable with particulars regarding payments, the Court regarded the general scope and intent of the deed and construed it so as to give effect thereto: Coleman v. Hill, 10 O. R. 172.

3. Words superadded in writing are entitled to have greater effect attributed to them than the printed clauses in the short forms mortgage. For this reason, and because it came first in the mortgage, words added in writing after the covenant to pay the mortgage money (Cov. 4) were held to modify and control the distress clause (Cov. 15):

McKay v. Howard, 6 O. R. 135. As to joint covenants: see Mercantile Amendment Act, R. S. O. 1914, ch. 133, sec. 6.

7. There is nothing in this covenant repugnant to the provision No. 14. A mortgagee when his mortgage is in default may under the covenant, without giving notice, make any lease which will not interfere with the mortgagor's right to redeem. The action intended in the proviso (14), is not the mere taking possession to keep down the interest, but the entering on the lands to lease or sell in such wise that the right of redemption may be postponed or destroyed. Where the security is scanty, it is competent for the mortgagee to make the best provision he can for his safety, even to cutting down trees, subject to an account at the proper time: Brethour v. Brooke, 23 O. R. 658, 21 A. R. 144.

12. Where insurance moneys are received by a mortgagee under an insurance effected under this covenant, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid, nor, though he applies part upon overdue principal is he bound to apply the balance in discharge of overdue interest: Edmonds v. Hamilton Provident, 19 O. R. 677, 18 A. R. 347. See Armour, R. P. pp. 194, 197. See H. & L. notes pp. 976-8 as to application of insurance money under mortgages.

14. Where a sale is effected pursuant to the Short Forms power, the mortgagee is a trustee of the proceeds of sale, and the mortgagor is entitled to bring an action against him for an account notwithstanding the expiration of six years from the time of sale: Briggs v. Freehold Loan, 26 A. R. 232. Mortgagees offered lands for sale under power of sale by auction and privately but without result. They then foreclosed, and pending foreclosure brought a separate action on the covenant against the executors of the mortgagor and sold under execution other lands of the mortgagor, and applied the proceeds on the mortgage debt. Some

time after foreclosure they sold to a purchaser and conveyed to him by ordinary short form deed without recitals, the purchaser being aware of the proceedings under judgment on the covenant. It was held that the proceedings on the covenant opened the foreclosure and any person entitled to redeem might bring action without setting aside the final order but that the sale by private contract and conveyance could be supported as an exercise of the power of sale: Chalfield v. Cunningham, 23 O. R. 153; see Brethour v. Brooke, 23 O. R. 658, 21 A. R. 144, (note to cl. 7). Sale without notice: "Provided that the said mortgagee on default of payment for two months may without giving any notice enter on and lease or sell the said lands." The assignee of this mortgage was held unable to confer good title on his purchaser in as much as notice was dispensed with which was not an exception or qualification of the short form, but an abolition of one of its terms, so that resort could not be had to the long form for construction: Re Gilchrist and Island, 11 O. R. 537. But a power of sale without notice may be exercised by the mortgagees, construing the words in their strictest sense if the act does not apply so long as the power is exercised by and against those strictly within its wording. And in such a case if the mortgagees give notice to some incumbrancers, they are not thereby required to give notice to all: Re British Canadian and Ray: 16 O. R. 15. Where the power was "Provided that the mortgagee on default for one day may without any notice enter on and lease or sell said lands," a sale made by the mortgagee himself was upheld: and held also that under the power, entry on the land was not necessary prior to sale. On appeal, a Divisional Court was equally divided: Clark v. Harvey, 16 O. R. 159. For variation permitting assignees of the mortgage to exercise it validly: see Barry v. Anderson, 18 A. R. 247. A power of sale in a mortgage to a building society, expressed to be exercisable by the trustee or trustees for the time being of the society without mentioning assigns, is not exercisable by an assign: Re Rumney and Smith (1897), 2 Ch. 351. Where a power of sale was exercisable by mortgagees, but not

by their assigns, and the mortgage was made to trustees, it was held that new trustees appointed were not assigns, but stood as if appointed by the original deed creating the trust, and could exercise the power: Re Gilmour and White, 14 O. R. 694. A notice stating that unless payment is made, proceedings will be instituted to obtain possession, is insufficient to support a sale: Bartlett v. Jull, 28 Gr. 140. A proviso for sale on "one month's notice" is within the covenant and a valid variation: Re Green and Artkin, 14 O. R. 697.

Execution creditors are "assigns" and entitled to notice, but only those having executions in the Sheriff's hands at the time notice of sale is given need be served: Re Abbott and Metcalf, 20 O. R. 299, Re Martin and Merritt, 3 O. L. R. 284, at p. 290. Notice must be given to persons having interest in the land vested or claimable by them of whose interest the mortgagee has notice: Stewart v. Rowson, 22 O. R. 533. Where a power of sale provides that on one month's default the power may be exercised on one month's notice, the month's default and the notice cannot run concurrently: Gibbons v. McDougall, 20 Gr. 214. But where the power provided that on three months' default the power might be exercised without notice, and then the mortgagees covenanted to give one month's notice, it was held that the notice and default might run concurrently: Grant v. Canada Life, 29 Gr. 256. After the Statute of Limitations has run against a mortgagor, service of notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title not being in any way affected: Shaw v. Coulter, 11 O. L. R. 630. The wife of a mortgagor joining to bar her dower is not an "assign" within the meaning of the statutory power, and service of the notice of exercising power of sale need not be made on her: Re Martin and Merritt, 3 O. L. R. 284. After the coming into force of the Devolution of Estates' Act and after the expiration of the period limited in sec. 13 of that Act, no caution having been registered, it is not necessary to serve notice of sale on the personal representatives of a deceased mortgagor: Re Martin and

Merritt, 3 O. L. R. 284. It is sufficient to serve the heir through an infant, where the power is to be exercised on notice to the heir: Re Martin and Merritt, 3 O. L. R. 284, at p. 290; Bartlett v. Jull, 28 Gr. 140, at p. 142-3; Tracy v. Lawrence, 2 Drew. 403. But see as to statutory implied power of sale: R. S. O. 1897, ch. 121, sec. 20; R. S. O. 1914, ch. 112, sec. 21. The short forms power probably permits substitutional service at the residence, though the mortgagor may be within the jurisdiction: O'Donohoe v. Whiley, 2 O. R. 424. As to what may be sufficient service of notice of exercising power of sale on agent in Ontario for a mortgagor residing abroad: Fenwick v. Whitham, 1 O. L. R. 24. See also as to what constitutes a good notice and proper service: Re Abbott and Metcalf, 20 O. R. 299; see Dig. Ont. Case Law, col. 4468-4472. Requisition demanding proof of service of notice of exercising power of sale: Life Interest, &c., v. Hand in Hand, 1898, 2 Ch. 230.

Damages for improper exercise of power: Ames v. Higdon, 69 L. T. 292. Constructive notice: Ware v. Egmont, 4 DeG. M. & G. 460; Bailey v. Barnes, 1894, 1 Ch. 25. Validity of purchase under power of sale by mortgagee's solicitor: Nutt v. Easton, 1899, 1 Ch. 873, 1900, 1 Ch. 29. Sale by mortgagee to one of several mortgagors, tenants in common: Kennedy v. DeTrafford, 1897, A. C. 180. When a valid contract of sale was made by a mortgagee under power of sale before any notice of intention to redeem was received from the wife of the mortgagor, the wife had lost any right she previously had to redeem. If the land had been foreclosed instead, *quære*: Standard Realty Co. v. Nicholson, 2 O. W. N. 1189; 19 O. W. R. 1189; 24 O. L. R. 46. A mortgagee selling under power, and who pays off an encumbrancer, who, to his knowledge, holds collateral security, must take over such collateral for the benefit of execution creditors who are to be treated as encumbrancers: Glover v. Southern Loan, 1 O. L. R. 59. Tender of redemption money must be made a reasonable time before the sale: Gentles v. Canada Permanent, 32 O. R. 428. On sale by mortgagee under power he may retain more than six years arrears of interest notwithstanding R. S. O. 1914, ch. 75, sec.

18: Ford v. Allen, 15 Gr. 565; Re Marshfield, 34 Ch. D. 721. Purchase of lands at sale under power—purchaser acting as trustee for mortgagor: Kane v. Trusts and Guarantee Co., 12 O. W. R. 301. On a sale of real estate by a mortgagee under power of sale in the lifetime of the mortgagor, surplus proceeds are personal estate notwithstanding that the power directs them to be paid to the mortgagor "his heirs or assigns" and that the mortgagor was a lunatic: Re Grange; Chadwick v. Grange, 1907, 2 Ch. 20. A member of the investment committee of a friendly society is under suspicion as purchaser under sale proceedings taken under one of the society's mortgages. The onus is on him to shew the fairness of the transaction: Hodson v. Deans, 1903, 2 Ch. 647. Duties, powers and rights of mortgagees selling under power: Wilson v. Taylor, 4 O. W. N. 253, 1376, 23 O. W. R. 359, 24 O. W. R. 669; Barnes v. Queensland Bank, 1906, St. R. Qu. 133. Hazeltine v. Consolidated Mines, 13 O. W. R. 271, 994; Haddington Island Quarry Co. v. Huson (1911), A. C. 729. Duty of mortgagee to exercise power in good faith, not to make misstatements or omissions of material facts nor fix conditions by which persons would be deterred from bidding: Kaiserhof Hotel v. Zuber, 23 O. L. R. 481, 25 O. L. R. 194, 46 S. C. R. 651. The words "absolutely dispose of in the Short Forms power, are applicable to an exchange as well as a sale for money: Smith v. Spears, 22 O. R. 286: see Armour on Titles, p. 399, etc. Where there has been a sale under power the position is not at all the same as after a foreclosure in respect of "opening up." On a sale after foreclosure, the mortgagee may make a gain, he has not to account, and if he does not make enough to pay the amount of his debt, he cannot sue for the balance. Where the property is sold under power, the mortgagee cannot make a gain, he must account for any surplus, but can sue for a deficiency: Burnham v. Galt, 16 Gr. 417; Pegg v. Hobson, 14 O. R. 272; Rudge v. Richens, L. R. 8, C. P. 358; Standard Realty v. Nicholson, 24 O. L. R. 46. Position of purchaser in good faith, making no enquiry as to title, where the owner of the equity not properly served: Doctrine of constructive notice held not to apply as

against purchaser: Williams v. Sun Life, 19 W. L. R. 564; 21 W. L. R. 271. See also, Jones v. North Vancouver Land Co., 1910, A. C. 317. An order for foreclosure *nisi* does not extinguish power of sale: Stevens v. Theatres Limited, 1903, 1 Ch. 857. It would appear that where there is default in a mortgage containing an acceleration clause, and the mortgagee sues for the whole amount of the mortgage, the Court will relieve as from a forfeiture: Tylee v. Hinton, 42 U. C. R. 228, 3 A. R. 53. It was afterwards held that this rule was not to be extended to the case where the mortgagee proceeds to exercise his power of sale, and no suit is instituted: Robertson v. Hetherington, 3 C. L. T. Occ. N. 141. This latter case was really a construction of the then Rule, Ch. O. 461, afterwards Con. Rule 388, and 1913 Rule 485. Upon a construction of clause 16, of the Short Forms Act, R. S. O. 1914, ch. 117, it was held that as a matter of contract, the mortgagee must accept his arrears and costs and, on his refusal, would be restrained from proceedings: Todd v. Linklater, 1 O. L. R. 103.

Sale under power: see Dig. Eng. Case Law, IX., pp. 1771, *et seq*: Existence of power, p. 1171; Validity of power, p. 1773; Notice to mortgagor, p. 1778; Sale by auction or private contract, p. 1780; Price, p. 1780; Management and conduct, p. 1782; Conditions, p. 1783; Rights to proceeds, p. 1784. As to concurrent proceedings: see R. S. O. 1914, ch. 112, sec. 29 and notes thereto. Validation of sale prior to 23rd March, 1888: see R. S. O. 1897, ch. 121, sec. 34, (unrepealed). Proceedings when mortgage provides for sale without notice: R. S. O. 1914, ch. 112, sec. 27 (2); or alternative provisions in lieu of proceeding under this covenant: R. S. O. 1914, ch. 112, sec. 27 (1). Provision for registration of notice of exercising power of sale and proof of service: R. S. O. 1914, ch. 124, sec. 58. As to application of proceeds of sale: surplus proceeds and their distribution: Campbell v. Croil, 8 O. W. R. 67; Re Ferguson and Hill, 24 O. W. R. 634; 4 O. W. N. 1339; 10 D. L. R. 855; and see notes to R. S. O. 1914, ch. 112, sec. 23. As to service of notice on personal representative within and after three years from death of owner of equity: see Re Martin and Merritt, 3 O. L. R. 284; and R. S. O. 1914, ch. 119, sec. 13,

and notes. For form and effect of power, notice of sale, and conveyance: see Armour on Titles, p. 399, *et seq.*

15. Attornment clause in mortgage as constituting a tenancy at will: Ex. p. Voisey re Knight, 21 Ch. D. 442. The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the *bona fide* purpose of securing the debt without being either a fraud on creditors or an evasion of the Chattel Mortgage Act: Trust and Loan v. Lawrason, 6 A. R. 286, 10 S. C. R. 679. The provision should create a tenancy at will with a fixed rent, i. e., the amount of the interest, and payable at the same times. There is no repugnancy between such a provision and the covenant for quiet enjoyment (17), which latter is made subject to the provision creating the tenancy: Pegg v. I. O. F., 1 O. L. R. 97. Mortgagee's right to distrain: see R. S. O. 1914, ch. 112, sec. 14, and notes.

16. Under a mortgage in which the principal is payable in instalments extending beyond five years, the mortgagor was entitled to a discharge upon payment of principal and interest and three months' additional interest under R. S. C. 1886, ch. 127, sec 7; and it made no difference that the mortgage was given to secure a balance of principal money and under special agreement: Re Parker, 24 O. R. 373; and see now R. S. O. 1914, ch. 112, sec. 17. When a judgment has been recovered it cannot be set aside on payment of interest and costs. The acceleration clause is a matter of contract and is not a penalty: Wilson v. Campbell, 15 P. R. 254. Default in an instalment of principal: see Biggs v. Freehold Loan, 26 A. R. 232, 31 S. C. R. 136. The effect of this clause is to give a right in every case to the mortgagor or his assigns to pay all arrears and lawful charges and thereupon restrain the mortgagee from taking further proceedings for the principal if not due except under this acceleration clause, unless a judgment has been obtained: Todd v. Linklater, 1 O. L. R. 103. This clause has the effect that on default in payment of interest the principal is

made payable as if the time for payment had fully come, and a right of action arises and the Statute of Limitations begins to run: McFadden v. Brandon, 6 O. L. R. 247, 8 O. L. R. 610; R. S. O. 1914, ch. 75, sec. 18, and notes. Stay of proceedings on payment of interest: Hazeltine v. Consolidated Mines, 13 O. W. R. 994.

CHAPTER 118.

The Accidental Fires Act.

CHAPTER 119.

The Devolution of Estates Act.

Refer to Armour on Devolution; Armour on Titles; Bicknell and Kappele, Practical Statutes, pp. 631-633; Williams on Executors.

3. This Act does not interfere with an express power of sale given by a will to executors and extending beyond the periods of vesting prescribed by the Act. There is nothing in it to interfere with the provisions which testators may themselves have made as to the time and manner in which their estates are to be dealt with: Re Koch and Wideman, 25 O. R. 262; Mercer v. Neff, 29 O. R. 680; Re Fletcher, 26 O. R. 499. Where an authority to sell real estate is given to executors the fee simple is impliedly vested in them for that purpose: Re Roberts and Brooks, 10 O. L. R. 395; see also R. S. O. 1897, ch. 129, sec. 21; R. S. O. 1914, ch. 121, sec. 44. Where land is devised to executors on trusts and the estate vests in the executors in consequence of the devise and not by statute, they may resort to the statute to supplement their powers under the devise: Re Koch and Wideman, 25 O. R. 262; Re Roberts and Brooks, 10 O. L. R., 395; Mercer v. Neff, 29 O. R. 680; Re Hewett and Jermyn, 29 O. R. 383: and see also

Re Ross and Davies, 7 O. L. R. 433. Where by a man's will property was devised to his wife for life and after her death to the children equally on the youngest attaining 21, a daughter who survived her father, married, and died without issue in her mother's lifetime, was held to have a "share" in which her husband had an interest. The widow of a deceased son also had her proper interest under this Act: Re Stainsby, 9 O. W. R. 839, 14 O. L. R. 468. The Act has not superseded but is to be read in conjunction with R. S. O. 1897, ch. 128, secs. 36 and 37; R. S. O. 1914, ch. 120, secs. 37 and 38; Mason v. Mason, 13 O. R. 725; Scott v. Supple, 23 O. R. 393. Under this Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew: Re C. P. R. and the National Club, 24 O. R. 205. Title outstanding in personal representative: Martin v. Magee, 19 O. R. 705, 18 A. R. 384, and see sec. 13 *infra*. Where special executors for property in Australia, and also general executors were appointed, the latter alone were the "personal representatives," and could make title to land in England without the concurrence of the special executors: Re Cohen's Executors and L. C. C. 1902, 1 Ch. 187. Right of executors to appropriate special assets to answer shares of the residue not interfered with, at all events in cases where there is a trust for sale and conversion: In re Beverly, 1901, 1 Ch. 681. Effect of devolution of Estates Act where a charge was created by the testator but the estate not expressly vested in any trustee: Yost v. Adams, 13 A. R. 129. Devise to trustees without adding "and their heirs." Executors of survivors unable to make title: Re Crunden and Meux, 1909, 1 Ch. 690. Devolution of trusteeship on executors of will of surviving trustee: Re Waidanis: Rivers v. Waidanis, 1908, 1 Ch. 123. Appointment of new trustees by donee of power ousting executors of surviving trustee: Re Routledge, Routledge v. Saul, 1909, 1 Ch. 280. "Distributed as personal property:" Brothers and sisters of the half blood share equally with those of the whole blood: In Re Wagner, 6 O. L. R. 680; (see sec. 30 *infra*). For consideration of the term "limited to the heir as special occupant," in

former section: see In re Inman: Inman v. Inman, 1903, 1 Ch. 241; and cases there distinguished and applied: Wilson v. Butler, 2 O. L. R. 576. This section must be read as subject to R. S. O. 1897, ch. 77, sec. 4; R. S. O. 1914, ch. 80 sec. 6; the effect of which is to give a widow a parliamentary title to the goods of her deceased husband which are exempt from seizure: Re Tatham, 2 O. L. R. 343; and see also sec. 12 *infra*. Devisees are not necessary parties to an action for dower: Malone v. Malone, 17 O. R. 101. "Devolve upon" means "pass to:" see Re Booths Estate, 16 O. R. 429 (notes to sec. 19). Devolution of Estates Act and real assets: Re McGarry, 18 O. L. R. 524. This case discussed, see 45 C. L. J. 621. Where motion for administration under Con. Rule 944 (1913 Rule 608) the executor or administrator must have 14 clear days' notice. When heirs and devisees necessary parties, see H. & L. notes p. 1193.

4. It is held in England that notwithstanding the provisions of the Land Transfer Act, 1897, sec. 1 (1), a grant to the nominee of the Crown as administrator to an intestate without known relatives, should go as before the Act to the personalty only without reference to the real estate: Re Hartley, (1899), P. 40. What effect if any has the power conferred on the Surrogate Court to grant administration as to realty upon the jurisdiction of the High Court where real estate is involved? Mutrie v. Alexander, 23 O. L. R. 396. Accounting prior to this Act by heir-at-law and by devisees in possession: see H. & L. notes p. 888. Compensation prior to this Act to executors intermeddling with realty: H. & L. notes p. 883. Where a mortgage comprised both real and personal estate: See H. & L. notes p. 983. Judgment against personal representative: see H. & L. notes p. 344 and p. 339.

5. Real estate is on an equality with personal as regards administration, and this provision has rendered it unnecessary for a testator to direct that his real estate be charged with payment of debts. But where such a direction is in fact made, the Court will give effect to it at the instance of pecuniary legatees: Re Kempster, Kempster v.

Kempster, 1906, 1 Ch. 446; Re Roberts, 1902, 2 Ch. 834. This Act vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts, but (except in the case specially provided for in sec. 6), the order in which the different classes of property are applicable to the payment of debts has not been changed by the Act: Re Hopkins, 32 O. R. 315; see also Scott v. Supple, 23 O. R. 393. " Assets "—payment of debts. Realty not to be sold until general personal estate not specifically bequeathed is exhausted: Re Hopkins, 32 O. R. 315; Re Talham, 2 O. L. R. 343, 348; Re Moody, 12 O. L. R. 10; Re McGarry, 14 O. W. R. 244, 18 O. L. R. 524. (See Article, 45 C. L. J. 621, where Re McGarry is discussed). Where lands were held in trust by a deceased intestate, the Court refused to direct the official guardian to approve of a conveyance from the administrator to the beneficial owner, as this Act only permits sale of lands for payment of debts and for purposes of distribution: Re Davis, 12 O. W. R. 653. See secs. 20, 21 *infra*.

6. This section is only applicable where there is both realty and personalty in the residue: Re Moody, 12 O. L. R. 10. Goods exempt from seizure under the Execution Act are not, except for funeral and testamentary expenses, assets in the executor's hands for payment of debts: Re Tatham, 2 O. L. R. 343. The testator's debts, funeral expenses expenses of his will, and the expenses attending the administration of his estate, should be charged rateably on his real and personal estate according to their respective values: Re Way, 6 O. L. R. 614; Re Thomas, 2 O. L. R. 660; Scott v. Supple, 23 O. R. 393. Devise of incumbered land: see Scott v. Supple, 23 O. R. 393; Mason v. Mason, 13 O. R. 725. The Devolution of Estates Act has not disturbed the earlier decisions as to personalty being the primary fund for creditors: Re McGarry, 14 O. W. R. 244, 18 O. L. R. 524. Liability of real estate for costs of administration action ordered to be paid " out of the estate:" In re Vickerstaff, 1906, 1 Ch. 762. Except in the case of a residuary devise especially provided for in this section, the order

in which different classes of property are applicable to the payment of debts has not been changed by this act: Re Hopkins, 32 O. R. 315. Mixed fund for payment of debts, etc.: Foxwell v. Kennedy, 2 O. W. N. 821, 18 O. W. R. 782, 24 O. L. R. 189. Real and personal estate comprised in a residuary bequest, primarily and *pari passu* liable for a mortgage burden: Re Auston, 2 O. W. N. 1358, 19 O. W. R. 684. Duty of executor and not of trustee to realise on real property to pay debts: Foxwell v. Kennedy, 24 O. L. R. 189.

9. The widow of an intestate having elected to take her interest under this section is entitled to one third of his real estate absolutely: Re Reddan, 12 O. R. 781. Time for electing: see Baker v. Stuart, 25 A. R. 445. Election by widow where lands of intestate have been sold and money is in Court: Baker v. Stuart, 29 O. R. 388, 25 A. R. 445. Where a widow elects to take under this section, she must do so by an attested instrument in writing, pursuant to the section, even where the lands have been sold under an order of the Court at her instance free from dower, and the proceeds are in Court: Re Galway, 17 P. R. 49. An election by a widow may be made by will, which, as to such election, speaks from the time of its execution: Re Ingolsby, 19 O. R. 283. This section does not apply where, by marriage settlement, the widow has received an equivalent in lieu of dower: Toronto General Trusts Co. v. Quin, 25 O. R. 250. This section applies only to the case of the descent of the inheritable lands of the intestate: see Cowan v. Allen, 26 S. C. R. 292, at p. 314. Administrator of widow is entitled to payment out of proceeds of sale of deceased husband's real estate of the amount of dower, according to her expectancy at the time of sale, she having elected to take dower in lieu of her distributive share: Re Pettit, 4 O. L. R. 506. By bringing an action for the construction of her late husband's will a widow may have made her election to take under the will, and it may be too late for her to elect to take her distributive share under this section: Rudd v. Harper, 16 O. R. 422. The only person who can assign dower is the executor, in whom the whole inheritance of the testator is vested. A conveyance from the devisee of

the lands is of no avail: Allan v. Rever, 4 O. L. R. 309. Instrument evidencing widow's election: McEwen v. Gray, 2 O. W. N. 945, 18 O. W. R. 888. When widow put and not put to her election: see *e.g.*: Re Shunk, 31 O. R. 175: Leys v. Toronto General Trusts, 22 O. R. 605; Laidlaw v. Jackes, 27 Gr. 101; Amsden v. Kyle, 9 O. R. 439; Re Quimby, 5 O. R. 738; Mutchmoor v. Mutchmoor, 8 O. L. R. 271; King v. Yorston, 27 O. R. 1; Re Hurst, 11 O. L. R. 6. A devise of all testator's lands to widow *durante viduitate* puts her to her election: Re Horace B. Allen, 4 O. W. N. 240, 23 O. W. R. 253, 7 D. L. R. 494.

10. In addition to the administrator, infant children of deceased intestate mortgagor are proper parties in foreclosure: Keen v. Good, 14 P. R. 182; see H. & L. notes, p. 388. Representation where no caution has been registered: see Ramus v. Dow, 15 P. R. 219, note to sec. 13. As to the general representative capacity of the administrator in respect of realty: see H. & L. notes, pp. 339, 342; R. S. O. 1914, ch. 62, secs. 56, 57. Where decree of foreclosure made against mortgagor who dies before final order obtained, the mortgagor's estate devolves on his personal representative. Where there are infants concerned: see Con. Rule 595; H. & L. notes, p. 787; 1913 Rule 466. The Court may on the application of a mortgagee in a mortgagee action appoint an administrator to the estate of an intestate mortgagor: McLaren v. Rivett, 7 C. L. T., Occ. N. 202.

11.—(1) Necessity for application to Court in certain cases to enable administrators to sell free from dower: see Re Redman, 10 O. W. R. 16.

11.—(3) Gross sum: see Re Pettit, 4 O. L. R. 506.

12. For the purpose of computing the rights of a widow, the "real and personal estate" means all that he has whether in possession, reversion or contingency: Re Heath, Heath v. Widgeon, 1907, 2 Ch. 270. Executor of widow of deceased intestate: widow not having taken out administration of her husband's estate being less than £500 (Intestate Estates Act, 1890, sec. 1): Re Bryant (1896), P. 159.

Where all the legatees and the executor named in the will predecease the testator, he has died intestate within the meaning of this Act: Re Cuffe, Fooks v. Cuffe, 1908, 2 Ch. 500. This section does not apply where there is a partial intestacy: Re Harrison, 2 O. L. R. 217; Re Twiggs Estate, 1892, 1 Ch. 579. The widow of an intestate who has left no issue is entitled to $1,000 out of his real estate in Ontario, notwithstanding that she has received other benefits under the laws of another country out of his estate in that country: Sinclair v. Brown, 29 O. R. 370. Deed by widow: Bowman v. Watts, 13 O. W. R. 481. The proportionate part of the widow's charge has priority over her right of dower: Re Charrière; Duret v. Charrière, 1896, 1 Ch. 912.

13. The provisions of this section do not apply where there is an express or implied devise of the fee to the executors under the will: Hewitt v. Jermyn, 29 O. R. 387; and see Re Roberts and Brooks, 10 O. L. R. 395; Re Koch and Wideman, 25 O. R. 262, etc., etc.; notes to sec. 3 *ante*. It is only while the estate remains vested in the personal representatives of deceased person that they are to be deemed in law his heirs. After the expiry of that period it is unnecessary to serve the personal representatives with a notice of exercising power of sale under the Short Forms Act. This is in spite of the fact that by a caution filed subsequently lands can be revested in the personal representative. Upon whom notice is to be served is determined according to the actual circumstances existing at the time notice is given: Re Martin & Merritt, 3 O. L. R. 284. After the lapse of the period limited by this section an executor loses his right of retainer by not registering a caution and by treating the property as vested in the devisees: Re Starr, 2 O. L. R. 762. An heir in whom lands will have become vested before a day fixed for the sale by them by the personal representative is entitled to an injunction restraining the sale. The subsequent registration of a caution cannot affect his right of action: Byer v. Grove, 2 O. L. R. 755. An administrator *ad litem* appointed after the period limited by the section has no *locus standi* to maintain an action to set aside

a tax sale of land belonging at the time of death to the estate of the deceased: Rodger v. Moran, 28 O. R. 275. When in administration lands of an intestate have been sold by the Court, the widow may although the period limited by the section has expired, elect to take her distributive share in lieu of dower, provided the estate be not distributed, on the footing of her having retained her dower right: Baker v. Stuart, 29 O. R. 388, 25 A. R. 445. In a mortgage action against the surviving husband and children of the mortgagor, begun within the period after the death of the mortgagor limited by this section, the plaintiff was held entitled, after the expiry of the period, to judgment for the enforcement of the mortgage without having the personal representative before the Court, no administrator having been appointed and no caution having been registered: Ramus v. Dow, 15 P. R. 219: see Rule 193, H. & L. notes, p. 339; Rule 194, H. & L. notes, p. 344; 1913 Rules 74, 90. The devisee of real estate has a transmissible interest in the lands of the testator during the period pending which they are vested under the Act in the personal representatives: Re McMillan, 24 O. R. 181. Since the Devolution of Estates Act the right of an heir-at-law to sue to set aside a conveyance (*e.g.*, from a father to his daughters) as improvident and for undue influence is not higher than (if as high as) the right of a residuary legatee to sue in respect of personal property. Such a plaintiff has no right to bring the action at all until the expiration of the period of three years fixed by sec. 13; and the fact that the personal representative is made a defendant does not assist the plaintiff: Empey v. Fick, 13 O. L. R. 178, 15 O. L. R. 19. Where land "has become" vested in heir under this section, and without conveyance: effect of the words "shall become," and repeal of 3 W. & M., ch. 14: Beer v. Williams, 15 O. W. R. 868, 1 O. W. N. 702, 21 O. L. R. 49. The Statute of Fraudulent Devises, 3 & 4 W. & M., ch. 14, is now obsolete: see 2 Edw. VII. ch. 1, sec. 2: Beer v. Williams, 21 O. L. R. 49. Vesting of estate in legatee on assent of executor and consequences flowing therefrom: see Attenborough v, Solomon, 1913, A. C. 76; Thorne v. Thorne, 1893,

3 Ch. 196. A caution under this section is an "instrument" within the meaning of the Registry Act; R. S. O. 1914, ch. 124, sec. 2 (*d*).

14. Executors and administrators under this Act are not in all respects in the same position as a trustee for sale of lands. It is the duty of the latter to sell. Upon the former is cast a discretion to be exercised only for certain purposes and in certain events: Re Fletcher, 26 O. R. 499. Nothing in the Act derogates from any right possessed by an executor or administrator independently of the Act. The Act does not apply where executors have a statutory power of sale to satisfy a charge: Re Moore and Langmuir, 21 C. L .T. 562; 37 C. L. J. 824. Where the executors take under a devise and not under the statute, a caution need not be registered to retain the fee in them: Mercer v. Neff, 29 O. R. 680; Re Hewett & Jermyn, 29 O. R. 383. Where executors are given an express power to sell lands, such power can be exercised by the survivor. This Act does not interfere with express powers of sale given to executors by the will: Re Koch and Wideman, 25 O. R. 262; see also Re Hewitt v. Jermyn, 29 O. R. 383; Mercer v. Neff, 29 O. R. 680; see notes to sec. 3 *ante*.

15.—(1) As to cases where probate has been taken out or letters of administration granted after the expiry of the time limited in the section and the effect of the registration of a caution in such cases: see In re Martin, 26 O. R. 465; In re Baird, 13 C. L. T. 277. Effect of registration of caution after expiry of time limit: Ianson v. Clyde, 31 O. R. 579. Construction of section: Re Bowerman & Hunter, 13 O. W. R. 891, 18 O. L. R. 122; and see Byer v. Grove, 2 O. L. R. 755.

15.—(1*c*) An administrator who is also the only adult interested in the real estate is not deprived of his right to consent to the registration of a caution. His application to register a caution is sufficient evidence of consent: Re Hart Estate, 13 O. L. R. 379, 9 O. W. R. 285.

15.—(1*d*) Effect of order of Judge permitting registration of caution under this section: see Ianson v.

Clyde, 31 O. R. 579. Ex parte application to register caution: Re McCully, 23 O. L. R. 156. Leave to file caution: Re Mills, 3 O. W. N. 1036, 21 O. W. R. 887. Appeal from order allowing registration of caution lies to Divisional Court: Re McCully, 2 O. W. N. 407, 662, 17 O. W. R. 846, 18 O. W. R. 236, 23 O. L. R. 156.

15.—(3) The effect of the registration of a caution after the expiry of the time therefor is to place the lands of the testator again under the power of the executors so that they can sell them to satisfy debts. The operation of a devise of lands is by the Act only postponed for the purpose of administration: Ianson v. Clyde, 31 O. R. 579. "Certain points in connection with the Devolution of Estates Act:" see article F. P. Betts, 43 C. L. J. 752, where the question of whether title can be made to a purchaser under the provisions relating to belated cautions where there are no unsatisfied debts, and whether in making title under such a caution, it is not necessary to obtain releases of dower from married beneficiaries.

18. Co-heirs since 1834 would take in England as joint tenants (Owen v. Gibbons, 1902, 1 Ch. 636), but in Ontario they take as tenants in common: see R. S. O. 1914, ch. 109, sec. 13.

19. Where under the will authority to sell real estate is given to executors, the fee simple is impliedly vested in them for that purpose. Where executors get such power under the will, they get it independently of this Act, and can make title without the consent of the Official Guardian: Re Roberts and Brooks, 10 O. L. R. 395; see Re Koch and Wideman, 25 O. R. 262; Re Fletcher, 26 O. R. 499; Much v. Neff, 29 O. R. 680; and see notes to sec. 3 *ante*. The consent of the Official Guardian is not necessary to the conveyance of partnership lands to the surviving partner. The Act does not apply to such a case, the property devolving on the personal representative *virtute officii* and not by virtue of the statute: Re Fulton and McIntyre, 7 O. L. R. 445. This Act does not apply to a case where the executor derives his title to the lands from and acts under the will and the provisions of the Trustee Act (R. S. O. 1914,

ch. 121): Mercer v. Neff, 29 O. R. 680. Where the executors take under a devise to them on trust to sell, the Official Guardian's consent is not necessary: Re Booth, 16 O. R. 429. Nor where, though infants were concerned, the land was devised to the executor in trust in fee with power of sale: Re Dorothy Bryant (unrep. 22 Dec. 1890). Nor where the will did not give the executor the estate on the land, but did give him express power to sell and distribute: Re Detwiller (unrep. Dec. 22, 1894). The word "devolve" does not here mean "falling upon by way of succession," but simply "passing:" Re Booth's Estate, 16 O. R. 429. Where land was sold under this section with the approval of the Official Guardian, and by consent of the widow, free from dower, on the understanding that she was to get a gross sum in lieu of dower, the widow was allowed the gross sum in spite of the opposition of creditors: Re Rose, 17 P. R. 136. Order of Judge at trial sufficient to dispense with consent of Official Guardian: Belanger v. Belanger, 2 O. W. N. 543, 24 O. L. R. 439. Mode of procedure in sale of infant's lands: Re Sugden, 4 O. W. N. 924, 24 O. W. R. 212. An infant's deed is invalid: Beam v. Beatty, 3 O. L. R. 345, 4 O. L. R. 554; Confederation Life v. Kinnear, 23 A. R. 497; Nottingham v. Thurston, 1903, A. C. 6. Infant's lands may also be conveyed under The Settled Estates Act, R. S. O. 1914, ch. 74; the Partition Act, R. S. O. 1914, ch. 114, sec. 9; The Infants Act, R. S. O. 1914, ch. 153, sec. 5. An infant cannot make a will: R. S. O. 1914, ch. 120, sec. 11. Notice to Official Guardian: see Con. Rule 971; 1913 Rule 690. Application to Judge for direction and procedure as to taxation: payment into Court to credit of infants, etc.: see Con. Rule 972; 1913 Rules 691, 733. Where the approval of the Official Guardian is not required, notice need not be given to him: Re Fletcher, 26 O. R. 499; see H. & L. notes, p. 1217.

20. An executor or administrator cannot make the lands of the testator the subject of speculation or exchange by him in the same manner as if the lands were his own: Tenute v. Walsh, 24 O. R. 309. Where lands are conveyed to husband and wife they now take as tenants in common, and the husband can, under this Act as administrator of his

wife and in his own right, make a valid conveyance of the whole lands, although there are no debts to pay: Re Wilson and Toronto Incandescent Light Co., 20 O. R. 397. Where there is a devise of the fee simple, directly or impliedly under the will to the executors, they take the lands independently of this Act: see Re Roberts and Brooks, 10 O. L. R. 395; Re Koch and Wideman, 25 O. R. 262; Re Fletcher, 26 O. R. 499; Mercer v. Neff, 29 O. R. 680; and the provisions of sec. 13 do not apply: Hewitt v. Jermyn, 29 O. R. 387. As to general representative capacity of administrator in regard to realty: see R. S. O. 1897, ch. 59, sec. 61; and H. & L. notes, pp. 339, 342; R. S. O. 1914, ch. 62, sec. 56, 57.

21.—(1) Power of executors to sell: see secs. 3, 20, 21, of this Act, and R. S. O. 1914, ch. 121, secs. 20, 44, 47. The power to sell for payment of debts is not qualified by sub-sec. 2. That sub-section was intended to make it clear that executors had power to sell for purposes of distribution where there were no debts, and the consent of the official guardian on behalf of infants, lunatics and non-concurring heirs and devisees is only necessary where the sale is for purposes of distribution only: Re Ross and Davies, 7 O. L. R. 433. See also Re Bradley's Estate, 6 O. L. R., at p. 399.

21.—(2) Where there is no necessity to sell for payment of debts, the administrator has no power to sell in face of the objection of adult beneficiaries: Re Mallandine, 10 C. L. T. 226. Administrator selling against wish of adult heir, and without filing belated caution: see Byer v. Grove, 2 O. L. R. 754; note to sec. 13 *ante*. Construction of *ex post facto* operation of this section: Re Bowerman and Hunter, 13 O. W. R. 891, 18 O. L. R. 122.

21.—(5) An administrator desired to sell certain lands pursuant to his powers under this section. There were certain heirs who were *sui juris*, but whose concurrence had not been got because of the delay and expense involved. Held proper for the Official Guardian to approve of the sale pursuant to his powers under the section, after making the usual enquiries as in a case of infant heirs: Re Bradley's Estate, 6 O. L. R. 397.

24.—(2) Where land "has become" vested in heir and without conveyance, effect of words "shall become" and repeal of 3 W. & M., ch. 4, Statute of Fraudulent Devises: Beer v. Williams, 15 O. W. R. 868, 1 O. W. N. 702, 21 O. L. R. 49. Comment on Beer v. Williams, 21 O. L. R. at p. 51: see 46 C. L. J. 594. Vesting of estate in legatee on "assent" of executor and consequences flowing therefrom: see Attenborough v. Solomon, 1913, A. C. 76; Thorne v. Thorne, 1893, 3 Ch. 196. Devise of real estate in trust: mortgage by equitable tenant for life: Re Atkinson, 1908, 2 Ch. 307.

25. The executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew: Re C. P. R. and the National Club, 24 O. R. 205. Where infants are concerned, executors and administrators have power under this section to mortgage lands: Re Bennington, 18 C. L. T. 239. Application for approval of lease under clause (*b*) must be made to the Court and not to a Judge in Chambers: Re Montgomery, 1 O. W. N. 999.

26. No right to creditors to follow real assets in hands of purchaser given by Land Transfer Act, 1897, Statutory advertisements: unknown liabilities: see Re Cary and Lotts Contract, 1901, 2 Ch. 463. Unless 20 years (Eng.) have elapsed since the death of the testator who has charged his real estate with payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's enquiry whether any debts of the testator remain unpaid, and the purchaser ought not to make the enquiry, as he will get a good title even if there are no debts: Tanqueray Williaume v. Landau, 20 Ch. D. 465. This does not apply to a case of an executor selling leaseholds: Re Whistler, 35 Ch. D. 561; Re Venn, 1894, 2 Ch. 101. Where will contains devise to executors for various purposes, including payment of debts, no presumption arises within statutory period that the debts are paid, and the purchaser has no right to be informed as to them. The Ontario statutory law is the same as the English law: see Re Tanqueray, 20 Ch. D. 465; Re Mackay and Nelson, 4 O. W. N. 1607, 24 O. W. R. 963.

27. See Re Wood, Wood v. Wood, 1902, 2 Ch. 542.

28. What are "advancements:" Boyd v. Boyd, L. R. 4 Eq. 305; Taylor v. Taylor, 20 Eq. 155. Release by son of intestate: claim by grandchildren: advancement: Re George Lewis, 29 O. R. 609. Intestacy in respect of beneficial interest in share of residue: bringing advances into hotchpot: see Re Roby, Howlett v. Newington, 1907, 2 Ch. 84. See as to hotchpot: Re Ford, Ford v. Ford, 1902, 2 Ch. 605.

29.—(1) A husband is benficially entitled to a share in the personal property of his wife on her decease because of his marital relationship and right, and in the same way, to a share in her land by virtue of this section. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself: Dorsey v. Dorsey, 29 O. R. 475; 30 O. R. 183. Husband's rights: see Lamb v. Cleveland, 19 S. C. R. 78.

30. The Statute of Distributions was drawn with the intention of superseding the common and canonical law by the rules of the civil law. The common ancestor is disregarded, and one reckons up to the deceased's father as one degree and from the father down as one degree, making brothers and sisters two degrees, whereas in canonical law there is but one: see Armour on Devolution, 244, *et seq.*, especially sub-tit.: "Mode of Distribution." In case of a partial intestacy of the beneficial interest in residue of personal estate, the analogy of the Statute of Distributions applies as to the persons to take the shares, but not as to the doctrine of hotchpot: Re Roby; Howlett v. Newington, 198, 1 Ch. 71. Where a sole executor and universal legatee predeceases the testator there is an intestacy and children who have received advances must bring them into hotchpot before receiving their shares: Re Ford: Ford v. Ford, 1902, 2 Ch. 605. Under various orders, allowances were made to the presumptive next of kin of a lunatic, who were to account for such allowances if they survived the lunatic. The lunatic died a bachelor and intestate. One of the persons to whom allowances had been made died in the lifetime of the lunatic, leaving

children: Held that the children took *per stirpes* under the Statute of Distributions as representing their parent, but were under no obligation to account for allowances made to her: In re Gist: Gist v. Timbrill, 1906, 2 Ch. 280, 75 L. J. ch. 657. The words "next of kin" in an English will which contains a legacy to next of kin of a deceased foreign subject must be construed according to English law, and so construed may mean—in the absence of any reference to the Statute of distributions—the nearest blood relations in an ascending and descending line including those of the half blood: Re Ferguson's Will, 1902, 1 Ch. 483. Children of father's deceased sister held entitled to the exclusion of grandchildren of mother's brothers: Re McEachern, 10 O. L. R. 499. Representation among collaterals: see Crowther v. Cawthra, 1 O. R. 128. Distribution of intestate's estate: father's share: see Arkell v. Roach, 5 O. R. 699; Re Quimby, Quimby v. Quimby, 5 O. R. 738. "Entitled under the Statutes of Distribution:" illegitimate next of kin: see Re Wood, Wood v. Wood, 1902, 2 Ch. 542. The division of personal estate among descendants of an intestate is *per stirpes* and not *per capita*: Re Natt, Walker v. Gammage, 37 Ch. D. 517. Where brothers and sisters are entitled to share in an intestacy the children of a deceased brother or sister of the intestate are entitled to share *per stirpes*: Walker v. Allen, 24 A. R. 336. In the distribution under this Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with those of the full blood: In re Wagner, 6 O. L. R. 680; see also Re Adams, 6 O. L. R. 697. As to father's share and change made by this Act: Armour, Devolution, p. 275. "Kindred" defined: Re Goodman's Trusts, 17 Ch. D. 266. "Right heirs according to the law of descent in Ontario: Re Bower, 9 O. L. R. 199. For table of distributive shares of beneficiaries in intestacy, see Bicknell and Kappele's Practical Statutes, p. 633. See also as to distribution, Armour, Devolution, pp. 273 *et seq.*

31. See Armour, Devolution, p. 277; Keilway v. Keilway, 2 P. Wms. 344.

32. The rule that executors are not bound to pay pecuniary legacies before a year, does not prevent them, where no time is fixed and there is sufficient to pay debts, legacies, and charges, from paying a legacy forthwith: Re Holland, 3 O. L. R. 406. See as to lapse of one year before administration, H. & L. notes p. 366.

CHAPTER 120.

The Wills Act.

Refer to Theobald on Wills (Can. notes), Jarman on Wills, Williams on Executors, White and Tudor's Leading Cases, Hawkins on Wills, Kingsford (Can.), Walkem (Can.), Underhill and Strahan Interpretation of Wills; Bicknell and Kappele, Practical Statutes, pp. 645-658.

2.—(*a*) The word "possibility" includes a right of re-entry for condition broken: In re Melville, 11 O. R. 626. The possibility of reverter on a fee simple conditional is a right of entry devisable under the Wills Act: *Quære* whether it is an "estate": Pemberton v. Barnes, 1899, 1 Ch. 544. As to estate *pur autre vie*: see Armour, R. P., p. 274.

3. By the Ontario Statute, 36 Vict. ch. 20 (see sec. 27 *post*), the English legislation of 1837, was adopted and wills were thereafter presumed to speak from death, unless a contrary intention appears. Prior to 1874, there was no special legislation in Ontario respecting wills of personalty. Wills of realty date from 32 Henry VII. ch. 1, and 34 and 35 Henry VII. ch. 5, but it was not until 12 Car. II. ch. 24, converting other tenures into fee simple, that the power to will lands became general. By 29 Car. II. ch. 3, sec. 5, signature, and 3 or 4 credible witnesses were required. A witness or his wife was not a credible witness, if a beneficiary. This was changed by 25 Geo. II. ch. 6, which made only the gift void, while the will remained valid. The statute of 1834, 4 William IV. ch. 1, dealing with wills of realty of persons dying after 6th March, 1834, enabled after acquired

real estate to be devised, abolished the necessity for words of limitation, and made two witnesses subscribing in the presence of each other sufficient. 22 Vict. ch. 34, sec. 16, dealt with the wills of married women in regard to their separate estate (see secs. 6 and 9 (5) notes); see Armour, R. P., pp. 405-407. A will was made in 1868, republished by codicil in 1870. The devisee, to whom land was devised without words of limitation, died in 1874, and the testator in 1877. Held that R. S. O. 1877, ch. 106, sec. 7 *et seq.*, did not apply and that under the former law the devise lapsed; Zumstein v. Hedrick, 8 O. R. 338. Republication of will of married woman: Noble v. Willock, L. R. 2 P. 276. Republication, execution of codicil at later date: Re Fraser, 1904, 1 Ch. 726; Re Hunter, 25 O. L. R. 400 (see pp. 403-4. See Armour, R. P., p. 406.

4. See Zunstein v. Hedrick, 8 O. R. 338; Armour, R. P., p. 407, 90.

5. See Armour, R. P., pp. 403, 405; Armour, Titles, p. 348.

6. C. S. U. C. 73, sec. 16 (R. S. O. 1877, sec. 6), only removed the disability of coverture in respect of the wills of married women, not the disability of infancy: Re Murray Canal, 6 O. R. 685; Smith v. Smith, 5 O. R. 690. C. S. U. C. 73, did not authorize a married woman to devise her property otherwise than to or among her children. Any disposition in favour of her husband or otherwise was void, and there was an intestacy as to the portion so disposed of: Mitchell v. Weir, 19 Gr. 568; see also Jordan v. Frogley, 8 O. W. R. 265. A married woman could not devise her property to one of several children to the exclusion of others: Munro v. Smart, 26 Gr. 37, 310, 4 A. R. 449; Re Ontario L. & S. Co. v. Powers, 12 O. R. 582. She could devise separate estate, even where her husband had been in possession of it before 4th May, 1859 (see R. S. O. 1897, ch. 163, sec. 5): Re Hilliker, 3 Ch. Ch. 72; see Armour, R. P., p. 407. As to wills of married women made after 1st January, 1874: see R. S. O. 1914, ch. 149, sec. 4.

7. Armour, Titles, p. 349.

9. "Every Person may:" As to law regarding a sound and disposing mind: see Dew v. Clark and Clark, 2 Addams 79; Smith v. Tebbitt, 16 T. L. Rep. 811. As to "sanity" and "a disposing mind," under this Act: see note to R. S. O. 1914, ch. 68, sec. 2 (*e*). Testamentary capacity: see Robertson v. McOuet, 17 O. W. R. 852. Insane delusions: McIntee v. McIntee, 22 O. L. R. 241. Senile dementia: Malcolm v. Ferguson, 14 O. W. R. 737, 1 O. W. N. 77; McGarrigle v. Simpson, 1 O. W. R. 685. Mental capacity: see Kaulbach v. Archbold, 31 S. C. R. 387; Bell v. Lee, 8 A. R. 185; Skinner v. Farquharson, 32 S. C. R. 58; McHugh v. Dooley, 10 B. C. R. 537; Smee v. Smee, 5 P. D. 84. A greater scope of general capacity is needed where the whole of a man's property is being dealt with (*e.g.*, as by a will) than when he deals with a single piece by way of contract: Jenkins v. Morris, 14 Ch. D. 674; Thamer v. Jundt, 22 O. W. R. 206, 3 O. W. N. 1307. If a testator is able to understand the nature of the act and its effects, the extent of the property he is disposing of, to comprehend and appreciate the claims to which he should give effect, and no insane delusion brings about a disposition of it, which if the mind were sound would not have been made, then he is competent to make a will: Badenach v. Inglis, 29 O. L. R. 165; Banks v. Goodfellow, L. R. 5 Q. B. 549. Onus as to capacity: Madill v. McConnell, 12 O. W. R. 452, 17 O. L. R. 209; Badenach v. Inglis, 4 O. W. N. 716, 1495, 29 O. L. R. 165; Freeman v. Freeman, 19 O. R. 141; McLaughlin v. McLaughlin, 26 S. C. R. 646; Emes v. Emes, 11 Gr. 325; Ingoldsby v. Ingoldsby, 20 Gr. 131; Martin v. Martin, 15 Gr. 586; Sproule v. Watson, 23 A. R. 692. From the passing of 36 Vict. ch. 20, sec. 6, the word "testator" included "married women." This remained the law until R. S. O. 1887, when the clause interpreting "person" and "testator" as including married women was omitted, and her statutory right to make a will relegated to the Married Women's Property Act: (See now R. S. O. 1914, ch. 149, sec. 4). The clause, R. S. O. 1897, ch. 128, sec. 9 (5), does not appear in the present Act. See sec. 27 (2). See Armour, Titles, pp. 359, 360; R. P., pp. 410, 411.

"Person" and "testator" do not include an infant (see sec. 11), even though a married woman: Smith v. Smith, 5 O. R. 690; Re Murray Canal, 6 O. R. 685. An Indian can make a will: Johnson v. Jones, 26 O. R. 109: see R. S. C. ch. 81, sec. 25. As to convicts: see R. S. C. 146, sec 1033.

As to what may be devised.
Prior to the Wills Act, leaseholds did not *prima facie* pass as lands:: Rose v. Bartlett, Cro. Car. 292. Since Wills Act, might pass as real estate, sec 2 (*d*): see Swift v. Swift, 1 De G. F. & J. 160. Appurtenances: House and lands described by metes and bounds, include a room not within the boundaries: Potts v. Bovine, 16 O. R. 152. House and dwelling include curtilage, garden and outbuildings: Re Stokes, 21 O. L. R. at p. 467. Interests in expectancy and reversionary interests are "lands:" Re Melville, 11 O. R. 626. "Estate" may include all testator's property: Kirby Smith v. Parnell, 1903, 1 Ch., at p. 490. "Money:" see Re Bramley, 1902, p. 106; O'Connor v. O'Connor, 1911, 1 Ir. 263; Re Daly, 39 S. C. R. 122, at p. 135. "Money in Bank:" Re Mann, 1912, 1 Ch. 388. "Effects:" Hall v. Hall, 1892, 1 Ch. 361; Hammill v. Hammill, 9 O. R. 530. "Chattels" may include choses in action as well as choses in possession: Re McMillan, 4 O. L. R. 147; Re McGarry, 18 O. L. R. 525. "Mortgages" may pass legal estate, subject to Devolution of Estates Act: Hawkins, p. 65. "Rents and profits" in absence of other disposition will vest lands: Hawkins 158; Re Booth and Merriam, 2 O. W. N. 1268. Gift of income may vest corpus: Re Chambers, 16 O. L. R. 62; Re Hunter, 24 O. L. R. 5. Unrestrained power of disposition may vest corpus: Re Bethune; 7 O. L. R. 417. See also Armour, R. P., p. 410, and pp. 156, 379 (entry for condition broken) 233 (executory interests).

11. A married woman under age cannot make a valid will: Re Murray Canal, 6 O. R. 685. Armour, R. P., pp. 296, 410-411.

12.—(1) Where the witnesses could not be found nor their handwriting proved, a motion to have the will established on the consent of all parties interested

was refused on the ground that not sufficient evidence was adduced that the will was the will of the testator under this section: Williamson v. Williamson, 17 O. R. 734. The attesting witnesses must attest and subscribe as directed in the statute, no such latitude being given them as to the testator, who may acknowledge his signature: O'Neill v. Owen, 17 O. R. 525; Scott v. Scott, 13 O. R. 551. Where there is a devise of land to an attesting witness, there is intestacy as to this devise, and the heir is not bound to elect between this land a legacy bequeathed to him by the will: Munsie v. Lindsay, 1 O. R. 164; see Armour Titles, pp. 349, 354-357; Armour, R. P., 407-408. Presence of attesting witness: Brown v. Skirrow (1902), P. 3. Acknowledgment of signature: McNeill v. Cullen, 35 S. C. R. 510; Williamson v. Williamson, 17 O. R. 734; Kreh v. Moses, 22 O. R. 307; Scott v. Scott, 13 O. R. 551. Foreign will may be valid though unattested (*e.g.* under French law), and be admitted to probate, but will not operate so as to import sec. 28: Re D'Este; Poulter v. D'Este, 1903, 1 Ch. 898. Where witnesses could not be found and will was holograph: see Re Young, 27 O. R. 698. See Digest English case law, XV. col. 347-366, "Attestation;" also XV. col. 335-347, "Signature of testator."

12.—(2) Will on separate sheets of paper, some of which were re-written after execution: O'Neill v. Owen, 17 O. R. 525.

13. As to exercise of general power by general devise: see sec. 30. Where there is a special power, a right of selection out of a limited class: see Re Sawdon, 3 O. W. N. 136. This section will not extend to a power to appoint by deed only (1 Sugden on Powers, 369). As to power to appoint by will only: see Phillips v. Cayley, 43 Ch. D. 222; and as to power to appoint part of a fund: Re Wilkinson, 1910, 2 Ch. 216. Execution is invalid if not in accordance with the statute, even though in accordance with instrument creating the power: Baretto v. Young, 1900, 2 Ch. 339; Re Pryce, 1911, 2 Ch. 286. The formalities required apply to all documents purporting to exercise a power to appoint which are testamentary in form, whether the power is a power to appoint by

will or a power to appoint by deed or writing: Re Barnett, Dawes v. Ixer, 1908, 1 Ch. 402. Armour Titles, p. 357.

14. " Mobilization " is a fair test whether a soldier is or is not in actual military service: Gattward v. Knee, (1902), P. 99; May v. May (1902), P. 103. Will of infant soldier: Re Hiscock (1901), P. 78. Testamentary passage in letter: Re Spratt (1897), P. 28. When a letter contains passages unmistakably testamentary, the general testamentary character will not be affected by the fact that it also shews an intention to draw up a more formal document at a later date: In the goods of Scott (1903), P. 243. Armour, R. P., p. 409; Bicknell & Kappele Prac. Stats., p. 650, Enc. Laws of Eng., vol. XII., p. 596. As to wills of seamen: see the Merchant Shipping Act, 57, 58 Vic., ch. 60, esp. secs. 177, 260.

16. Armour, R. P., p. 409, Titles, p. 354.

17. One of the residuary legatees was witness. Held: the residue was to be distributed rateably among the other residuary legatees as if the witness were non-existent: Farewell v. Farewell, 22 O. R. 573. A legacy invalid because the legatee's husband was a witness to the will was held validated by a reviving codicil witnessed by independent witnesses: Purcell v. Bergin, 20 A. R. 535, 23 S. C. R. 101. The will is to be construed before the effect of section 17 is considered: Aplin v. Stone, 1904, 1 Ch. 543. In a case of devise " to A. absolutely and in case of her death, without heirs, to B," where A. was a witness, the gift to A. being void, the gift to B. took effect at once: in Re Maybee, 8 O. L. R. 601. Devise of rent directed to be paid to trustee: see Hopkins v. Hopkins, 3 O. R. 223. A legatee signed as a witness and afterwards, on being advised of the effect of this, the will was also signed by the solicitor for the testator as witness, the name of the legatee not being struck out. Evidence was admitted to shew the actual facts and the legatee not necessarily incapacitated: Re Sturgis, 17 O. R. 342; but see Little v. Aikman, 28 U. C. R. 337. Where land is devised to an attesting witness there is intestacy as to such devise, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the

will: Munsie v. Lindsay, 1 O. R. 164; see also as to extent of rule making bequest to witness invalid: in Re Munsie, 10 P. R. 98; Munsie v. Lindsay, 1 O. R. 164, 11 O. R. 520; Morrison v. Morrison, 9 O. R., at p. 225. Husband of devisee as witness: Crawford v. Boyd, 22 Gr. 398. Where a will is attested by two witnesses, and a third who is a devisee, also subscriber as witness, a devise to him is void: Little v. Aikman, 28 U. C. R. 337. Where the devise to the witness was of the whole estate, the will was wholly inoperative. A previous will, which had been revoked by the inoperative will, was under the doctrine of "dependant relevant revocation," admitted to probate: Re Tuckett, 9 O. W. R. 979. Where a testator has signed his name in the presence of two witnesses and at his request they attest his signature, the execution is complete, and if a third person afterwards adds his name, the Court will not come to the conclusion without cogent evidence that the third person signed as an attesting witness: Re Sharman, A. R., 1869, L. R. 1, P. & D. 661; Re Smith, 15 P. D. 2. For example where the devisee and executor signed thinking he had to do so in that capacity and knowing that two witnesses not benefiting were necessary and had signed as such: Re Lomas, 9 O. W. R. 975. Where there is an absolute gift to the wife of an attesting witness with an alternative contingent gift to her children in the event of her being dead at the period of distribution, there is an intestacy if the wife is living at the period of distribution: Aplin v. Stone, 1904, 1 Ch. 543. Validity of document as will notwithstanding invalidity of bequests: Freel v. Robinson, 18 O. L. R. 651. Armour Titles, p. 353, R. P., p. 409.

18. Armour Titles, p. 353, R. P., p. 409.

19. Armour, R. P., p. 409.

20. Application of Corresponding English Act to others than "British subjects": Re Groos (1904), P. 269. "Personal estate" includes leaseholds: Re Grassi; Stubberfield v. Grassi, 1905, 1 Ch. 584.

21. Revocation of will by marriage revokes declaration of trust therein as to insurance policy: Re Watters, 13 O. W. R. 385. Revocation by marriage: Ewbank

v. Halliwell, 2 Bro. C. C. 220; Re Russell, 15 P. D. 111; Re Reid, 35 L. J., P. 43, L. R. 1 P. 74; Mette v. Mette, 28 L. J., P. 117. Will made in contemplation of marriage: Re Cadywold, 27 L. J., P. 36; Jackson v. Hurlock, Amb. 489. Power of appointment exercised by will: Re Fenwick, L. R. 1 P. 319; Re Fitzroy, 1 Sw. and Tr. 133; Re McVicar, L. R. 1 P. 671; Re Worthington, 25 L. T. 853; Hodsden v. Lloyd, 2 Bro. C. C. 534. Armour, Real Property, pp. 411-414.

22. The birth of a child after the making of a will does not revoke the will: Re Tobey, 6 P. R. 272.

23. Revocation: insufficient where will lost: Sugden v. Lord St. Leonards, 1 P. D. 154; Stewart v. Walker, 6 O. L. R. 495. Where the testator as he supposes duly executes a second will and says in effect, "Now I have executed this will, the former will and codicil are of no use," and destroys them, and the later will turns out ineffective, the earlier one is not revoked and may be admitted to probate. But if the testator says in effect, " Whatever I do, I intend to cancel this as my will from this time forth," the will is revoked: Scott v. Scott, 1 Sw. & Tr. 258; Clarkson v. Clarkson, 2 Sw. & Tr. 497; Re Elizabeth Middleton, 3 Sw. & Tr. 583; Dancer v. Crabb, L. R. 3 P. & D. 98; Dixon v. Solicitor (1905), P. 42; Re Tuckett, 9 O. W. R. 979; see also in Re Parker, 20 Gr. 289. Partial destruction: see O'Neill v. Owen, 17 O. R. 525. Revocation by subsequent will: see Purcell v. Bergin, 20 A. R. 535, 23 S. C. R. 101 (*sub nom.* Macdonell v. Purcell). Destruction should take place in the presence of the testator: Re Tobey, 17 O. R. 525. Any alteration or revocation made in or of the provisions of a will after 1 Jan., 1874, must be attested with same manner as a will; and that notwithstanding the will was made prior to that date: Smith v. Miriam, 25 Gr. 383. Tearing off name: *animus cancellandi*: Crooks v. Cummings, 6 U. C. R. 305. See Armour, R. P., pp. 414, 415. Will torn up by testator when intoxicated; pieces pasted together by him when sober: Re Brassington, 1902, P. 1. Destruction of a will after execution of codicil: Beardsley v. Lacey, 67 L. J., P. 35. Execution of will in duplicate: evidence of revocation: Atkinson v. Morris, 1897, P. 40. Each sheet of will signed and attested, all purporting to be executed on same date;

first two sheets in reality re-copied, resigned and attested eighteen months after the last three sheets: Leonard v. Leonard, 1902, P. 243. Mode of revoking wills and admissibility of evidence of intent: Freel v. Robinson, 18 O. L. R. 651. Second document containing no revoking words: Re Molson; Ward v. Stevenson, 21 O. L. R. 289. Revocation of will by will: Dig. Eng. Case Law, XV., col. 376. Of will by codicil: *Ib.*, col. 380. Of codicil by codicil: *Ib.*, col. 384. Of codicil by revocation or re-execution of wills *Ib*, col. 386. By deeds and other writings: *Ib.* col. 388. By destruction or mutilation: *Ib.* col. 424.

24. Where a testator after execution of his will makes alterations without further signature or attestation and then by codicil conforms "his will" it is a question of construction what the instrument is which the testator intended to confirm: In re Hay, Kerr v. Stinnear, 1904, 1 Ch. 317. Erasures: Re Brasier, 1899, P. 36. "Apparent": see Finch v. Combe, 1894, P. 191. Armour, R. P., pp. 408, 414; Armour Titles, pp. 355-6. Alterations, additions and omissions: see Dig. Eng. Case Law, XV. col. 298.

25. A will which has been revoked cannot be revived by codicil unless the intention to revive it appears on the face of the codicil either by express words or by a disposition of the testator's property inconsistent with any other intention or by expressions conveying with reasonable certainty the existence of such intention: Purcell v. Bergin, 20 A. R. 535, 23 S. C. R. 101 (*sub nom.* Macdonell v. Purcell). A reference in a codicil to a revoked will and the removal of an executor named therein and the substitution of another in his place are not sufficient to revive the will: Purcell v. Bergin, 20 A. R. 535, 23 S. C. R. 101 (*sub nom*, Macdonell v. Purcell); see also as to confirmatory codicils: Holmes v. Murray, 13 O. R. 756; and intention to revive will: McLeod v. McNab, 1891, A. C. 471. Revival and republication: Dig. Eng. Case Law, XV. col. 446.

26. A testator bequeathed all his personal estate to his wife and devised his lands to his executors in trust for her for life and then over. After the date of the will the testator sold his land and took back a mortgage for the purchase money. It was held that this

section had not the effect of making the devise applicable to the interest in the land which the testator had at his death by reason of the mortgage; the mortgage was personal estate and fell under the absolute bequest to the widow: Re Dods, 1 O. L. R. 7. Where fee acquired by foreclosure: Legrus v. Cockerell, 5 Sim. 384; Silberschildt v. Schiott, 3 V. & B. 45. Arrears of interest on mortgage debt: Gibbon v. Gibbon, 22 L. J. C. P. 131. Mortgagee in possession: Bower v. Barlow, L. R. 8 Ch. 171. Property sold and mortgage back taken: Moor v. Raisbeck, 1 Sim. 123; Re Clowes, 1893, 1 Ch. 214. Land under execution: Re Anthony, 1892, 1 Ch. 450. See Locke King's Act, sec. 37 notes.

27.—(1) A testator devised to A. "the property on H. Street" and gave all the residue of his estate, "which I shall be entitled to at my decease," to B. He afterwards acquired other property on H. Street. The after-acquired property on H. Street was held not to go to A., but to fall into the residue: Morrison v. Morrison, 9 O. R. 223, 10 O. R. 303. See also where there was a specific exception of the after-acquired land from the devise: Vansickle v. Vansickle, 9 A. R. 352. The use of the word "now" in the case of a bequest of "all the furniture and stock in trade now in the house," did not limit the bequest to the date of the will. Although the bequests were specific bequests they were bequests of that which is generic and might be increased or diminished: In re Holden, 5 O. L. R. 156. Devise of "Walkerfield," which "I now reside upon," was held to speak from the death of the testator in spite of dealings with the lands devised by selling portions and purchasing other lands adjoining and contracting to build a dwelling which remained unfinished: Halton v. Bertram, 13 O. R. 766. Where a testatrix had a mortgage which she bequeathed to A. and left the residue of her estate to B., and subsequently collected the mortgage and bought land with the proceeds, B. was entitled to the lands: Hammill v. Hammill, 9 O. R. 530. When a right of entry for breach of condition exists, upon the breach of condition no new estate is acquired: Re Melville, 11 O. R. 626; see Armour Titles, p. 360, R. P. 411. Where a testator devises a named house which has a plot of

ground attached and subsequently builds other houses on the plot, the houses so built pass under the gift: Re Evans, Evans v. Powell, 1909, 1 Ch. 784. A declaration of trust as to insurance policy contained in will speaks from date of death and not from date of making will so as to bring the effect of the declaration within statutory provisions passed after the date of the will: Re C. O. F. and McHutcheon, 14 O. W. R. 251. Application of principle of this sec.: Re Hunter, 3 O. W. N. 529, 24 O. L. R. 5, 25 O. L. R. 400. But, as against a subsequent declaration, a declaration made by will altering or diverting the amount of insurance going to preferred beneficiaries is deemed to have been made at the date of the will: R. S. O. 1914, ch. 183, sec. 171 (4). Lands acquired after date of will: Re Mackenzie Estate, 24 O. W. R. 678, 4 O. W. N. 1392. Subsequent contract to purchase: Re Portal & Lamb, 30 Ch. D. 50. After acquired freeholds: Cave v. Harris, 57 L. J. Ch. 62. After acquired stock: Hotharn v. Sutton, 15 Ves. 319. Will speaking from death, "where I now reside." The use of "now" is not necessarily evidence of contrary intention: Re Willis, 1911, 2 Ch. 563; and a similar rule is applied in the case of personal estate: Re Holden, 5 O. L. R. 156 (*ante*); Re Ashburnham, 1912, W. N. 234. At common law leases acquired after date of will did not pass without clear evidence of intention: James v. Dean, 11 Ves. 383. Personalty owned at death passed: Dudes v. Graham, 16 Gr. 167. To rebut the statutory presumption, evidence must be strong: Re Stokes, 1 O. L. R. 464. Contrary intention: see Re Evans, Evans v. Powell, 1909, 1 Ch. 784; Re Atkins, 3 O. W. N. 665, 21 O. W. R. 238. Evidence of contrary intention may be deduced where there is a specific bequest of property applicable only to property existing at date of will: Emuss v. Smith, 2 DeG. & Sm. 722; Re Clifford, 1912, 1 Ch. 29. A testator left so many shares to A. After the date of the will and before the testator's death the value of the shares was reduced from £50 to £10 by dividing them. The legatee was only entitled to take the number of shares left him by will of the value of £10 each: Re Gillins, Inglis v. Gillins, 1909, 1 Ch. 345. A testator bequeathed "money invested in" a certain stock, which at the date of his will he owned. At the date of his death this stock

had been converted into another stock. Held that the second stock did not pass by the gift: Re Slater, Slater v. Slater, 1906, 2 Ch. 480. This provision leaves the question open whether a particular property passes by the specific or residuary devise: Re Portal & Lamb, 30 Ch. D. 50. Bequest of stock: see also Bothamley v. Sherson, L. R. 20 Eq. 304.

The general rule as to donees is that the description applicable at the date of the will governs: Re Denton, 25 O. L. R. 505, 26 O. L. R. 302. Gift to the "wife of A." means *prima facie* the wife known to the testator and living at the date of the will and not to a subsequent wife: Re Coley; Hollinshead v. Coley, 1903, 2 Ch. 102; Re Burrows, 10 L. T. 184. Gift to "wife" refers to person so known at date of will: Marks v. Marks, 40 S. C. R. 210; but see provisions of the Insurance Act: R. S. O. 1914, ch. 183, sec. 178 (3). Gift to children by first marriage: only children by second and third marriage at date of will: children of second marriage take: Ling v. Smith, 25 Gr. 246. Does a will operate from death: see article 48 C. L. J. 251.

27.—(2) Will made during coverture: Re James, Hole v. Bethune, 1910, 1 Ch. 157.

28. This section applies only to lapsed devise: unnecessary in case of lapsed bequest: Carter v. Haswell, 26 L. J. Ch. 576. "When a testator has executed a will in solemn form you must assume he did not intend to make it a solemn farce and that he did not intend to die intestate. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy," per Esher, M. R.: in Re Harrison, 1885, 30 Ch. D. 390. The statute is remedial and should be construed liberally: Walsh v. Fleming, 10 O. L. R. 226. What amounts to a residuary devise: *Ib.* Where there is a devise of realty to two devisees and one dies, they would have taken as tenants in common (R. S. O. 109, sec. 13), and the lapsed share goes into the residue, but where there is a bequest of personalty to two and one dies the survivor takes all, as they would have taken as joint tenants: Re Gamble, 8 O. W. R. 797, 13 O. L. R. 299; see Armour, R. P., pp. 419-421. A devise of "all other freehold

tenements at W. and elsewhere " is a good residuary devise: Mason v. Ogden, 1903, A. C. 1. Residuary clause: Smith v. Smith, 22 O. L. R. 127. Lapsed legacies: see Re Smith, 7 O. L. R. 619. A devise of " the residue of my estate " will pass the residue of the lands though misdescribed: Doyle v. Nagle, 24 A. R. 162. Contrary intention: see Hawkins, p. 55; citing Skrymsher v. Northcote, 1 Sw. 750; Humble v. Shore, 7 Hare 247; but as to these cases: see Re Allen, 1903, 1 Ch. 276, and Re Quimby, 3 O. W. N. 97. And see also as to contrary intention: Hawkins, p. 54; Underhill, p. 159; Re Conger, 19 O. L. R. 499. No devisee can take under the will of a testator whose death has been caused by the felonious act of the devisee: Lundy v. Lundy, 24 S. C. R. 650.

29. See Armour, R. P., p. 418.

30. Where there is power to appoint among a class, if no selection is made all members take equally: Rule in Brown v. Higgs; Hawkins, p. 77, *et seq.*; McPhail v. McIntosh, 14 O. L. R. 312. A deed of trust provided that certain lands should go to the settlor's children in default of appointment by deed. Afterwards he made his will under seal and devised " all the rest of my estate, real and personal, to which I shall be entitled at my death," to one of the three children; this residuary devise was held no execution of the power nor even such a defective execution as equity could aid: Shore v. Shore, 21 O. R. 54. Such words as " all the property which comprises my estate in England as well as in France," in a foreign will not attested in conformity with English law is not such an indication of the will as to import this section of the Wills Act so as to operate as a general power of appointment: In re Scholefield, Scholefield v. St. John, 1905, 2 Ch. 408, 74 L. J., Ch. 610. An appeal from this decision was compromised: 75 L. J. Ch. 720. A foreign will containing no indication that it is to be construed with reference to English law, does not import sec. 30 of the Wills Act so as to operate as an exercise of a general power of appointment: in Re Price; Tomlin v. Latter, 1900, 1 Ch. 442, 69 L. J., Ch. 225; In re D'Este, Poulter v. D'Este, 1903, 1 Ch. 898, 72 L. J. Ch. 305. Bequest of personal property described in

a general manner: gift of all stocks, shares and securities: Re Jacob, Mortimer v. Mortimer, 1907, 1 Ch. 445. Power to tenant for life to charge all or part of settled property; gift of remainder of personalty; charge on realty: see in Re Slavin, Marshall v. Wolseley, 1906, 2 Ch. 459. Appointment under special power by will dated prior to will creating the power, held not within the legal presumption of this Act, even supposing it were possible to exercise such a power by anticipation: Re Hayes, Turnbull v. Hays, 1901, 2 Ch. 529. Exercise of power of appointment by general devise by will: Re Ross, 1 O. W. N. 867. Executing power of appointment by residuary bequest: Re Wilkinson, 1910, 2 Ch. 216. This section has no application to the case of limited powers such as those exercisable with reference to beneficiaries under the Insurance Act, but only to cases where the testator has power to appoint in any manner he may think proper: Re Cochrane & A. O. U. W., 11 O. W. R. 956, 16 O. L. R. 328. Application of this section to insurance policies: Re Sawdon, 3 O. W. N. 136, 20 O. W. R. 181. Exercise of power: document "purporting to be a will": Re Broad, 1901, 2 Ch. 86. "Appoint, devise and bequeath": Re Mayhew, 1901, 1 Ch. 677. "Give, devise, bequeath and appoint": Kent v. Kent, 1902, p. 108. Appointment to trustees to convert real estate: Re Redgate, 1903, 1 Ch. 356. Limited power; exercise by will: Re Bradshaw, 1902, 1 Ch. 436; Re Oliver's Settlement, 1905, 1 Ch. 191; Re Beale, 1905, 1 Ch. 256; Re Bowles, 1905, 1 Ch. 371. Construction of power: power arising on death or second marriage of widow: Re Shuckburgh's Settlement, 1901, 2 Ch. 794. General power, income: Re Marten; Shaw v. Marten, 1901, 1 Ch. 370. Cy-pres, general intent: Re Rising, 1904, 1 Ch. 533. Limited power: donee appointing to himself: Taylor v. Allhusen, 1905, 1 Ch. 529: see also Re Davies Trusts, L. R. 13 Eg. 163; Re Saunders, 1898, 1 Ch. 457; Stevens v. King, 1904, 2 Ch. 30; Bayfus v. Lawley, 1903, A. C. 411; Re Peacock, 1902, 1 Ch. 522; Re Seabrook Gray v. Baddeley, 1911, 1 Ch. 151. Execution of power by devise or bequest in general terms: see Dig. Eng. Case Law, X col. 1435, *et seq.* Before the Wills Act: *Ib.* col. 1448. Under the Wills Act: *Ib.* col. 1453.

31. Where there is an immediate devise in fee and then a gift over on the death of the first devisee without leaving children or issue, the *prima facie* meaning of the testator is that the gift over is to take effect on a death without children, not confined to the testator's lifetime, but at any time: Edwards v. Edwards, 15 Beav. 357; O'Mahony v. Burdett, L. R. 7 H. L. 388; Cowan v. Allen, 26 S. C. R. 292. A devise " to my son M. 50 acres during his lifetime and then to go to his children if he has any, but if he has no issue to be divided equally among my grandsons " gave a life estate with remainder in fee to the children and not an estate tail: Chandler v. Gibson, 2 O. L. R. 442. Gift of rents with gift over on failure to fulfil conditions held an equitable estate in tail: Crumpe v. Crumpe, 1900, A. C. 127. Repugnant condition: Hutt v. Hutt, 3 O. W. N. 131, 20 O. W. R. 185. A devise to the testator's wife absolutely and in the event of her death to be divided equally among her children, was construed as meaning " in the event of her death during the testator's lifetime," and the widow took an estate in fee simple: Re Walker and Drew, 22 O. R. 332. Remarks on application of section: *Ib.*, p. 335: see Armour, R. P., p. 418.

32. See Sparks v. Wolf, 25 A. R., p. 326, and esp. remarks of Moss, J.A., on meaning and construction of this section at pp. 336-7. The Act abolishing primogeniture placed no interpretation on the word heirs. Therefore, where a will made after it was in force devised property in certain contingencies to " the heirs " of a person named, such heirs were all the brothers and sisters of such person and not his eldest brother only: Sparks v. Wolf, 25 A. R. 326, 29 S. C. R. 585. As to wills made before 1 Jan., 1852, up to 5 March, 1880: see Tylee v. Deal, 19 Gr. 602; Baldwin v. Kingstone, 18 A. R. 63, and appendix; also R. S. O. 127, sec. 37, and notes thereto: see Armour, R. P., p. 205 (and footnote), also pp. 418-9.

33. Where specific property is expressly excepted from a residuary bequest for the purpose of bequeathing it to a particular legatee, the property so excepted will, if the particular bequest fails to take effect, fall back into the residue: Blight v. Hartnoll, 23 Ch. D.

218. This rule does not apply where the particular legatee dies in the lifetime of the testator who then makes a codicil referring to such legatee's death and confirming the will containing the exception: Re Fraser: Lowther v. Fraser, 1904, 1 Ch. 726. This section is to be construed strictly and is confined to cases where the word "issue" is used or some word of precisely the same legal import, and does not extend to cases where the word "heirs" is used: Re Brown and Campbell, 29 O. R. 402. A gift to "heirs" or "heirs of body," coupled with gift to an ancestor, creates one estate in fee simple or fee tail: Rule in Shelley's Case, 1 Co. Rep. 88b. Recent applications of the rule, see McKinnon v. Spence, 20 O. L. R. 57; Re McAllister, 24 O. L. R. 1, 25 O. L. R. 17; Van Grutten v. Foxwell (1897), A. C. 658. The failure of issue referred to in the section is failure at the death and not an indefinite failure: see Jarman on Wills, 5th Ed., pp. 521, 1321; Marten v. Chandlar, 26 O. R. 81; see Armour, R. P., p. 421-2. "Death without issue": see Dig. Eng. Case Law, XV. col. 1012, *et seq.*

36. Where there was a gift to a brother and sister for their lives and after their death to their children their heirs and assigns forever share and share alike and the brother predeceased the testator; it was held that there was an intestacy as to the brother's share, as the gift was to tenants in common: Rudd v. Harper, 16 O. R. 422. Effect in change in law or will made prior to 1 Jan., 1874: Zumstein v. Hedrick, 8 O. R. 338. Devisee held to take life estate: see McGarry v. Thompson, 29 G. R. 287. "Heirs," "heirs according to will:" Re Sawdon, 20 O. W. R. 181, 3 O. W. N. 136.

37. This section does not apply to gifts to a class: Re Moir, 14 O. L. R. 541; Re Hannah Hunt, 5 O. L. R. 197; Re Bauman, 1 O. W. N. 293. In case of gifts to a class the shares of members of the class dying before the testator do not pass to the issue of those so dying, but go to other members of the class: Olney v. Bates, 3 Drew 319; Stewart v. Jones, 3 De G. & J. 532: Higgins v. Dawson, 1902, A. C. 1; Re Harvey's Estate, 1893, 1 Ch. 567; Re Coleman and Jarron, 1876, 4 Ch. D. 165; Re Williams, 5 O. L.

R. 345, 2 O. W. R. 47; Re Clark, 8 O. L. R. 599, 4 O. W. R. 414; Re Sinclair, 2 O. L. R. 349. "All the residue of my estate I give in equal shares to all my children, except J., as she already has had more than the others. Her share or a double share, shall go to M." M. predeceased the testator, leaving issue. Held that M., being specially named, did not avail to change the rule, and M.'s share went to other members of the class and not to his issue: Re Moir, 9 O. W. R. 858, 14 O. L. R. 541; Re Stanhope's Trusts, 27 Beav. 201; Shaw v. McMahon, 2 Con. & L. 528; Re Featherstone's Trusts, 22 Ch. D. 111. A testatrix directed her estate to be divided into four equal shares, one share to be paid to each of her four children. One child predeceased her intestate, leaving a husband and two children. Held under this section that the husband took one-third of one quarter share and the children the rest: Re Hannah Hunt, 5 O. L. R. 197. Where, however, no member of the class is alive at testator's death, all born subsequently take: Underhill, p. 309; Hawkins, p. 93. As to child *en ventre sa mère*: Hawkins, p. 104; Re Salaman (1908), 1 Ch. 4; Re Griffiths (1911), 1 Ch. 246. Where "words of futurity" are used, after-born members of the class may take: Hawkins, pp. 92, 97; Armour, R. P., p. 420.

"Child or other issue:" McNeil v. Stewart, 1 O. W. N. 19. Applicability to gifts to collateral relatives: Re Gresley, 1911, 1 Ch. 358. Application of section to annuity to sister of testator: Re Denton, 25 O. L. R. 505, 26 O. L. R. 294. "Child or other issue" means "legitimate child or other legitimate issue": Hargraft v. Keegan, 10 O. R. 272. Issue take only subject to any right of advancement against the parent: Re Carter, 20 O. L. R. 127. "Shall die"—where the devisee had in fact died before the execution of the will, the heir of the devisee was entitled: Re Bauman, 1 O. W. N. 493. Devise to children and issue of children dying before testator and his wife: rights of issue of deceased child: Re Street and Nelson, 17 O. L. R. 50, 12 O. L. R. 339. Will following words of act: Re Greenwood: Greenwood v. Sutcliffe, 1912, 1 Ch. 392. "Living at the death of the testator": child *en ventre sa mère*: Re Griffiths, 1911, 1 Ch. 246. Principle of the section: Johnson

v. Johnson, 3 Hare 157; Pearce v. Graham, 32 L. J. Ch. 359; Re More's Trust, 10 Hare 178. Effect of the section: Mower v. Orr, 7 Hare 473; Barkworth v. Young, 4 Drew 1; Wisden v. Wisden, 2 Sm. & G. 396; Re Hone's Trusts, 22 Ch. D. 663; Re Hensler, 19 Ch. D. 612; Re Parker, 31 L. T. p. 8; Re Mason, 6 N. R. 193; Edger v. Furnivall, 17 Ch. D. 115. Application of section: Re Mathe, 2 O. W. N. 327, 17 O. W. R. 656. Lapse: see Dig. Eng. Case Law, XV. col. 1596.

38. Locke King's Act: A testator devised to his three daughters three named parcels of land and directed that if the mortgage thereon was not paid each of the daughters should pay $150 to assist in meeting the debt. Held that the devise was merely of an equity of redemption and the daughters were not entitled to hold their lands exonerated from the mortgage (some $4,000) on payment of the $150: Re Goulet, 10 O. L. R. 197. A testator specifically devised to A. land which was incumbered. He left a legacy of $5,000 to B. and did not make any disposition of the residue except as follows: "I charge my estate with payment of all incumbrances upon said lands at the time of my death." Held that the residue was charged with payment of the mortgage debt to the exclusion of the land specifically devised. Such residue was treated as if one fund and all personalty, and out of it all debts, including the mortgage debt, was paid and then the legacy, the balance if any, to go to the heirs-at-law and next of kin: Scott v. Supple, 23 O. R. 393. The Devolution of Estates Act has not superseded these sections but is to be read in conjunction with them. Mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to the mortgage debts: Mason v. Mason, 13 O. R. 725. A direction to trustees to whom a mixed residue of real and personal estate was devised on trust for sale to pay out of the proceeds of sale the testator's funeral expenses and debts "except charges and mortgage debts, if any, on property specifically devised," was sufficient evidence of "contrary or other intention," to throw

the discharge of a mortgage existing at the date of the testator's death, on lands specifically devised: In re Valpy, Valpy v. Valpy, 75 L. J. Ch. 301, 1906, 1 Ch. 531. Lien for unpaid purchase money on land which the testator had contracted to buy: mortgage greater than value of property: right to disclaim: see Re Kensington, 1902, 1 Ch. 203. Expression of intention to exonerate: Re Bank's Trusts, 1905, 1 Ch. 547. "Good will" does not pass to a mortgagee not in possession *de facto*. A legatee of goodwill of a business takes it free from the mortgage debt: Re Bennett, Clarke v. White, 1899, 1 Ch. 316. "Persons claiming through or under the deceased:" Re Ritson, 1899, 1 Ch. 128. Where land subject to execution unsatisfied at the testator's death, the execution must be paid by the devisee of the land in exoneration of the testator's general personal estate: Re Anthony, 1892, 1 Ch. 450. The donee of an option under a will to purchase land at a fixed price is entitled, when he exercises the option, to a conveyance free of incumbrance: Re Wilson, Wilson v. Wilson, 1908, 1 Ch. 839. Where mortgaged land is devised and there is a direction to pay the mortgage out of other realty, and this proves insufficient, the mortgaged property is only exonerated to the extent of the substituted property: Re Birch, Hunt v. Thorn, 1909, 1 Ch. 787. Liability of freehold property for debt to bank: Re Hawkes, Reeve v. Hawkes, 1912, 2 Ch. 251. This section leaves in force the equitable rule as to paying pecuniary legatees in priority to devisees, where the personalty or residuary estate fails to answer both: Re Auston, 2 O. W. N. 1357, 19 O. W. R. 684. Locke King's Act applies to vendor's lien: Re Cockcroft, 24 Ch. D. 94; Re Kershaw, 37 Ch. D. 674; Re Kidd, 1894, 3 Ch. 558. Beneficiary takes subject to taxes accrued prior to testator's death: Mackay v. Mackay, 4 O. W. N. 300; but see Re Watkins, 12 B. C. R. 97. "Contrary or other intention": Re Fry, Fry v. Fry, 1912, 1 Ch. 86; Re Campbell, 1893, 2 Ch. 206; Re Fleck, 37 Ch. D. 677; Re Smith, 33 Ch. D. 195. Implied exoneration: Re Nevill, 59 L. J. Ch. 511; Re Bull, 49 L. T. 592. Application: see Bancroft v. Milligan, 4 O. W. N. 1605, 5 O. W. N. 506. See Re Chrysler, 13 O. W. R. 613.

CHAPTER 121.

THE TRUSTEE ACT.

Refer to: White and Tudor's Leading Cases; Brett's Leading Cases; Lewin, Underhill on Trusts; Jarman, Theobald on Wills; Williams on Executors; Bicknell and Kappele, Practical Statutes, pp. 387-398, 402-404, 407.

2.—(*q*) "Trustee" includes an executor *de son tort*: Re Preston, 13 O. L. R. 110. A "trustee with a beneficial interest in the trust estate is not a bare trustee: Morgan v. Swansea, 9 Ch. D. 582. Nor is an unpaid vendor who lets the purchaser into possession before execution of conveyance: Cunningham v. Frayling, 1891, 2 Ch. 567; see also Christie v. Ovington, 1 Ch. D. 279; see Armour, Titles p. 130 (and foot note), and p. 332.

4.—(1) "Appoint another person or persons" means some person or persons other than the person appointing. The personal representative of the last surviving trustee cannot appoint himself: In re Sampson, Sampson v. Sampson, 1906, 1 Ch. 435. Appointment of new trustee when trustee goes to reside "abroad"—meaning of "abroad:" Re James Curran, 2 O. W. N. 1268, 19 O. W. R. 501. Appointment of new trustees by donee of power—ousting personal representatives of surviving trustee: Re Routledge. Saul v. Routledge, 1909, 1 Ch. 280. Last surviving trustee: personal representative: executor not proving: Re Boucherett, Barne v. Erskine, 1908, 1 Ch. 180. In some circumstances a married woman may be appointed trustee in place of a deceased trustee: Re Gough, 3 O. L. R. 206; Re Kaye, 1866, L. R., 1 Ch. 397. An appointment of new trustee invalid under the trust instrument may be valid under the statute; retroactivity of the state considered: McLachlin v. Usborne, 7 O. R. 297. "Person nominated for the purpose:" Bankrupt and absconding trustee: appointment of new trustee: Re Wheeler and De Rochow's Settlement, 1896, 1 Ch. 315. Appointment of new

trustees: see Article 48 C. L. J. 322: see Dig. Eng. Case Law, XIV. col. 551. Appointment under statutory powers: Ib. col. 567 .

4.—(2) Principles by which the Court will be guided in appointing new trustee of settled estate: Re Jones' Trusts, 1 O. W. N. 418, 532. The Court possesses no jurisdiction to allow a trustee to retire from his post without appointing a new trustee in his place: Re Chetwynd's Settlement, 1902, 1 Ch. 692.

4.—(4) Appointment of trustee in place of executor: See H. & L. notes, p. 366.

4.—(6) New trustee is vested with powers, authorities, " and discretions " as if originally appointed: Kennedy v. Kennedy, 28 O. L. R. 1.

5.—(1) Where an appointment of new trustees is duly made under the statute the legal estate, by virtue of this section, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment: In re Hunter and Patterson, 22 O. R. 571. Declaration of trust by equitable mortgagor: London & County Banking Co. v. Goddard, 1897, 1 Ch. 642.

6. Where a sale was carried through but no assignment or transfer of the mortgage debt was executed and the vendor company became dissolved, the Court made an order vesting in the purchasers the mortgage debt and such estate as was vested in the vendor company at the date of dissolution: Re General Accident Assurance Corporation, 1904, 1 Ch. 147. Dissolution of company; petition for new trustee by new company, and vesting order appointing: see Re Bomore Road (No. 9), 75 L. J. Ch. 157, 1906, 1 Ch. 359. Vesting orders: see Judicature Act, R. S. O. 1914, ch. 56, sec. 72.

7. There is no rule of construction that a gift to a child " born " within a specified period will extend to a child still " *en ventre sa mere* " at that period. That construction will only be adopted when it is for the benefit of the unborn child: Villar v. Gilbey, 1907, A. C. 139; Blasson v. Blasson, 2 DeG.

J. & S. 665; Re Salaman, DePass v. Sonnenthal, 1907, 2 Ch. 46, reversed 1908, 1 Ch. 4.

15. Where there was a sale of a company's assets but by inadvertence no transfer of certain patents was executed and the company became dissolved, the legal interest in the letters patent became vested in the Crown (if anywhere), and the Court had no jurisdiction under this section to make a vesting order: Re Taylor's Agreement, 1904, 2 Ch. 737. Vesting stock in name of infant: Re De Haynin, 1910, 1 Ch. 223.

19. The Court may proceed though some of the parties interested are not before it: see Con. Rule 202, H. & L. notes p. 362, 1913 Rules 79 *et seq.*

20. Where a person in the position of executor is found selling or mortgaging his testator's estate, he is to be presumed to be acting in the discharge of his duties as executor unless there is something in the transaction which shews the contrary: Re Venn and Furze's Contract, 1894, 2 Ch. 101; see also as to enquiries as to payment of debts: Re Tanqueray-Williaume v. Landau, 20 Ch. D. 465; Re Whistler, 35 Ch. D. 561: see R. S. O. 1914, ch. 119, sec. 26, notes.

22. The solicitor to receive money under this section must be a solicitor appointed by the trustee himself: Re Hetling and Merton, 1893, 3 Ch. 269 Powers of attorney for trustee: Re Hetling and Merton's Contract, 1893, 3 Ch. 269. Misappropriation by solicitors of executors: Re Lord de Clifford, 1900, 2 Ch. 707; Clark v. Bellamy, 27 A. R. 435; (see Murdy v. Burr, 2 O. L. R. 310, legislatively overruled, 3 Edw. VII. ch. 7, sec. 26). When can a trustee appoint an attorney: see Article 48 C. L. J. 288.

26. What amounts to money "paid upon any trust or for a limited purpose" within the meaning of the section: see Grey v. Richmond, 22 O. R. 256; McMillan v. McMillan, 21 Gr. 594; Moore v. Mellish, 3 O. R. 174.

28. This does not apply where no discretion is given the trustees as to investments: Re Richardson, 3 O W. N. 1473. Nature of investments: "securities," company shares, debentures, second mortgages, land: Re J. H. 25 O. L. R. 133. Municipal corporations are to invest their sinking funds in trustee investments under this Act: R. S. O. 1914, ch. 192, sec. 303.

30. The power to vary investments applies to all investments authorized by the Act, whether made under the Act or not: e. g., where securities were invested under an instrument which contained no power to vary: Hume v. Lopez, 61 L. J. Ch. 423, 1892, A. C. 112; but see Manchester Royal Infirmary v. A. G. 59 L. J. Ch. 370, 43 Ch. D. 420. "Trust funds" includes money invested on security as well as uninvested cash: per Lord Watson and Lord McNaughton, Hume v. Lopez, 1892, A. C. 112. The power to invest in certain stocks does not authorize trustees to set apart or appropriate any of such stocks to answer a particular purpose, e. g., to provide for an annuity so as to facilitate the distribution of the estate:. In re Owthwaite, 60 L. J. Ch. 854, 1891, 3 Ch. 494.

31. Trustees when considering whether trust funds should be invested on mortgage must, notwithstanding the opinions of the valuers, solicitors, or other trusted agents, exercise their own judgment as to security. They must regard the transaction not only from the point of view of securing the capital but also consider whether the income of the property is sufficient to provide interest on the amount advanced. They should reasonably regard the position of the borrower, but should not advance a sum in excess of the proper amount relying on the borrower's financial position: In re Somerset, Somerset v. Poulett, 62 L. J. Ch. 720, 63 L. J. Ch. 41, 1894, 1 Ch. 231. A trustee is not entitled to the protection of the Act unless the report or valuation which ultimately proves insufficient, was made upon his own instructions and directed to the particular investment. A trustee is not entitled to the protection unless the investment which has proved deficient, was a proper investment at the time in all respects other than value: In re Walker, 59 L.

J. Ch. 386, 62 L. T. 449. General considerations governing the investment of trust funds on mortgages and principles of valuations: Shaw v. Cotes, 1909, 1 Ch. 389. Under a power to invest "in his name or under his legal control" a trustee cannot invest in a contributory mortgage: Re Dive, Dive v. Roebuck, 1909, 1 Ch. 328. Advance of more than half value: insufficient security: Palmer v. Emerson, 1911, 1 Ch. 758. Trustees are entitled to credit *pro tanto* for defective securities: see H. & L. notes p. 900. See also Blyth v. Flodgate, 63 L. T. 546; see Dig. Eng. Case Law, XIV. 680 *et seq.*

34. Liability of trustees for loss on investment: Re Nicholls, Hall v. Wildman, 4 O. W. N. 930, 1511, 29 O. L. R. 206.

35. It is not within the scope of implied authority of a member of a firm of solicitors to make himself a constructive trustee so as to make his partners liable: funds in jeopardy: improper investments: Mara v. Browne, 1896, 1 Ch. 199.

36. In order to give the Court power to impound the interests of a beneficiary, the beneficiary must have "instigated, etc.," some act or omission which is in itself a breach of trust and not some act which only becomes a breach of trust by reason of want of care on the part of the trustees: Re Somerset, Somerset v. Poulett, 1894, 1 Ch. 231. The words "in writing" apply only to "consent," not to "instigation" or "request:" Griffith v. Hughes: 1892, 3 Ch. 105. See also as to application of section Re T. 1903, 88 L. T. 13. Right to impound interest of instigating beneficiary in the hands of an assignee for value: Bolton v. Curre, 1895, 1 Ch. 544. Interest of married woman: Ricketts v. Ricketts, 64 L. T. 263.

37. A trustee does not entitle himself to relief by proving that he acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust: National Trustees Co. v. General Finance, 1905, A. C. 373; see also Re Smith, Smith v. Thompson, 71 L. J. Ch. 411. "Honestly and reasonably:" Smith v. Mason, 1 O. L. R. 594; Henning v. Maclean, 2 O.

L. R. 169, 4 O. L. R. 666; Dover v. Denne, 3 O. L. R. 664; Pervins v. Bellamy, 1899, 1 Ch. 797; Chapman v. Browne, 1902, 1 Ch. 785; Stewart v. Snyder, 27 A. R. 423; Markham v. Aurora, 3 O. L. R. 609; King v. Matthews, 5 O. L. R. 228; Elgin Loan v. National Trust, 7 O. L. R. 1, 10 O. L. R. 41; Whicher v. National Trusts, 14 O. W. R. 888, 19 O. L. R. 605, 1 O. W. N. 130, 17 O. W. R. 788, 2 O. W. N. 383, 22 O. L. R. 460; Re MacKay, 1911, 1 Ch. 300; Re Nicholls, Hall v. Wildman, 4 O. W. N. 930, 1511, 29 O. L. R. 206; Re Dive, Dive v. Roebuck, 1909, 1 Ch. 328. Technical breaches: see Henning v. McLean, 2 O. L. R. 169, 4 O. L. R. 666. A trustee is not negligent merely in not prohibiting the mortgagor from granting occupation leases or in failing to insert a clause requiring the mortgaged property to be kept in repair: principles of valuation discussed. Shaw v. Cotes, 1909, 1 Ch. 389. Did the defendant act as an ordinary prudent man would have done in regard to his own business? How far will Court go to protect trustees: see McDonald v. Trusts and Guarantee Co., 1 O. W. N. 886; Whicher v. National Trusts, 19 O. L. R. 605; and cases cited at p. 612; and see sec S. C. 22 O. L. R. 460. Where the Court finds that the trustee has acted both honestly and reasonably, there is then a case for the Court to consider whether the trustee ought reasonably to be excused for the breach of trust, looking at all the circumstances: Whicher v. National Trust, 22 O. L. R. 460; National Trustees v. General Finance Co., 1905, A. C. 373; Re Nicholls, Hall v. Wildman, 29 O. L. R. 206. What constitutes a loss flowing directly from breach of trust such that executors must make good; Sculthorpe v. Tipper, 1871, L. R. 13 Eq. 232; Re Nicholls, Hall v. Wildman, 29 O. L. R. 206. Insufficient security—advance of more than half value: Palmer v. Emerson, 1911, 1 Ch. 758. Hazardous security: Shaw v. Cotes, 1909, 1 Ch. 389. Where trustees paid a portion of a trust fund to their solicitor who claimed it under an assignment which shewed on its face a prior charge, but the trustees made no enquiry and did not get production of the assignment, it was held that they could not shelter themselves behind their agent's fraud: Davis v. Hutchings, 1907, 1 Ch. 356. Application of this section:

King v. Matthews, 5 O. L. R. 228. Breach of trust which is not to be excused under this section: see Elgin Loan v. National Trust, 7 O. L. R. 1. Misappropriation by solicitors: Re Lord de Clifford, 1900, 2 Ch. 707; Wyman v. Paterson, 1900, A. C. 271. Pertinence to Municipal Council: see Rochford v. Brown, 3 O. W. N. 343, 20 O. W. R. 591. Application to trusts under mortgage trust deed: Whicher v. National Trust, 22 O. L. R. 460. Application of funds in payment of costs of officer incurred in action against him: Rochford v. Brown, 25 O. L. R. 206.

38. A trustee "*de son tort*" is liable to account and entitled to come to the Court under this section and obtain an order allowing him to pay money in: Re Preston, 13 O. L. R. 110. Infant's money is to be paid into the Supreme Court, not into the Surrogate Court: Re Mercer, 3 O. W. N. 1292, 22 O. W. R. 217, 26 O. L. R. 427.

41.—(1) Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under the Fatal Accidents Act, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative: McHugh v. G. T. R., 32 O. R. 234, 2 O. L. R. 600; but see Darlington v. Roscoe & Sons (1907), 1 K. B. 219. An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, obtain an order of revivor and continue the action: Mason v. Peterborough, 20 A. R. 683. This section applies to actions of crim. con.: C. v. D., 10 O. L. R. 641. Action by officer commanding militia against municipality in respect of expenses of riot continued by his personal representative: Crewe-Bond v. Cape Breton, 14 S. C. R. 8. Action for infringement of patent: Leslie v. Calvin, 9 O. R. 207. Executor's costs of unsuccessful action: Re Champagne, St. Jean v. Simard, 7 O. L. R. 537. For Quebec law as to survival of actions: see C. P. R. v. Robinson, 19 S. C. R. 292, 1892, A. C. 481. "When actions survive:" see H. & L. notes, pp. 608-9. Præcipe order of revivor: see Con. Rule 296; H. & L. notes, pp. 607-613; 1913 Rule 136.

41.—(2) An action for seduction survives, the common law being altered by the section to the extent necessary to entitle the plaintiff to maintain an action against the representative of the person who committed the wrong: Lince v. Faircloth, 11 C. L. T. Occ. N. 49. The section does not authorize action against an administrator *ad litem*, but only against an executor or general administrator clothed with full power: Hunter v. Boyd, 3 O. L. R. 183. Injury to servant: action under R. S. O. 1914, ch. 146, survives: Casselman v. Brady, 7 O. W. R. 328, 8 O. W. R. 198. In the absence of a fiduciary relationship, no action can be maintained against the representatives of any deceased person, unless his estate has profited: Hamilton Provident v. Carnell, 4 O. R. 623. Claim against estate of deceased: unliquidated damages for deceit: *actio personalis moritur cum persona*: Re Duncan, Terry v. Sweeting, 1899, 1 Ch. 387. Action of tort for permissive waste and non-repair against executor of deceased tenant for life: Woodhouse v. Walker, 5 Q. B. D. 404. The right of action for compensation for injury or death by negligence of Government employees does not abate on the demise of the Crown: The King v. Desrosiers, 41 S. C. R. 71. Action against executors of a deceased person for obstruction to lights: Jenks v. Viscount Clifden, 1897, 1 Ch. 694.

41.—(3) "Within one year." It is probably necessary that a pending action must be revived within a year: Hunter v. Boyd, 3 O. L. R. 183, at p. 188; Kidd v. Kidd, 11 O. W. R. 553.

43. Where a testator appoints special executors of property in Australia, and also general executors, the latter alone can make good title to the testator's real estate in England, without the concurrence of the special executors: Re Cohen's Executors and L. C. C., 1902, 1 Ch. 187. Grant of probate to one of two executors: right of executor to sell: Re Hewett and Jermyn, 29 O. R. 383. Renunciation of executorship: forfeiture of bequest: see Paton v. Hickson. 25 Gr. 102. Form of renunciation: Doe d. Ellis v. McGill, 8 U. C. R. 224. Liability notwithstanding renunciation: Vannatto v. Mitchell, 13 Gr. 665. Release of executor not a

relinquishment of trust: Berringer v. Hiscott, 6 O. S. 23. Withdrawing renunciation: Allen v. Parke, 17 C. P. 105.

44. Where the authority to sell real estate is given to executors, the fee simple is impliedly vested in them for that purpose: Re Roberts and Brooks, 10 O. L. R. 395; Davis to Jones and Evans, 1883, 24 Ch. D. 190. The Devolution of Estates Act does not interfere with an express power of sale given to executors: Re Koch and Wideman, 25 O. R. 262; Re Fletcher Estates, 26 O. R. 499; Mercer v. Neff, 29 O. R. 680. Where the real estate devolves on executors by will independently of the Devolution of Estates Act, and the intention of the testator gathered from the whole will is that the sale and division of the estate shall be carried out by the executors, if the testator has not expressly authorized the executors to make the sale, they are authorized under this section: Re Roberts and Brooks, 10 O. L. R. 395. As to the meaning of the word "devolve," in the Devolution of Estates Act, to be used in the sense merely of "passing:" see In re Booth's Trusts, 16 O. R. 429. See notes to R. S. O. 1914, ch. 119, secs. 3, 13, 19. A power to vary and transpose "securities" enables trustees to sell real estate: Re Gent and Eason's Contract, 1905, 1 Ch. 387. Where there was a power to sell with the consent of executors and one executor died, the Court would not force a purchaser to take title from the survivor: Re McNabb, 1 O. R. 94. But a power of sale to executors as such can be exercised by the survivor: Re Koch and Wideman, 25 O. R. 262; Re Ford, 7 P. R. 456. A power to sell does not authorize exchange: Re Confederation Life and Clarkson, 6 O. L. R. 606. But authorizes a sale on credit: Re Graham, 17 O. R. 570. Executor selling or mortgaging without concurrence of his co-executor: see Cumming v. Landed Credit, 22 S. C. R. 246.

46. Lands contracted to be sold: see Re McIntyre, 7 O. L. R. 548; Armour on Titles, pp. 130, 333, 335. As to the case of a married woman: see Armour on Titles, p. 219; R. S. O. 1914, ch. 149, sec. 23.

47.—(1) A testator directed his executors to pay his debts, and subject thereto devised a portion of his estate and directed that the balance after payment of the debts should go to his four children in equal shares. Then, in a paragraph, devised the property to the devisees direct. It was held that a power of sale was given to the executors under this section, and that by sub-sec. 5 the purchasers were released from the necessity of enquiring as to the due execution of the power: Re Bradburn and Turner, 3 O. L. R. 351. A testatrix whose estate was incumbered gave, by her will, $4,000 to her daughter charged on property devised to her son, and gave the residue to her son, subject to the said charge. She provided also that in case of the death of either son or daughter, the whole estate was to go to the survivor, and in case of the death of both without issue, to the brothers of the testatrix. It was held that the trustees, either under the Devolution of Estates Act or under this section, and even without the concurrence of the son and daughter, could make a good title: Re Ross and Davies, 7 O. L. R. 433. By a direction that his debts should be paid by his executors, a testator gives an implied power of sale to them, even where the failure of the testator to enumerate certain lands in a subsequent part of his will creates an intestacy as to the part of them in question. Even where the whole estate is not expressly vested in the trustee, the terms of the will may be such that he devises it so as to create a charge thereon, which the Act, in effect, transmutes into a trust, and thereupon clothes the executor with power to fully execute the trust by conveying the testator's whole estate: Yost v. Adams, 8 O. R. 411, 13 A. P. 129. Charge of real estate with payment of debts and legacies. Devise of real estate to trustees: right to sell: Re Adams and Perry's Contract, 1899, 1 Ch. 554. Where the entirety of the testatrix' estate was given to her husband as trustee and executor, though beneficially only for his life, the right to mortgage for debts was held to be given under this provision, and the mortgage being made less than 18 months from the testatrix' death, the mortgagee was exonerated from all enquiry: Mercer v. Neff, 29 O. R. 680. Mortgage to pay legacies by trustee

of realty: Lundy v. Martin, 21 Gr. 452. Charge of debts on real estate implies power to sell. Query as to wills which went into effect before 29 Vic., ch. 28, sec. 15: Grummett v. Grummett, 14 Gr. 648, 22 Gr. 400; see Armour on Titles, pp. 49, 130, 218 (footnote), 357-8.

47.—(2) As to exercise of such powers by administrator with will annexed: Re Clay and Tetley, 16 Ch. D. 3.

47.—(5) Enquiries as to payment of debts and regularity of executor's proceedings: see Re Tanqueray-Williaume and Landau, 20 Ch. D. 465; Re Whistler, 35 Ch. D. 561; Re Venn and Furzes' Contract, 1894, 2 Ch. 101; notes to sec. 20 *ante,* and see also, R. S. O. 1914, ch. 119, sec. 26, notes. See Mercer v. Neff, 29 O. R. 680; Re Bradburn and Turner; note to subsec. (1) *ante*; Armour on Titles, p. 49.

47.—(6) "A devise to any person or persons in fee or in tail or for the testator's whole estate and interest" does not mean a devise of a life estate to one or more persons, and a remainder or remainders to one or more others, jointly or successively, and with, it may be, executory devises over to still other persons, so that the whole estate is disposed of; but it means a devise of his whole interest, whatever it be, whether fee simple or less interest, to the same person or persons as joint tenants or tenants in common: Re Ross and Davies, 7 O. L. R. 433. These words are of general application, and apply to wills coming into operation as well after as before 18th September, 1865: Gray v. Richmond, 22 O. R. 256; see Armour on Titles, p. 49. Where a will creates a charge of debts and legacies on land and contains an executory devise thereof, the executor has continuing power of sale: Re Barrow in Furness Corporation, 1903, 1 Ch. 339.

50. See Surrogate Courts Act, R. S. O. 1897, ch. 59, secs. 21 and 63; R. S. O. 1914, ch. 62, secs. 26, 27. These sections, and the jurisdiction of the Surrogate Court are based on the hypothesis of death. As to distinction between void and voidable grants: see Williams on Executors (9th ed.), p. 501. As to

presumption of death: Williams on Executors, 9th ed., p. 264; Enc. Laws of England, Article "Death: Proof of:" vol. IV., p. 138.

52. The power of an executor to compromise a claim against the estate of his testator is a power under the common law, and may, in a proper case, be exercised where the person making the claim is a co-executor: Re Houghton; Hawley v. Blake, 1904, 1 Ch. 622. See Irwin v. Toronto General Trusts, 24 A. R. 484 (overruled by 63 Vic. ch. 15, sec. 2). Executors have, under this section, the right to apply the money of the estate in the purchase of a release of the widow's dower: Re McIntyre, 7 O. L. R. 548. Executors are not protected either by this section or by 53 Vic. ch. 33, sec. 30 (D.), in making payments in respect of promissory notes signed by the testator, having notice that such notes were made without consideration and intended by the testator as gifts to the payees: Re Williams, 27 O. R. 405. Are municipal taxes a debt of the testator or an incumbrance payable by the devisee: Re Watkins, 12 B. C. R. 97; Mackay v. Mackay, 4 O. W. N. 300. See R. S. O. 1914, ch. 120, sec. 38, notes.

53. Hinde Palmer's Act does not abolish an executor's right of preference of one creditor over another before a judgment for administration, but as a result of that Act a simple contract creditor may be preferred by the executor to a specialty creditor: Re Samson; Robbins v. Alexander, 1906, 2 Ch. 584, overruling Re Hankey, Smith v. Hankey, 1899. 1 Ch. 541. Where there was a deficiency of assets, it was held that it was no defence to an action for entering the warehouse of the deceased and converting goods therein to allege as a set-off a debt owing by the deceased: Monteith v. Walsh, 10 P. R. 162. Where one creditor is over-paid he will be ordered to refund at the instance of other creditors. The statute places creditors and legatees in this respect on the same footing: Chamberlen v. Clark, 1 O. R. 135, 9 A. R. 273. An administratrix has no *locus standi* to bring such an action: Leitch v. Molsons Bank, 27 O. R. 621; see note to sec 56. There is a "deficiency of assets in case the estate is unable to pay, not only debts, but interest from

the date of the administration order: Re Whitaker, 1904, 1 Ch. 299. Voluntary creditors rank *pari passu* with creditors for value: Re Whitaker, 1901, 1 Ch. 9. In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors: Milne v. Moore, 24 O. R. 456. Where certain creditors got judgment against the executor, seized and sold the real estate, they were still liable to account, the other creditors being entitled to have the whole estate distributed *pro rata*: Bank of B. N. A. v. Mallory, 17 Gr. 102. Execution creditors whose writs are in the Sheriff's hands do not lose their priority, nor does a creditor who has a sequestration in the hands of the sequestrators: Meyers v. Meyers, 19 Gr. 185. A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate of the deceased: Chamberlen v. Clark, 1 O. R. 135, 9 A. R. 273. All distinction between specialty and simple contract debts being abolished for administration purposes, it is no defence for an executor when sued on a promissory note to allege that there are specialty debts more than equal the goods not administered: Parsons v. Gooding, 33 U. C. R. 499. An administrator being served with a writ at the suit of a simple contract creditor, allowed judgment to go by default and the goods to be sold under execution. At the suit of a specialty creditor he could not set up the defence of no notice. The amount of the sale must be applied in due course of administration: Hutchinson v. Edmison, 11 Gr. 477; see also Taylor v. Brodie, 21 Gr. 607. The fact that a claim against the deceased's estate arose in consequence of a breach of duty as trustee gives such a claim no preference over other creditors of the estate: Brock v. Cameron, 25 Gr. 369; see Bicknell & Seager D. C. Act. 279-280. As to lien of execution creditor on money in sheriff's hands: see Re Hunter, 4 O. W. N. 451, 23 O. W. R. 692, 8 D. L. R. 102.

54. "Purchaser:" Re Lawley, 1911, 2 Ch. 530.

56. This section corresponds with the English Act, 22 & 23 Vic., ch. 35, sec. 29. "Creditors and others" includes next of kin, and the statute is applicable to claims for distributive shares of the assets as well

as debts and demands in the nature of debts: Newton v. Sherry, 1 C. P. D. 246. The advertisement need not appear in the "Gazette:" Re Cameron, Mason v. Cameron, 15 P. R. 272. A notice by executors that "all parties indebted to the estate of the late (testator)are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are required to file same by said date," is not a sufficient notice within this section to protect executors: Stewart v. Snyder, 30 O. R. 110, 27 A. R. 423. Nature of the notice depends on the nature and locality of the matter in question: In re Bracken, Doughty v. Townson, 43 Ch. D. 1. Where one of the next of kin who would, if alive, be entitled to a distributive share had left Canada in 1876, and had not been heard from since, it was held that an advertisement under this section would bar him if he were thereafter to make any claim, and the administrators were entitled to divide the assets as though the absentee were dead, without ever having had issue: Re Ashman, 15 O. L. R. 42. Notice of claim against estate: Re Land Credit Co. of Ireland, 21 W. R. 135; Jervis v. Wolferstan, L. R. 13 Eq. 18. Duty to give unpaid creditor information of parties receiving the money: Re Lindsey, Filgate v. Lindsey, Ir. R. 8 Eq. 61. Sufficiency of notice: Newton v. Sherry, 1 C. P. D. 246; Wood v. Weightman, L. R. 13 Eq. 434; Re Bracken, Doughty v. Townson, 43 Ch. D. 1; Stuart v. Babington, 27 L. R. Ir. 551. A trustee is not exonerated by the section if he had actual notice of a claim before distribution, even though he may have sent the notice prescribed and received no response to it: Carling Brewing Co. v. Black, 6 O. R. 441; see Bicknell & Seager D. C. Act, p. 280; Holmested & Langton, pp. 366-7. An administrator having paid claims in full, pursuant to the statutory advertisement, has no status to maintain an action to recover money from the creditors so paid when subsequently claims come to his knowledge by which the estate is shewn to have really been insolvent: Leitch v. Molsons Bank, 27 O. R. 621. Unpaid creditors have themselves a right to make creditors who have shared, make up a payment which will put them on an equality: Doner v. Ross, 19 Gr. 229; Bank of B. N. A. v. Mallory, 17 Gr. 102; Chamberlin v. Clark,

1 O. R. 135, 9 A. R. 273. This right is equitable and acquiescence or laches will bar it: Re Eustace (1912), 1 Ch. 561; Blake v. Gale, 31 Ch. D. 196. Liability of executors of a surviving executor as to claims in respect of the estate of which their testator had been surviving executor: necessity for advertisement: Stewart v. Snyder, 30 O. R. 110. Application of this section in winding-up proceedings: see R. S. O. 1914, ch. 178, sec. 185; and in assignments: see R. S. O. 1914, ch. 134, sec. 26.

57. Freehold estates over which a testator has a general power of appointment and which he appoints by his will, are assets for payment of his simple contract debts after all the testator's own property has been previously so applied: Fleming v. Buchanan, 3 De G. M. & G. 976, 22 L. J. Ch. 886. Where the donee of a general testamentary power of appointment over a fund in consideration of money lent covenants by deed to exercise the power by will, giving the lender a first charge on the fund, and does so, the fund is assets for the payment of the appointor's debts generally, and the lender has no priority over other creditors: Re Lawley, Beyfus v. Lawley, 1903, A. C. 411.

58. Consideration of effect of repeal of 3 W. & M., ch. 14: see 2 Edw. VII. ch. 1, sec. 4, ch. 17; Beer v. Williams, 21 O. L. R. 49.

59. When an executor is appointed by the Supreme Court or by the Surrogate Court, the executorship is not transmitted: see R. S. O. 1914, ch. 62, sec. 60.

63. A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of the section, but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in respect of the firm's liability: Bell v. Ottawa Trust, 28 O. R. 519; see H. & L. notes, p. 922. As to mortgagee's claim: see H. & L. notes, p. 923.

66. Applications for advice under this section are among the matters excepted from the jurisdiction of the Master in Chambers: Con. Rule 42 (6); 1913 Rule 208 (6). The application is made by originating notice under Con. Rule 938 (see sub-sec. *g*) 1913 Rule 600 (*g*). As to persons to be served: see Con. Rule 939 (*a*), 1913 Rule 601; and Re Harley, 17 P. R. 483. The Court will not interfere with the exercise of the discretion given to executors and trustees under the will: Re Sergeant, 8 O. L. R. 260. Under the provisions of this section the Court has decided as to the validity of a condition: Re Diller, 6 O. L. R. 711. Whether executors had power to sell land: Re Crawford, 4 O. L. R. 313. Whether a sale should be approved and confirmed: Nelson v. Bell, 32 O. R. 118; and see H. & L. notes, p. 1181. Guardians are now within the terms of the section: 2 Edw. VII. ch. 12, sec. 18: (see Re Mathers, 18 P. R. 13). Application for advice or direction in regard to proposed loan to beneficiary doubtfully within the section: Re Hamilton Estate, 25 O. W. R. 198, 5 O. W. N. 230. The Court will not advise executors as to a scheme or method of realization: Re Fulford, 29 O. L. R. 375. Questions which can be disposed of on summary application: Baechler v. Baechler, 4 O. W. N. 226, 23 O. W. R. 235. Questions authorized by the Trustee Act and the Rules: Re Gordon, 3 O. W. N. 1458, 22 O. W. R. 577. Scope of section: Re Rally, 3 O. W. N. 273, 25 O. L. R. 112. When summary application not warranted: Re Turner, 22 O. W. R. 543, 3 O. W. N. 1438.

67. Jurisdiction of the Court in these matters: see H. & L. notes, p, 16. The English law is different: there a trustee is not entitled to compensation for his services: Robinson v. Pett, II. White and Tudor. p. 606, and notes thereto. See as to applicability of English cases: Re Leckie, 36 C. L. J. 136. The whole matter of what costs trustees, and particularly solicitor trustees are entitled to, is fully discussed by Holmested & Langton, pp. 894-5-6. As to compensation and what are just allowances: see H. & L. notes, pp. 897-900. As to amendment by 63 Vic. ch. 17, sec. 18: see Re Church, 8 O. W. R. 983. The proper things to be considered in fixing remuneration of trustees are:—

(1) Magnitude of trust.
(2) Care and responsibility springing therefrom.
(3) Time occupied in performing its duties.
(4) Care and ability displayed.
(5) Success which has attended its administration.

Re Toronto General Trusts and Central Ontario Ry., 6 O. W. R. 350; Re Prittie Trusts, 12 O. W. R. 264; Re McIntyre v. London and Western Trusts, 7 O. L. R. 548, 3 O. W. R. 258; Re Patrick Hughes, 14 O. W. R. 630; Re Sanford Estate, 18 Man. L. R. 413. Remuneration of trustees whose duties extend over a number of years should be an annual allowance based, not on amount, but on the nature of the property and the responsibility involved: Re Patrick Hughes, 14 O. W. R. 630; In re Williams, 4 O. L. R. 501; Re Sanford Estate, 18 Man. L. R. 413; Re Prittie Trusts, 12 O. W. R. 264. Annual allowance in lieu of or in addition to percentage: see Re T. G. Trusts and Central Ont. Ry., 6 O. W. R. 350; Saskatchewan v. Leadley, 14 O. W. R. 426. Proper allowance is a matter of opinion: McDonald v. Davidson, 6 A. R. 320. The Master may allow a lump sum, but he should see that the services have been rendered: Stinson v. Stinson, 8 P. R. 560. Compensation where executor discharges his duty honestly but keeps his accounts loosely: Hoover v. Wilson, 24 A. R. 424. Executor retaining money in his hands unemployed: Gould v. Burrett, 11 Gr. 523. An executor will not be allowed for services of an agent which were performed gratuitously: Chisholm v. Barnard, 10 Gr. 479. Trustees should not be paid an allowance on taking over an estate, but for taking over and distributing: McIntyre v. London and Western, 7 O. L. R. 548, at p. 556; Re Patrick Hughes, 14 O. W. R. 630. Allowances to executors and trustees: see particularly Re Berkley's Trusts, 8 P. R. 193; Re Fleming, 11 P. R. 426; Williams v. Ray, 9 O. R. 534; Re Farmers Loan, 3 O. W. R. 837; Re Prittie Trusts, 12 O. W. R. 264; Saskatchewan v. Leadley, 14 O. W. R. 426; Re Patrick Hughes, 14 O. W. R. 630; Re Griffin, 3 O. W. N. 1049, 23 O. W. R. 254. Rate of compensation and method of computation: Thompson v. Freeman, 15 Gr. 384; Re Fleming, 11 P. R. 272, 426; Thompson v. Fairbairn, 11 P. R. 333; Archer v. Severn, 13

O. R. 316; Denison v. Denison, 17 Gr. 306; Torrance v. Chewett, 12 Gr. 407; McLennan v. Howard, 9 Gr. 178; Re McIntyre, 7 O. L. R. 548; Re Morrison, 13 O. W. R. 767; Re Church, 8 O. W. R. 983, 12 O. L. R. 18; Gibson v. Gardner, 8 O. W. R. 526, 13 O. L. R. 521. Method of ascertainment of compensation to executors and administrators: 3 D. L. R. 168. Allowances to trustees and executors in Ontario: art. 49 C. L. J. 19. This section does not cover the case of a "next friend." A next friend however, stands in the same position as a trustee in respect of costs, charges and expenses properly incurred before action brought: Vano v. Can. Cotton Mills, 1 O. W. N. 763, 21 O. L. R. 144. Remuneration applies only to express trustees. A surviving partner is probably not a trustee at all: Livingston v. Livingston, 3 O. W. N. 1066, 21 O. W. R. 901, 26 O. L. R. 246. It is the settled practice for a Master passing accounts of executors to allow them compensation without an order of the Surrogate Judge allowing the same. Where an executor obtained such an order and the Master acted on it and not on his own discretion, an appeal from the report was allowed, with costs to be paid by the executor: Biggar v. Dickson, 15 Gr. 233. As to provisions in Surrogate Act respecting accounts: see R. S. O. 1914, ch. 62, secs. 70, 71, 72. And as to appeals: see sec. 34, and Re Alexander, 31 O. R. 167.

67.—(4) See Re Leckie Estate, 36 C. L. J. 136, and see R. S. O. 1914, ch. 159, sec. 68.

CHAPTER 122.

The Vendors and Purchasers Act.

Refer to Armour on Titles; Armour on Real Property; Dart on Vendors and Purchasers; Bicknell and Kappele, Practical Statutes, pp. 695-698.

2—(*a*) The section is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching the conveyance as voluntary, even though the transaction took place prior to its enactment: Sanders v. Malsburg, 1 O. R. 178. The production of an original mortgage which was more than 20 years old proves itself under this section which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue: Allan v. McTavish, 28 Gr. 539, 8 A. R. 440. Where lands were conveyed by deed on certain trusts, of which deed only a memorial was registered, and later a deed of appointment was registered, also by memorial, purporting to contain a full copy of the deed in which were recited what purported to be the trusts of the former deed: Held, the production of the memorial 20 years old of the deed of appointment was sufficient evidence of what those trusts were in a contract of sale in which the vendor was bound to shew a good title: Re Ponton and Swanston, 16 O. R. 669. A recital in a deed more than twenty years old that the grantee was administrator of his father's estate, and that the lands were conveyed to him in satisfaction of a debt, was sufficient evidence of the facts so recited, and was not displaced by evidence of a prior grant of administration to another for a limited purpose: Gunn v. Turner, 8 O. W. R. 796, 13 O. L. R. 158. Effect of recital of mortgagees as "trustees," or "trustees who are entitled to and advance the mortgage money on a joint account:" see Armour on Titles, pp. 34, 35; and see provisions of R. S. O. 1914, ch. 133, sec. 4. A recital in a deed more than 20 years old that the vendor was seized in fee simple is sufficient evidence under this Act, so that no prior abstract can

be demanded, except in so far as the recital is proved inaccurate: Bolton v. London School Board, 7 Ch. D. 766, followed; Macklin v. Dowling, 19 O. R. 441 (Ferguson, J., at p. 444). For criticism of the soundness of this: See Armour on Titles, pp. 38-41, 120-121. The decision in Bolton v. London School Board ought not to be followed: Re Wallis and Grout's Contract, 1906, 2 Ch. 206, 75 L. J. Ch. 519. A mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money does not of itself afford conclusive evidence of a debt so that the mortgagee can maintain an action for its recovery. Quære whether this section applies to such an action or only to actions where the title to land is in question: London Loan v. Smyth, 32 C. P. 530; see also Saunders v. Malsbury, 1 O. R. 542; Gunn v. Turner, 8 O. W. R. 796, 13 O. L. R. 158. A purchaser may bring an action to have the evidence taken on oath instead of by statutory declaration and also to test it by cross examination: Armour, Titles, p. 102, see also p. 115. Statements in affidavits attached to memorials as evidence of due execution: see Armour, Titles, p. 133. Purpose of recitals: see Armour, R. P., pp. 321-2.

2.—(*c*) All memorials are now over 20 years old. A memorial executed by the grantee is good secondary evidence when the possession has been in accordance with the title claimed in examining a title under the Quieting Titles Act, and the weight of authority appears to be that such evidence is admissible also in civil suits: Re Higgins, 19 Gr. 303. Memorial as evidence of trusts: see Re Ponton and Swanston, 16 O. R. 669, note to sec. 2 (*a*) *ante*. A registered memorial 20 years old, of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained: McDonald v. McDougall, 16 O. R. 401. A memorial registered over 60 years executed by the grantee was not sufficient secondary evidence of the deed where there was no actual possession of the land, and even though possession of some of the lands had gone with the deed, as long as there was no

such possession of the lands immediately in question: Van Velsor v. Hughson, 9 A. R. 390. A memorial over 30 years old executed by the grantor was admissible evidence and sufficient proof of deed in an action of ejectment: Regina v. Guthrie, 41 U. C. R. 148; Regina v. McDonell, 41 U. C. R. 157. A registered memorial of a deed executed under power of attorney is not sufficient evidence of the power: Canada Permanent v. Ross, 7 P. R. 79. The production of a registered memorial executed by the grantee where possession is not shewn to follow the deed, is not sufficient evidence in proof of the deed: Evidence in proof of a paper title discussed: Mulholland v. Harman, 6 O. R. 546. See as to memorials and certified copies as evidence: R. S. O. 1914, ch. 124, sec. 19; R. S. O. 1914, ch. 76, secs. 46, 47: see also Dig. Ont. Case Law, col. 2364, *et seq.*, H. & L. notes, p. 703; Armour, Titles, pp. 110-114, 131-134.

2.—(*d*) See R. S. O. 1897, ch. 119, sec. 39, R. S. O. 1914, ch. 109, sec. 55, and Criminal Code, 1906, secs. 396, 419, as to concealment, &c., of documents of title. See Armour, Titles, pp. 43-45, as to effect of this sub-section.

4. Cf. Imperial Act, 37-38 Vic. ch. 78, sec. 9. The only parties necessary are those who would be necessary to a suit for specific performance and mortgagees who were joined were dismissed with their costs: Re MacNabb, 1 O. R. 94. The Act is intended to provide for the simple case where there is no dispute as to the validity of the contract and the Court ought not to enter upon the question of the validity of the title until it is decided that the contract is binding: Re Robertson and Daganeau, 9 P. R. 288; Re MacNabb, 1 O. R. 94. Only those matters should be entertained which would be entertained upon a reference as to title under a decree for specific performance: Re MacNabb, 1 O. R. 94; see Henderson v. Spencer, 8 P. R. 402; and also In re Trelevan and Horner, 28 Gr. 624, where the Court would not compel the purchaser to accept title on an application where infants were interested under a settlement, though in an action for specific performance the completion of the sale might have been ordered and the purchase money

paid into Court for investment. If the Court adjudicates on a question of title and directs the purchaser to complete and he fails to do so, it is unnecessary to bring an action for specific performance: the requisite relief may be obtained on notice of motion for payment, or in default, a resale, etc.: Re Craig, 10 P. R. 33. The costs are in the discretion of the Judge: Givins v. Darvill, 27 Gr. 502. Costs where possessory title is made: Re Boustead and Warwick, 12 O. R. 488. A purchaser is not unreasonable in demanding strict proof of the extinction of a paper title, and may insist on having examination of witnesses. An action need not be brought for the Court has power upon an application under this Act to refer it to the Master before whom the evidence may be taken *viva voce*: Scott v. Nixon, 2 Dr. & War, 388. Judges of District Courts who were Local Judges of the High Court had no jurisdiction to deal with applications under this Act: Re Michell, 31 O. R. 542, H. & L. p. 191. Where a Master on a reference under this Act to settle title under a written agreement for a lease, ruled that evidence might be given to shew what covenants a lease might contain, appeal does not lie to the Supreme Court of Canada from a judgment affirming such ruling: C. P. R. v. Toronto, 18 P. R. 374, 451, 30 S. C. R. 337. Parties to a V. and P. application are in the same position as they would be on a reference as to title in a suit for specific performance: Re Burroughs, Lynn and Sexton, 5 Ch. D. 601; (quoted with approval, Toronto v. C. P. R. 18 P. R. 374 at p. 386); Re Eaton, 9 P. R. 396; Re Thomas McNabb, 1 O. R. 94. (Contra see Re Bingham and Wrigglesworth, 5 O. R. 611). Re Robertson and Daganeau, 9 P. R. 288, gives the true scope of the Act and should be followed: Re Farmer and Reid, 12 O. W. R. 1076. The Court has jurisdiction on a V. and P. application to make an order for the rescission of the contract and return of the deposit: Re Walker and Oakshott, 1901, 2 Ch. 383; Re Hargreaves & Thompson, 32 Ch. D. 454. While the existence or validity of the contract cannot be tried on a V. and P. application, a dispute as to the validity of the contract will not oust jurisdiction to try other questions: Re Hughes & Ashley (1900), 2 Ch.

595. The vendor's right to rescind may be tried in this way: Re Jackson and Woodburn, 37 Ch. D. 44. The Court can determine what form the conveyance shall take if there is one: Re Hughes and Ashley, 1900, 2 Ch. 595. The Act is intended to enable vendors and purchasers to determine distinct isolated points arising under a contract and not the question whether the vendor has a good title in a general way: Re Wallis and Barnard, 1899, 2 Ch. 515. If an action is brought instead of an application the extra costs may be disallowed: King v. Chamberlayn (1887), W. N. 158. Where, as a consequence of the vendor's fault, the purchaser is entitled to damages (Day v. Singleton (1899), 2 Ch. 320), they cannot be recovered by a V. and P. application: Re Wilson and Stevens (1894), 3 Ch. 546. Scope of the Act: see Re Calcott and Elvin, 67 L. J. 327; Re Lander and Badgley, 1892, 3 Ch. 41; Re Jones and Cummings, 3 O. W. N. 672, 21 O. W. R. 248; Re Paterson and Canadian Explosives Limited, 4 O. W. N. 1175. Applies to contracts of title guarantee insurance: see R. S. O. 1914, ch. 183, sec. 160. Where doubtful title arises through testamentary language, proper practice is to construe will on originating summons with all parties before the Court pending application under V. and P. Act: Cameron v. Hull, 3 O. W. N. 807, 4 O. W. N. 581, 23 O. W. R. 736.

A very wide range of questions of title and conveyance have been answered on applications under this section. For example: Whether certain lands passed by will to a particular devisee: Re Bain and Leslie, 25 O. R. 136. Whether the will of a deceased mortgagee whose executor had given a discharge in 1888 must be registered: Re Taylor and Martin, 14 O. L. R. 132. Whether a conveyance could be made of certain lands in the lifetime of the life tenant: Re Rathbone and White, 22 O. R. 550. Whether local improvement rates were an incumbrance which the vendor was bound to commute: Re Graydon and Hammill, 20 O. R. 199. What taxes a vendor should pay: Re Wilson, 20 O. R. 532. What interest a purchaser should pay: Re Dingman and Hall, 17 A. R. 398. Whether a power to sell can be exercised by a surving executor: Re Koch and Wideman, 25 O. R.

262; Re Hewett and Jermyn, 29 O. R. 383; Re MacNabb, 1 O. R. 94. Whether the surviving trustee of a congregation which had separated could make title: Re Wansley and Brown, 21 O. R. 34. Whether purchasers were entitled to compensation, and whether certificates of *lis pendens* should be removed: Re Bobier and Ontario Investment, 16 O. R. 259. Whether a power of appointment was validly exercised: Re Ontario L. & S. Co. and Powers, 12 O. R. 582. What evidence a purchaser is entitled to: Re Morton and York, 7 O. R. 59. Whether an assignment of mortgage by endorsement on the memorial was sufficient evidence: Re Mara, 16 O. R. 391. Whether under a conveyance the grantee took a fee simple, or a trust was created: Re Bingham and Wrigglesworth, 5 O. R. 611. Whether trustees and *cestuis que trustent* joining could make a good conveyance: Givins v. Darvill, 27 Gr. 502. Whether payment of a sum of money was made "as a deposit" or as "an instalment;" and whether it was forfeited: Labelle v. O'Connor, 15 O. L. R. 519, 11 O. W. R. 95. Whether restraint on alienation of lands devised by will was valid: Re Martin and Dagneau, 11 O. L. R. 349. Whether vendor in position to make title under power of sale in mortgage: Re Sovereign Bank and Keilty, 1 O. W. N. 456. Whether a building restriction affected title so as to give rise to action for damages for breach: Re Ham and Cameron, 1 O. W. N. 821. Whether outstanding legacies barred by statute: Mulholland v. Norrie, 14 O. W. R. 1112, 1 O. W. N. 214, 20 O. L. R. 27. Whether a beneficiary and surviving trustee could convey: Re Mara and Wolfe, 4 O. W. N. 866. Whether a will gave a life estate or if there was power to convey the fee: Wolfe v. Holland, 3 O. W. N. 900, 21 O. W. R. 525. Whether deed is sufficient to convey all the land covered by a building: Re Maton v. Clavir, 4 O. W. N. 263, 23 O. W. R. 279. Whether an instrument registered formed a cloud on title: Rosenberg v. Bochler, 4 O. W. N. 757, 24 O. W. R. 59. Whether creditors were necessary parties to a deed by debtor and his assignee: Re Snell and Dyment, 4 O. W. N. 759, 24 O. W. R. 64. Whether will created settled estate: Re Lane and Beacham, 4 O. W. N.

243. Construction of will as affecting title: Re Nichol and Reardon, 16 O. W. R. 48. That the assignee of a mortgage absolutely assigned can give a discharge even if it appear on the face of the assignment that it is given as collateral security for a debt of lesser amount: Re Bland and Mohun, 5 O. W. N. 522. (So long as it is not by way of charge: Mercantile Bank v. Evans: 1899, 2 Q. B. 613).

The following cases are also noted: (not all under this Act, but dealing with cognate matters):

If a purchaser's fear of title have a reasonable foundation in fact or in law it ought not to be forced on him: Re Edgerly and Hotrum, 4 O. W. N. 1434, 24 O. W. R. 800. If acceptance of title involves a "reasonably decent probability of litigation" it will not be forced on an unwilling purchaser: Re Piggott and Kern, 4 O. W. N. 1580, 24 O. W. R. 863. Where the registered title stood in the names of two persons, one of whom was dead, and an affidavit was tendered that the deceased had no interest, the Court refused to declare the title valid on summary application: Re Farmer and Reid, 12 O. W. R. 1076. Where encroachment, the purchaser bound to accept evidence of possession for statutory period: Re Butler and Henderson, 4 O. W. N. 498, 23 O. W. R. 576. Proof of possession by affidavits with right of cross-examination: Re Aiken and Ray, 14 O. W. R. 744, 1 O. W. N. 95. A quit claim may be directed to be procured to clear up a possible cloud on title: Tozman v. Lax, 5 O. W. N. 51, 25 O. W. R. 49.

Executors who have probate in England can discharge mortgage in Ontario on registration of will and probate without obtaining probate here or having the probate resealed here. *Aliter* as to administration: Re Green and Flatt, 29 O. L. R. 103; 4 O. W. N. 1388.

Freehold land held by statutory title based on 10 years possession is not thereby freed from restrictive covenants: Re Nesbitt and Potts contract, 1905, 1 Ch. 391, 1906, 1 Ch. 368. A person who buys land from a successful squatter is affected by notice of restrictive covenants with

which he would have become acquainted if he had made reasonable enquiry into the title prior to the squatters: Re Nisbet and Potts, 75 L. J. Ch. 238, 1906, 1 Ch. 386; see Re Cox and Neve, 1891, 2 Ch. 109, 117; London S. W. Ry. v. Gomm, 20 Ch. D. 562, 582. Interpretation of restrictive covenants and building restrictions: Re Robertson and Defoe, 20 O. W. R. 712, 3 O. W. N. 431, 25 O. L. R. 286. Building restriction; covenant running with land; right of action for breach: Re Ham and Cameron, 1 O. W. N. 821. Under a contract for sale of land in fee, free of incumbrance, subject to one restrictive covenant, a vendor is not entitled to insert a further restrictive covenant on the ground of a prior contract with another which would render him liable to action unless the further restrictive covenant were inserted; though the prior contract might be a good defence to an action for specific performance: Re Wallis and Barnard, 1899, 2 Ch. 515. A common law condition providing for reverter of estate to grantor and his heirs in case land is put to other uses and purposes than those declared in the conveyance, though perhaps void as infringing the rule against perpetuities, renders an estate so doubtful that it will not be forced on an unwilling purchaser: Re Hollis Trustees and Hague, 1899, 2 Ch. 540. (See as to such a condition disallowed: Re St. Patrick's Market, 1 O. W. N. 92, 14 O. W. R. 794).

A provision in an agreement for sale that "the deed shall be prepared at the expense of the vendor" dispenses with the requirement of the general rule that the purchaser should prepare and tender the deed to the vendor: Foster v. Anderson, 15 O. L. R. 362, 42 S. C. R. 251. Right to sue for instalments under agreement for sale without tendering conveyance: Vivian v. Clergue, 15 O. L. R. 280. "Time is of the essence" in a contract of sale: see Foster v. Anderson, 15 O. L. R. 362, 42 S. C. R. 251; Labelle v. O'Connor, 15 O. L. R. 519, 11 O. W. R. 95. When a solicitor simply delivers an abstract, he does not "deduce" title: Re Webster and Jones, 1902, 2 Ch. 551.

Where a purchaser at a sale under the direction of the Court is entitled to be discharged from his

contract on the ground of misdescription, he is entitled to be paid out of funds in Court, not only his costs of search but also his costs of bidding and being allowed to be purchaser: Holliwell v. Seacombe, 1906, 1 Ch. 426. An obvious mistake in a description may be rejected if the rest of the description identifies the land: Re Blight and Ockenden, 12 O. W. R. 673. Rectification ordered of a mutual mistake in a conveyance discovered 6 years after its execution: Beal v. Kyte, 1907, 1 Ch. 564. Where vendors knowingly misdescribe property, as for example by omitting to state that they have no title to the minerals, they are not permitted to avail themselves of the clause in the contract enabling them to rescind on objection being taken which they are unwilling to remove. The purchaser is entitled to completion with compensation: Re Jackson and Haden, 1906, 1 Ch. 412. "More or less": Wilson Lumber Co. v. Simpson, 22 O. L. R. 452, 23 O. L. R. 253; Bullen v. Wilkinson, 3 O. W. N. 229, 859; Hunter v. Kerr, 21 W. L. R. 823. A conveyance in which land is described as "bounded on the west by said intended road" is an implied grant of an easement of way: Gogarty v. Hoskins, 1906, 1 Ir. R. 173. Plans as descriptions: Re Sparrow and James, 1910, 2 Ch. 60; Re Samson and Narbeth, 1910, 1 Ch. 741.

Where a requisition is made it is not open to a vendor under a contract in the usual form and not being willing to comply with the requisition, to rescind in a letter marked "without prejudice" offering an indemnity and annulling the sale in case of non acceptance: Re Weston and Thomas Contract, 1907, 1 Ch. 244. A condition giving a vendor a right to rescind if the purchaser should insist on any requisition which the vendor should be unable, etc., to remove, does not admit of a rescission where the vendor has no title to part of the property: Re Jackson and Haden, 1905, 1 Ch. 603, 1906, 1 Ch. 412. The benefit of a provision in a contract for the sale of land that if any objection or requisition be made by the purchaser which the vendor shall be unable or unwilling to comply with, the vendor shall be at liberty to rescind the agree-

ment, is lost if the vendor's solicitor attempts to answer the requisitions and enters into negotiations with the purchaser's solicitor regarding them, unless he expressly reserves his right to rescind later on: Crabbe v. Little, 14 O. L. R. 631. In a contract giving the vendor power to rescind where such right is reserved, if the purchaser makes any objection or requisition which the vendor "is unable or unwilling to remove or comply with," it is not sufficient that the vendor should have acted without caprice, he must also have acted reasonably: Quinion v. Horne, 1906, 1 Ch. 596. An objection to title that the legal estate is outstanding in the Crown is not an objection that goes to the root of title, so as to enable a purchaser to make requisitions out of time: Pryce-Jones v. Williams, 1912, 2 Ch. 517. The vendor of real estate is under an obligation to disclose any material defect in the title or in the subject of the sale which is exclusively within his own knowledge and which the purchaser could not be expected to discover for himself with the care used ordinarily in such transactions: Carlish v. Salt, 1906, 1 Ch. 335, 75 L. J. Ch. 175.

Where a vendor contracting as trustee has under his trust no power of sale but has previous authority from the beneficiaries, he can make title: Re Baker and Selmon's Contract, 1907, 1 Ch. 238. A voluntary settlement does not, in the event of the bankruptcy of the settlor, become void *ab initio*, but only from the date of the act of bankruptcy, and prior *bona fide* purchasers for value get a good title: Re Carter and Kenderdine, 1897, 1 Ch. 776. A power to vary and transpose "securities" enables trustees to sell real estate: Re Gent and Eason's Contract, 1905, 1 Ch. 387.

Purchaser entitled to make deduction where municipality claims taxes and vendor disputes: Phillips v. Monteith, 4 O. W. N. 1420. Onus to remove requisition as to tax sale: Re National Trust and Ewing, 2 O. W. N. 801, 18 O. W. R. 770. Vendor ordered to convey his half interest with abatement: Kennedy v. Spence, 3 O. W. N. 76, 20 O. W. R. 61.

Private lane as objection to title: Re Boulton and Garfunkel, 23 O. W. R. 1, 4 O. W. N. 25.

Cases under Vendor and Purchaser Act: see Dig. Eng. Case Law, XIV., col. 1502-1506. Dig. Ont. Case Law, col. 7261.

CHAPTER 123.

The Quieting Titles Act.

Refer to Armour on Titles, Holmested and Langton Judicature Act and Rules.

2. See Con. Rules 991 to 1014 inclusive, H. & L. notes, pp. 125 to 1242 inclusive, 1913 Rules, 692 to 714 inclusive. Who may file petition: effect of filing petition: see H. & L. notes, p. 126. This section does not apply to the case of a vendee who has contracted to purchase but who has not completed his contract. In such a case the Court may in the exercise of its discretion under sec. 3, refuse to entertain the petition filed without the consent of the vendor first obtained: Re Brown, 3 Ch. Ch. 158. Whether a married woman must apply by next friend: see Re Howland, 4 Ch. Ch. 74; Re McKim, 6 P. R. 190. Persons to whom the land is conveyed pending investigation of title, must be substituted as petitioners: Re Cummings, 8 P. R. 473. When the petitioner has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed: Re Pelton, 8 P. R. 470. Cross petition: see Re Dunham, 8 P. R. 472. Service of petition may be made an official guardian for infants who are required to be notified: Re Murray, 13 P. R. 367.

5. Form of petition: see Schedule H. & L. Forms No. 1430; see H. & L. notes, p. 1227. Filing petition: see Rule 993; 1913, Rule 694. Petitions to be referred to local referees must be first entered with Inspector: Con. Rule 997; 1913 Rule 698. How endorsed: see Con. Rules 995, 996; 1913 Rules

696, 697. When, pending investigation the petitioner registered a plan, the petition had to be amended in accordance: Re Morse, 8 P. R. 475.

6.—(*b*) Proofs required on investigating titles: see H. & L. notes, pp. 1228-30; and see Con. Rule 1000; 1913 Rule 701. In seeking to prove the existence and contents of a lost deed the affidavit of the petitioner alone as to searches is not sufficient. Particulars of searches, by whom made, when and why made, should be given: Re Bell, 3 Ch. Ch. 239. A memorial executed by the grantee is good secondary evidence in proceedings under this Act when the possession has been in accordance with the title: Re Higgins, 4 Ch. Ch. 128. Lost power of attorney: see Re Street, 4 Ch. Ch. 99. Affidavit of search for missing deeds should be by independent evidence: Ex parte Chamberlain, 2 Ch. Ch. 352.

6.—(*e*) Where the title was acquired within two years, a sheriff's certificate was required against the prior owner: Ex parte Lyons, 2 Ch. Ch. 357. The Court has no jurisdiction to grant a certificate unless all taxes except those for the current year have been paid: Ex parte Chamberlain, 2 Ch. Ch. 352.. A sheriff's certificate must be produced: Re Rundel, 4 Ch. Ch. 71. The sheriff must certify that he had no executions within 30 days previous, and and that the lands had not been sold under execution within 6 months: Re Harding, 3 Ch. Ch. 232. The treasurer's certificate must state whether the return of arrears of taxes by the township treasurer had or had not been made, and that the land had not been sold for taxes within 18 months preceding: Re Harding, 3 Ch. Ch. 232. Proof is indispensible that possession has always accompanied the title or that some sufficient reason exists for not adducing such proof: Ex parte Wright, 2 Ch. Ch. 355. The possession must be uninterrupted: Re Bell, 3 Ch. Ch. 239. Claiming against a patentee of the Crown: see Re Linet, 3 Ch. Ch. 230. A petitioner claiming title by possession should adduce clear and positive evidence of more than one independent witness. Notice will be served on the person having the paper title, if he can be found, and if not, evidence is to be put in of search for him and his

representative: Re Caverhill, 8 C. L. T. 50. An applicant for title by possession must prove it at his own expense and may be made to pay the costs, if an unsuccessful contestant: Low v. Morrison, 14 Gr. 192.

6.—(*g*) The Schedule should be an exhibit in the usual way to the affidavit under sec. 7 (1): Re Dickson, 3 Ch. Ch. 352.

7. Although it is not imperative that the affidavit should be made by the petitioner, a valid reason should be given why it is not so done: Re Rundel, 4 Ch. Ch. 71. The schedule of particulars must be made an exhibit in the usual way: Re Dickson, 3 Ch. Ch. 352. Form: see H. & L. forms, 1433, 1435; see H. & L. notes, p. 1228. Every material fact that is capable of being proved by independent evidence ought to be so proved. An affidavit of the petitioner as to search for missing deeds is insufficient: Ex parte Chamberlain, 2 Ch. Ch. 352.

8. The certificate should follow the wording of the section. A certificate of counsel that he had corresponded with the petitioner's agent on the subject and believed the statements true was insufficient: Re Dickson, 3 Ch. Ch. 352; H. & L. notes, p. 1228; Form No. 1434.

9.—(1). On what evidence the referee will proceed: notices when title claimed by possession: Evidence required of circumstances creating suspicion: negative evidence: see H. & L. notes, pp. 1236-7. "Receivable or sufficient in point of strict law:" The decision of a Court acting under such a statute is not a judicial decision: as to appeals: see Moses v. Parker, 1896, A. C. 245.

10. See Re Harding, 3 Ch. Ch. 232; Re Chamberlain, 2 Ch. Ch. 352; notes to sec. 6 (*e*).

12. Advertisement: see H. & L. notes, pp. 1235, 1230; Con. Rule 1004; 1913, Rule 705; see also sec. 41, *infra*. It is necessary to shew that the notices posted were continued for the period directed: Ex parte Hill, 2 Ch. Ch. 348.

14. Where title had passed into the hands of a trustee to pay creditors an advertisement was directed to be published calling on creditors to shew cause why certificate should not be issued: Re Rundel, 4 Ch. Ch. 71. Notice to heirs: Ex parte Hill, 2 Ch. Ch. 348. Notice to persons entitled to paper title: Ex parte Chamberlain, 2 Ch. Ch. 352; Re Caverhill, 8 C. L. J. 50. Where there was an alleged clerical error in a will, persons interested in the opposite view were given notice: Ex parte Lyons, 2 Ch. Ch. 357. The Court will exercise great particularity in seeing that all persons have been duly and regularly served with proceedings under this Act: Re Palmer, 2 Ch. Ch. 351. Costs against an unsuccessful adverse claimant: see H. & L. notes, p. 1241; see Con. Rule 1005; 1913, Rule 706; H. & L. notes, pp. 1256-7. H. & L. forms No. 1445: proof of service: H. & L. notes, p. 1237.

17. If it appear that, had a bill been filed to enforce the opposing claim, the applicant would have had a good defence as a *bona fide* purchaser for value without notice, he will be entitled to a certificate: Cochrane v. Johnson, 12 Gr. 177. The Court will exercise a liberal discretion where error is alleged to exist, both in time for appealing and for re-investigating a contestant's claim: Re Howland, 4 Ch. Ch. 74.

18. The filing of a petition is not such a proceeding as will save the rights of a contestant otherwise barred by the Statute of Limitations: Laing v. Avery, 14 Gr. 33. Where a contestant sets up a tax sale which proves invalid, he is entitled to a lien for the taxes paid by his purchase money: Re Cameron, 14 Gr. 612. A contestant who is in possession may point out the defects in the claimant's *prima facie* title before being called on to prove his own: Armour v. Smith, 16 Gr. 380. The Court will not grant a certificate to a person claiming the fee who is kept out of possession by a person who disputes his title: Re Mulholland, 18 Gr. 528. The applicant must have substantially an estate in possession: Re West Half Con. 6 Mono, 6 P. R. 150. Proceedings under this Act will not be made a substitute for an action of ejectment: Re Mulholland,

18 Gr. 528. If the contestant's claim impeaching the transaction by which the claimant's title arose can be successfully resisted by the claimant on any ground, it will form no obstacle to a certificate: Laing v. Matthews, 14 Gr. 36. When the claimant proves a *prima facie* title, the onus is on the contestant of proving assertions as to the meaning of descriptions of land in question: Re Burritt, 23 Gr. 432. See also as to misdescription: Re Callaghan, 8 P. R. 474. Where documents were impeached as forgeries, the Court directed an action to be brought so that the matter could be tried by a jury where the principal witnesses resided: Brouse v. Stayner, 16 Gr. 1. Where the genuineness of documents is doubtful the Court may refuse a certificate without pronouncing absolutely on the question: Graham v. Meneilly, 16 Gr. 661. Ajudication on contest: Costs: Report: see H. & L. notes, p. 1238. Where title made out before Local Referee, he is to certify same and forward papers to Inspector: Duty of Inspector: see Con. Rule 1007; 1913, Rule 708. Appeals from report: see H. & L. notes, p. 1239; Con. Rules 1013, 769-772; 1913, Rules 714, 502-504.

19. See Con. Rule 1198; H. & L. notes, p. 1434; 1913, Rules 373, 374. A contestant served with notice will not be prevented from asserting his rights until payment of costs of previous proceedings instituted by the claimant and ordered to be paid by the contestant: Shepard v. Hayball, 13 Gr. 681.

20. See Low v. Morrison, 14 Gr. 192, as to costs of asserting title by possession (note to sec. 6 (*e*)). The Referee has power over costs, and the Court refused to set aside his order dismissing a petition with costs: Re Referee, 2 Ch. Ch. 22.

23. Position of Crown as claimant by escheat of mortgage moneys: Re Raycraft, 15 O. W. R. 438, 20 O. L. R. 437, 1 O. W. N. 509. Invalidity of condition subsequent: Contingent reversionary interest: Re St. Patrick's Market, 1 O. W. N. 92; Re Hollis and Hague (1899), 2 Ch. 540.

25. A certificate granted on a false affidavit was set aside, the Court refusing to go into the merits of

the question whether the affidavit was necessary: Re Ashford, 3 Ch. Ch. 77. The Referee should "find and certify," not "adjudge and determine:" Per Mowat, V.C.: Re Referee, 2 Ch. Ch. 22. Where an erroneous certificate was issued but not registered, and no deed or incumbrance since made affecting the land, a proper certificate was directed to issue *ex parte*: Bradley v. McDonell, 2 Ch. Ch. 274.

27. Position of Crown as possible claimant by escheat from mortgagee who was not heard of for long time: Re Raycraft, 20 O. L. R. 437, 15 O. W. R. 438, 1 O. W. N. 509. See Armour on Titles, p. 32.

30. See Armour on Titles, p. 284.

31. English law recognises as valid in England a decree of divorce obtained by a wife against her husband before the Courts of a foreign country where the husband was not domiciled, on grounds which the law of his domicile, being that of another foreign country, would not have recognised in its own Court, where it appears that the decree was pronounced under such circumstances that the law of domicile of the husband recognises it as valid: Armitage v. Atty. Gen., 1906, P. 135. Mode of trial for declaration of legitimacy: Sackville West v. Atty. Gen., 1910, P. 143. For jurisdiction of Divorce Court in England to enable persons to establish their legitimacy and the validity of their marriages: see 21 & 22 Vic., ch. 93. Cases: see Dig. Eng. Case Law, VII., as to legitimacy of children: col. 660, *et seq*: as to validity of marriage: col. 626, *et seq*. See Con Rule 1012; H. & L. notes, p. 1241; 1913 Rule 713.

33. See Re Ashford, 3 Ch. Ch. 77; note to sec. 25, *ante*.

36. See H. & L. notes, p. 207.

37. Service on Official Guardian is good service on infants who are required to be notified of the proceedings: Re Murray, 13 P. R. 367. See also as to service on infants: Re Gilchrist, 8 P. R. 472. As to married women: see Re McKim, 6 P. R. 190; Re Howland, 4 Ch. Ch. 74.

47. See Con. Rules 991-1041, inclusive; 1913 Rules 692-714, inclusive.

CHAPTER 124.

The Registry Act.

Refer to Armour on Titles, Armour on Real Property, Bicknell and Kappele, Practical Statutes, pp. 761-767; Decisions and Rulings of D. Guthrie, K.C., Inspector of Registry Offices.

2.—(*d*) A by-law providing for the opening of a road is an "instrument:" Re Henderson and Toronto, 29 O. R. 669. Sheriffs' Act and Warrant under Imp. Act, 19 and 20 Vic., ch. 79, vesting lands in Canada and Scotland in trustee under bankruptcy proceedings in Scotland, although without witness or attestation clause and specifying no lands, was an instrument capable of registration: Robson v. Carpenter, 11 Gr. 293. Every species of conveyance by which lands are affected in law or in equity is included: McMaster v. Phipps, 5 Gr. 253. Order of Division Court Judge vacating a mechanic's lien is an instrument capable of registration: Guthrie, 1905, p. 31. The section formerly included only "municipal road by-laws:" see sec. 70 for further provisions. Money by-laws are not entered in the abstract index, but in a book specially for entering by-laws: see sec. 23 (5); Guthrie, 1897, p. 39. A mere statutory declaration is not an "instrument:" see Custody of Documents Act, R. S. O. 1914, ch. 125, sec. 2; Guthrie 1,907, p. 44, 1908, p. 22. Nor is a contract for sale evidenced by letters written by solicitors unless power of attorney is registered: Guthrie, 1901, p. 18. As to schedules without sufficient description: see Guthrie, 1902, p. 7. Registration of receiving order by way of equitable execution: see Armour, Titles, p. 178. Registration of judgment in alimony: see Judicature Act, R. S. O. 1914, ch. 56, sec. 73 and *post*, sec. 43. Registration of charge on land by a person without interest is a cloud on the title that should be vacated: Fee v. Macdonald, 3 O. W. N. 1378. Consideration of rights created by expropriation by-law and the propriety of registering it: Grimshaw v. Toronto, 4 O. W. N.

1124, 28 O. L. R. 512, and see *post*, sec. 70. Instrument capable of registration: see also Rosenberg v. Bochler, 4 O. W. N. 757, 24 O. W. R. 59.

2.—(*e*) An easement created by severance of a tenement is not within the Registry Act and not affected by subsequent dealing with the land: Israel v. Leith, 20 O. R. 361.

7. Where the county refuses or neglects to provide proper offices, the course for the registrar is not to furnish them himself and sue the county for the rent, but to compel the county by the aid of the Court to furnish such offices: Ward v. Northumberland, 12 C. P. 54; see also Reg. v. Northumberland, 10 C. P. 526. What "furniture" includes: see Newsom v. Oxford, 28 O. R. 442. Inspector's powers to direct equitable adjustment of expense to be borne by a city having no separate Registry Office: see Guthrie, 1911, p. 24. Consideration of what expenses may be deducted by registrars in arriving at net income: Guthrie, 1912, p. 9.

12. A registrar is within the Public Authorities Protection Act in an action brought against him to recover fees in excess of those allowed by statute: Ross v. McLay, 40 U. C. R. 87. But not where the action against him is for neglecting and refusing to furnish a statement in detail of fees charged by him and for a mandamus: Ross v. McLay, 40 U. C. R. 83. Or for negligently omitting a mortgage from an abstract: Harrison v. Brega, 20 U. C. R. 324. Action to recover fees: see County of Bruce v. McLay, 11 A. R. 477. Action for wrongfully registering documents: Ontario Industrial Loan v. Lindsey, 3 O. R. 66.

14. Where a Deputy Registrar did business for many years as a conveyancer with the knowledge of the Registrar and without objection, the Registrar could not afterwards claim the profits. But where the Deputy searched titles for persons, the Registrar being unaware of the practice, the Deputy was held chargeable with the fees. Where the Deputy omitted to charge full fees he was not liable to the Registrar for those fees where the omission was not

with a view to the Deputy's personal gain. The Statute of Limitations was held to be no bar in respect of these transactions: Smith v. Redford, 19 Gr. 274. An indictment charging a misdemeanour against the Registrar and his Deputy jointly is good if the facts establish a joint offence. A Deputy is liable to be indicted while the Registrar legally holds office, and even after the Deputy himself has been dismissed: R. v. Benjamin, 4 C. P. 179.

19. It was held that a Registrar was not obliged to place his books and indexes in the hands of any persons desiring to make a search, but might do so at his discretion and on his own responsibility: Re Webster and Registrar of Brant, 18 U. C. R. 87. But in a later case it was held that the Registrar was the person by whom all searches were to be made. A person inquiring into a title had no right to make searches and inspect the registry books, but he might require the Registrar to make the searches and produce the instruments and books for inspection. *Semble,* that the Registrar is bound to exhibit the abstract index when required to do so: Ross v. McLay, 26 C. P. 190; see also McNamara v. McLay, 8 A. R. 319. And discussion of these decisions: Armour, Titles, pp. 80-85; see also sec. 31 *infra* and notes.

As to effect of Registrar's abstract: Reed v. Banks, 10 C. P. 202; Lawrie v. Rathbun, 38 U. C. R. 255. Omission of instrument from abstract: Green v. Ponton, 8 O. R. 471. Wrongful registration: Ontario Industrial Loan v. Lindsey, 3 O. R. 66; see Armour, Titles, pp. 71, 79. The Registrar has merely to certify to facts, not express opinions or draw inferences: Guthrie, 1895, p. 33. He must furnish an abstract in strict accordance with the requisition therefor: Guthrie, 1899, p. 7. He cannot be asked to certify that a lot is free of incumbrance. He is to give a general abstract and let the parties determine for themselves: Guthrie, 1899, p. 24. Copies of registered instruments affecting the same lot may be verified by one certificate if the applicant does not require separate certificates: Guthrie, 1900, p. 5. A Registrar should use judgment in preparing an abstract of a comparatively small portion of a

lot so as not to incumber it unnecessarily with entries or unnecessarily increase the expense: Guthrie, 1900, p. 11. Where an abstract is ordered, the Registrar's duty is not simply to copy the contents of the abstract index, but to prepare the abstract by reference to the instruments themselves: Guthrie, 1898, p. 10. A mandamus will lie to compel a Registrar to give a proper abstract certified to shew all the registrations on record in the office upon the lot: Re Registrar of Carleton, 12 C. P. 225. A Registrar gave an intending purchaser an abstract of title which omitted outstanding mortgage. The purchaser, who had notice of the omitted mortgage, could not claim against the Registrar in respect of payments made after such notice, and the Registrar, who, on finding his mistake, bought the mortgage, was held entitled to foreclose it: Brega v. Dickey, 16 Gr. 494. Damages where Registrar omitted a first mortgage in giving a certificate of registrations to a purchaser of a mortgage on a lot. *Quaere,* whether costs which the purchaser was made to pay in endeavouring to obtain priority over the first mortgage could also be recovered from the Registrar: Harrison v. Brega, 20 U. C. R. 324. Searches are intended or presumed to be made personally. Instructions for abstracts and enquiries for information by mail are convenient and the practice should not be discouraged: Guthrie, 1910, p. 14. The heading in sub-sec. 2 is compulsory on Registrars. Where a continuation abstract is required of an abstract not so headed, the Registrar must insert it: Guthrie, 1911, p. 12. As to fees for abstracts: see *post,* sec. 92 (*f*) and notes.

21. This provision will probably have the effect of protecting a Registrar from the errors or mistakes of his predecessor, where such errors or mistakes occur say, not only in the abstract index, but also in the copies of the instruments in the registers, but not where the error or mistake is in the abstract index alone and could have been discovered by the Registrar had he, in preparing the abstract, referred to the instrument itself. The section would also protect a Registrar in respect of the omission by his predecessor of an instrument from the abstract index, *i.e.* where the reference is entirely omitted:

Guthrie, 1898, p. 10 (where see remarks on preparation of abstracts). Omission of instrument from abstract index: damages: Green v. Ponton, 8 O. R. 471. Wrongful registration of an instrument: action for removal will lie and Registrar is a proper party: Ontario Industrial Loan v. Lindsey, 3 O. R. 66.

22. It is the duty of the Registrar to give certified copies of all registered instruments (sec. 19 (1)). As to the use that can be made of them: see R. S. O. 1914, ch. 76, secs. 45-48; Armour, Titles, pp. 111, 115-117. Certified copies of registered wills as evidence: Armour, Titles, pp. 124, 348.

23.—(8) The charge created by a judgment in alimony binds all the land of the defendant in the registration division, R. S. O. 1914, ch. 56, sec. 73. Such a judgment is registered by a certificate: see *post*, sec. 43. There should now be attached a statutory declaration of the lands affected: (Guthrie, 1899, pp. 16, 23), unless the judgment was prior to 1st July, 1899, when it may go into the general register: Guthrie, 1899, p. 18. The general words of a probate do not render it necessary to enter the probate in the general register where the will itself does not contain a devise of lands without local description: Guthrie, 1897, pp. 12, 14, 1895, p. 5. A will cannot be restricted to the general register if its contents shew it should go into the separate registers: Guthrie, 1897, p. 46, and see *post*, sec. 34. Where a will contains a general residuary devise, but does not contain a devise of lands without local description: see Guthrie, 1899, p. 7; 1898, p. 7; 1897 p. 34, 1900, p. 7. Suggestion of proceedings where will incorrectly describes lands intended to be devised: Guthrie, 1898, p. 22, and see *post*, sec. 56 notes. Where a mortgage described certain lots by local description and also contained general words affecting "all the real estate" owned by the mortgagors, it was allowed registration on a statutory declaration being attached: Guthrie, 1899, p. 13. Where a deed to new trustees contained incidentally a power of attorney in general words, but the instrument itself described lands with local description, it was not required to be put in the general register: Guthrie, 1901, p. 14.

26. Rights as between the Registrar for a county and the Registrar for a city separated therefrom: Durand v. Kingston, 14 C. P. 439. Where a separate Registry Office is established for a city or town, the books which have been kept for it must be delivered over, although instruments relating to land outside the city have been improperly entered in such books: Re Registrar of London, 17 U. C. R. 382.

27. Delivery up to claimant; mandamus; replevin: see In re McLay, 24 U. C. R. 54.

31. As to abstract index and right to inspect it: see Re Webster, 18 U. C. R. 87; Ross v. McLay, 26 C. P. 190; McNamara v. McLay, 8 A. R. 319: see notes to sec. 19, *ante*. For discussion of these decisions: see Armour, Titles, pp. 80-85. In Lawrie v. Rathbun, 38 U. C. R. 255, it was held that the Registrar's omission to enter a deed in the abstract index did not invalidate the registration or deprive the deed of its priority. What constitutes registration: see Armour, Titles, pp. 60-71. See secs. 47, 52, 80: "In order to give full effect to this group of clauses we must resort to the fiction that all the duties of the Registrar are supposed to be performed simultaneously as soon as he has received the instrument:" Armour, Titles, p. 56. Where a mortgage contained a recital that the mortgagor had purchased lands described in the recital under an agreement for sale and had made default in a payment and gave the mortgage and other lands as collateral, the mortgage was properly registered on both lots as the recital might operate as an estoppel: Guthrie, 1898, p. 25. Where land is erroneously described in a will there is no means by affidavits or statutory declarations to avoid entering the will on the abstract index under the lot described in the will: Guthrie, 1899, p. 27. Where descriptions in deeds are uncomplicated and clear, it is the duty of the Registrar to enter such a description on the abstract index as will sufficiently identify its location. This is not always possible with complicated, involved and indefinite descriptions. Where the Registrar could have complied with this section, he is not entitled to charge for references in making up an abstract: see *post*, sec. 92 (*f*); Guthrie, 1900, p. 5. Restrictive

covenants affecting other lots than the lot conveyed should be noted against such other lots in the abstract index: Guthrie, 1911, p. 20.

33. Instrument capable of registration: Rosenberg v. Bochler, 4 O. W. N. 757, 24 O. W. R. 59. An instrument stating that A. claims certain lands and in certain events will commence proceedings for their recovery, is not a registrable instrument, and, if registered, an action will lie for its removal. The Act of Registration being a wrongful one, all parties concerned are responsible and the Registrar is a proper party to the action: Ontario Industrial Loan v. Lindsey, 3 O. R. 66. *Quaere,* whether a deed not specifying any particular lot by description is capable of registration: Russell v. Russell, 28 Gr. 419, and see *post,* sec. 34. The consideration money being omitted has no effect on the registration and it is no part of the Registrar's business whether the consideration is expressed or omitted: Guthrie, 1897, p. 50. Nor is it any part of his business to see whether the party who makes the deed is or is not the owner of the land described: Guthrie, 1899, p. 51. Where charge registered by a person without interest: see Fee v. Macdonald, 3 O. W. N. 1378; see also *ante,* sec. 2 (*d*) and notes.

34.—(1) A plan attached to a deed which is in effect a complete description by metes and bounds and which is referred to in the deed as forming part of the conveyance, is a satisfactory description under the Registry Act. This is the form of description in common use in deeds of railway rights of way: Guthrie, 1913, No. 9. Where a plan is attached to a deed to elucidate the description, the approved practice is to deposit an extra blue print with the Registrar. No extra fee is payable for this: Guthrie, 1912, p. 13. Where wills misdescribe lands: see note to sec. 56, *post.* An easement should be described by giving a description of the servient tenement and a description of the nature of the easement to which it is subject: Guthrie, 1911, p. 26. An incomplete instrument cannot be registered even though accompanied by statutory declaration of explanations: Guthrie, 1913, No. 17.

34.—(2) A will which affects lands without local description may be registered in the separate register without being first registered in the general register provided it has attached to it a statutory declaration describing the lands affected: Guthrie, 1913, No. 12. See *ante*, sec. 23 (8) notes.

34.—(6) A description of a township lot, save and except a portion described in a registered instrument, is a sufficient description if the registered instrument referred to itself contains a description capable of being traced by a surveyor: Guthrie, 1911, p. 16. What amounts to a sufficient description of lands; reference to lands described in other instruments involving searches; statutory declaration should be attached: Guthrie, 1902, p. 7.

34.—(7) A patent of Indian lands was obtained under assignments duly registered in the Indian Department. A prior assignee had executed a mortgage which was not registered in the department, but was registered in the County Registry Office. The patentee had no actual notice, and it was held that the registration in the County Registry Office was not notice and the patentee had priority over the mortgage to the extent of money paid for obtaining the patent: Re Reed and Wilson, 23 O. R. 552. Mortgagee of Crown vendee: see Garside v. King, 2 Gr. 673. Express notice of an unregistered assignment of unpatented land has the same effect as a like notice of an unregistered conveyance after patent: Goff v. Lister, 13 Gr. 406, 14 Gr. 451. Incumbrances before patent: see Holland v. Moore, 12 Gr. 296. Application of Registry Acts; purchase for value without notice: Casey v. Jordan, 5 Gr. 467; see Vance v. Cummings, 13 Gr. 5. The mortgagor and mortgagee have all the rights between themselves that they would have if the lands were actually vested in the mortgagor. The mortgagor is entitled to set up the Statute of Limitations, and the exercise of power of sale has not the effect of stopping the running of the Statute: Watson v. Lindsay, 27 Gr. 353, 6 A. R. 609. The Court will not partition lands, the title to which is in the Crown, nor will it order a sale at the instance of the representatives of a deceased locatee: Abell v. Weir, 24 Gr.

464. The remedy of a squatter is by application to the executive government of the province: Jenkins v. Martin, 20 Gr. 613. A will of unpatented lands cannot be registered as against unpatented lots: Guthrie, 1910, p. 35. Armour, R. P., p. 433.

35. The registration of a mortgage was not invalidated by the mortgagee signing it and a witness subscribing his name after it had been registered: Muir v. Dunnett, 11 Gr. 85. Where a Registrar recorded a certificate of discharge of mortgage the affidavit of which did not state the place of execution, it was held, although it might have been refused registration, yet being registered, it was an effectual reconveyance of the legal estate: McGrath v. Todd, 26 U. C. R. 87. The Court refused a mandamus to register a deed on a declaration of its execution made in England under 5 and 6 William IV., ch. 62: In re Lyons, 6 O. S. 627. A mortgagor is a competent witness to an assignment of mortgage: Guthrie, 1913, No. 17. A mandamus lay to compel a witness to prove the execution of a deed for registry: R. v. O'Meara, 15 U. C. R. 201 (see now sec. 40). As to attestation: see Armour, R. P., p. 319. One of the grantors is not a competent witness to a deed: Guthrie, 1895, p. 28. The Canada Evidence Act, providing for statutory declarations, does not apply to this Act: Guthrie, 1895, p. 30. A party may sign his name in any way he sees fit; using initials, abbreviations or foreign script: Guthrie, 1898, p. 16. This section refers to the mode of proof for documents defined in section 2 as "instruments" and does not extend to declarations of incorporation or other documents directed by other Acts to be registered: Guthrie, 1898, p. 20. An affidavit in which the witness deposed to seeing the document "executed by all the granting parties," was accepted where it plainly appeared who the granting parties were: Guthrie, 1898, p. 22. Where the affidavit is plainly defective the Registrar should not accept the instrument: Guthrie, 1898, p. 24. A shareholder in an unincorporated company should not be a witness to the company's deed, but a shareholder or even an office-holder may so act in respect of an incorporated company: Guthrie, 1899, p. 16. Registration without the affidavit on the copy left with the

Registrar being sworn, is quite irregular: Guthrie, 1899, p. 23. Where the signature of one party has not been proved either his name should be omitted from the abstract index or certificates of the fact that his signature has not been proved should be noted. The instrument in short, will be registered only in respect of the execution by the parties duly proved: Guthrie, 1899, p. 18. Registrars receiving instruments by mail not capable of registration owing to some defect are justified in sending them back by the same mode. But it is suggested that they should register the letter: Guthrie, 1897, p. 47. Where an instrument is registered by inadvertence, the affidavit being hopelessly bad by reason of omissions, the registration is a nullity: Guthrie, 1899, p. 19.

36. A discharge of a lien under this section by the assignee may be registered without prior registration of the assigment, as section 65 only refers to discharges of mortgages: Guthrie, 1901, p. 5.

37. The execution of deeds within the county as well as without may be proved before a commissioner: Re Registrar of York, 3 U. C. R. 188. It was held no objection that one witness swore the affidavit of execution before the other witness. It was held also that a statement by a witness that he had "seen the due execution" of the deed was sufficient: Reid v. Whitehead, 10 Gr. 446. Where an affidavit is sworn in England before a person who subscribes himself "a commissioner, etc.," or "a commissioner of oaths," the Registrar may assume that he is a commissioner entitled to take the oath: Guthrie, 1897, pp. 43, 53. Until some judicial interpretation of R. S. O. 1914, ch. 160, sec. 8, is given, an affidavit of execution taken before a notary in a foreign country is not to be rejected because the notary's seal is not affixed: Guthrie, 1897, p. 47. An affidavit sworn before a foreign justice of the peace is insufficient: Guthrie, 1899, p. 15. An instrument having attached to it an affidavit of execution sworn before a Commissioner for taking affidavits for use in the Supreme Court of Judicature in England may be registered though no official seal was attached and the commissioner did not certify that he had no official seal: Guthrie, 1913, No. 15; see provisions of R. S. O., 1914, ch. 1, sec. 23, and ch. 76, sec. 38.

40. Affidavit of execution: Davis v. Winn, 16 O. W. R. 945, 17 O. W. R. 105, 2 O. W. N. 47, 123, 22 O. L. R. 111.

41. See Armour, R. P., p. 319, "Attestation." It is not necessary that the proof to satisfy the County Judge should be written on the instrument. Where the affidavits are endorsed on the instrument they are virtually part of the Judge's certificate and like it should be copied in full: Guthrie, 1897, p. 21. Where a document is so informal as not to require attestation and there is doubt whether the person who made the affidavit actually signed as witness, the document should be endorsed with a certificate of the County Judge; and the document having been registered, the Court would presume that such certificate had been obtained: Per Taschereau, J.: Hoofstetter v. Rooker, 26 S. C. R. 41. A certificate under this section does not require the seal of the County Court: Guthrie, 1912, p. 22.

42. The inspector of prisons and public charities is a corporation sole (R. S. O. 1914, ch. 301, sec. 6) and under R. S. O. 1914, ch. 295, sec. 36, has power to sell and convey a lunatic's estate with the concurrence of the Attorney-General. The corporate seal of the inspector suffices and his signature does not require an affidavit. The practice is not to require an affidavit to the signature of the Attorney-General or other public official approving a conveyance: Guthrie, 1910, p. 27. Under this section an affidavit is not dispensed with merely because an instrument has the seal of a corporation affixed. There must be the signature of the secretary, manager or attorney or presiding officer. A liquidator properly does not fall within these words and an affidavit of execution should be filed: Guthrie, 1913, No. 10.

43. A judgment in alimony is registered by means of a certificate and until the certificate is registered the judgment does not bind the lands. Such a certificate affecting lands without local description, it would seem proper to register a statutory declaration of the lands it is intended to affect: see secs. 23, 24, and notes; see also H. & L. notes, p. 30, and R. S. O. 1914, ch. 56, sec. 73. An order for payment of interim alimony may be registered: Miller v. Miller, 8 C. L. T.

120. No rights are given by a certificate of *lis pendens*—the whole effect is that notice is given that rights are being claimed: Brock v. Crawford, 11 O. W. R. 143. Where a plaintiff registers a *lis pendens* for his own benefit, he may vacate it at any time and register the order: sections 36 and 37 of R. S. O. 1914, ch. 56, construed: McGillivary v. Williams, 4 O. L. R. 45. A *lis pendens* registered by the plaintiff in an action for declaration of inchoate right of dower vacated as vexatious: King v. King, 13 O. W. R. 760. A claim for commission and damages for failure to give an option could not possibly be the foundation of a claim in respect of lands and *lis pendens* registered was vacated: Jenkins v. McWhinney, 4 O. W. N. 90, 23 O. W. R. 29, 5 D. L. R. 883. Registration of *lis pendens* vacated on terms: land being sold and money paid into Court: Kennedy v. Kennedy, 4 O. W. N. 1370, 24 O. W. R. 626, 786. See also Rhum v. Pasternack, 9 O. W. R. 130. Certificates of *lis pendens*: see H. & L. notes, pp. 147, 149, also p. 867; R. S. O. 1914, ch. 56, secs. 36, 37.

45. A will in French filed with a notary in Quebec is registrable under this section and section 46, but an affidavit is also required of the death of the testator under sec. 56 (3): Guthrie, 1897, p. 42.

46. A party to a deed may sign in Hebrew or any language he likes. He may make a mark or any form of signature. The witness need not make any but the usual affidavit and in copying the signature the Registrar is to make the best imitation he can: Guthrie, 1897, p. 45; see Armour, R. P., pp. 309-310.

47. Under the land system of Ontario it is one of the terms of a contract of sale when nothing is said to the contrary that the sale should be completed by a proper conveyance susceptible of registration: Owen v. Mercier, 12 O. L. R. 529. A document was of such an informal character that it was merely a memorandum written by a solicitor commencing "Dear Sir," while at the foot the solicitor's name appeared in his handwriting whether as witness or as the person to whom the letter was addressed. The usual affidavit of execution was subsequently made and the document registered. It

was held that the informality of the proof of execution did not make the registration a nullity: Hoofstetter v. Rooker, 26 S. C. R. 41. Delivery of instruments for registration is intended or presumed to be made personally. The use of the mails is, however, convenient and ought not to be discouraged: Guthrie, 1910, p. 14. "Every certificate and affidavit" includes affidavits used on application for Judge's order under sec. 41, where these happen to be endorsed on the instrument: Guthrie, 1897, p. 21. See Armour, Titles, pp. 118-119, pp. 60-71, what constitutes registration, esp. p. 63. See also secs. 31, 52, 80.

48. The words "not to be recorded in full" do not now require to be signed: Guthrie, 1910, p. 30. An instrument which is a mortgage and something more, *e.g.* a restraint on alienation, cannot be endorsed under this section: Guthrie, 1901, p. 9. Nor can an instrument containing changes in favour of others than the mortgagee: Guthrie, 1901, p. 10. Where an instrument which is not proper to endorse under this section is tendered to the Registrar so endorsed for registration, the Registrar's duty is not to strike out the endorsement and register at full length, but to return the instrument: Guthrie, 1901, p. 11. An assignment of mortgage by way of mortgage is included in the section: Guthrie, 1901, p. 8. The Act does not permit the limited endorsement so as to reduce the registration fees where the assignment is of more than one mortgage: Guthrie, 1897, p. 14, 1898, p. 19. An agreement for annuities charged on land is not a "mortgage" within this section: Guthrie, 1897, p. 32. An instrument which contains special trusts and powers, although it is also a charge on lands and an assignment of mortgages, is not capable of endorsement under this section: Guthrie, 1897, p. 31. An assignment of mortgage may contain a special covenant for payment and still be capable of limited endorsement: Guthrie, 1898, p. 5. An appointment by way of mortgage pursuant to a power is capable of limited endorsement: Guthrie, 1898, p. 12. The fact that a statutory declaration is attached to a mortgage makes no difference as to its capability of endorsement.

The statutory declaration should be noted as not registered: Guthrie, 1898, p. 26. A mortgage to secure payment under partnership and having the agreement attached may be endorsed under this section: Guthrie, 1898, p. 27. A mortgage may be endorsed notwithstanding a prior mortgagee is a party thereto and agrees to postpone his mortgage: Guthrie, 1899, p. 9. An instrument granting lands assigning a mortgage and assigning an agreement for purchase by way of mortgage may be endorsed where the total effect of the instrument is that of a mortgage: Guthrie, 1898, p. 10. Where a number of mortgages are assigned by the same instrument the Registrar is entitled to be paid a minimum $1.00 for each mortgage assigned: Guthrie, 1911, p. 28; referring to unreported decision of Britton, J.

49. Execution of power of attorney must be proved by registration of the power or other evidence. Registration of the deed purporting to be executed under the power is not proof of the power and does not become so by any lapse of time: Armour, Titles, pp. 118-119.

50. The production of the registered duplicate original of an instrument with the Registrar's certificate endorsed thereon is by this section *prima facie* evidence of due execution notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to the alterations being left open. Where it would be an offence to alter a deed which has been completed, the legal presumption is that the alterations were made under such circumstances as not to constitute an offence: Graystock v. Barnhart, 26 A. R. 545. Where a Registrar endorsed "No. 44,322 purporting to be a duplicate hereof, was registered, etc.," it was held that the Registrar had not complied with the Act He must examine the instruments and certify without qualification the facts he is required to state: Re Bradshaw, 26 U. C. R. 464. This section does not enable a party to use as evidence a certified copy of a registered probate: Barber v. McKay, 17 O. R. 562, 19 O. R. 50; see Armour, R. P., p. 319; Titles, p. 115; and see sec. 22 and notes. Where an instrument, *e.g.*, a consent to an assignment of a

lease is attached to the lease, but not to be registered, the assignment should not be rejected by the Registrar, but a special form of endorsement should be made certifying that the assignment but not the consent purporting to be endorsed thereon, is duly registered. This is to avoid the effect of this section in respect of the unregistered consent: Guthrie, 1897, p. 24. An instrument may be registered in as many " parts " as is desired. The Registrar makes his endorsement on each part and charges extra for each extra certificate: Guthrie, 1897, p. 35. Where there is a mistake in the duplicate registered the Registrar has no power to rectify the error: Guthrie, 1897, p. 41.

52. See Armour, Titles, p. 60, "What constitutes registration," esp. pp. 60-61; see also secs. 31, 47, 80. Where a will is presented for registration containing devises for lands in different municipalities, the registration cannot be limited to one municipality on request. Section 92 must be complied with: Guthrie, 1897, p. 13.

54. Patents repealed or avoided: see *ante*, sec. 34 (7); H. & L. notes, pp. 24-5, and Con Rule 241, 1913, Rule 5; see also R. S. O. 1914, ch. 28, sec. 16, notes; R. S. O. 1914, ch. 56, sec. 16 (*a*), note (8).

56. See Armour, Titles, p. 361. When the copy of the will is left for registration there must be attached to it the affidavit mentioned in this sub-section. That is an essential preliminary to bring this sub-section into operation: Guthrie, 1897, p. 49. Where probate of a will has been registered and it is afterwards amended by the Surrogate Court, the Registrar cannot alter his books. The proper course is to register the amended probate: Guthrie, 1898, p. 23. Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only *prima facie* evidence as far as real estate is concerned, of the testamentary capacity of the testator: Sproule v. Watson, 23 A. R. 692. The will must be copied exactly the same as the original misspelled words and all as nearly as can be made out: Guthrie, 1895, p. 6. The witnesses should in their affidavits verify the copies of the will and

codicils and prove the due execution of the will. The affidavits when complete should be deposited in the Registry Office with the copy of the will and codicil: Guthrie, 1895, p. 14. Statutory declarations will not suffice: Guthrie, 1895, p. 30. When wills are registered in the general register: see sec. 23 (8), *ante*, notes. Where the original will was improperly deposited it was not to be treated as registered until this section had been complied with: Guthrie, 1895, p. 32. Registration of a will can only be had on registration of probate or on affidavit of witnesses to the will. Where the witnesses are dead, resort must be had to probate: Guthrie, 1898, p. 24. Discharges of mortgages by foreign executors and administrators: see *post*, sec. 65, notes. Where land is erroneously described in a will there is no means by affidvaits or statutory declarations to avoid entering the will on the abstract index under the lot described in the will: Guthrie, 1898, p. 22, 1899, p. 27. Affidavits alleging that lands in wills have been erroneously described or stating that a testator did not own a certain lot or professing to say what the testator's real intention was, cannot be registered: Guthrie, 1910, p. 36. Where a will was made some years before the testator's death and disposed of real estate which the testator subsequently sold in his lifetime as appeared by the books in the Registry Office, the Registrar may take the affidavit of an executor, under sec. 65 (5), stating that the will does not affect lands in the registry division except so far as the testator was the holder of a mortgage (or as the fact may be). It is not clear that the Registrar has the right to go behind that affidavit and the part of the will and probate accompanying the same: Guthrie, 1913, No. 13. The certificate of the Registrar of the Surrogate Court in sub-sec. (4) does not require to be under seal: Guthrie, 1910, p. 31. Where it is desired to obtain the certificate of the Registrar of the Surrogate Court to enable will or exemplification of probate to be filed, see as to proceedings: R. S. O. 1914, ch. 24, sec. 23, notes, Regulation No. 5 and Form 10, under that Act.

58. A notice of sale of lands under the Act respecting Mortgages (R. S. O. 1914, ch. 112), and a notice of

exercising power of sale in any mortgage, accompanied by proof of its service by declarations or affidavits, is what is permitted to be registered in the manner provided, without copying into the books. Other sale papers such as the advertisement of sale, the auctioneer's declaration, Sheriff's certificate and the like, cannot be registered but may be deposited under the Custody of Documents Act: Guthrie, 1897, p. 23. Where a notice of sale is addressed to (say) four persons, and service on three is proved by declaration and the fourth makes an admission of service, the admission should be verified by declaration before registration of the notice: Guthrie, 1899, pp. 19, 20. The Act makes no provision for accepting an admission of service: Guthrie, 1899, p. 20. The fee for registration is only 50 cents, even if more than four lots are affected: Guthrie, 1899, p. 22; see sec. 92 (*t*), *post*. Where a notice is deposited under the Custody of Documents Act, a Registrar not parting with possession of it within the meaning of section 12 of that Act by permitting it to be registered under this section at the request of the person depositing it: Guthrie, 1899, p. 25. For registration purposes it is not necessary that a notice of exercising power of sale should be signed, nor is the legal sufficiency of the notice a question for the Registrar: Guthrie, 1912, p. 15. Sales made before and after January 1, 1900: see Fenwick v. Whitwan, 1 O. L. R. 24. It appears that it is not compulsory to register the notice of exercising power of sale as a condition precedent to the registration of a conveyance made pursuant to such notice: Guthrie, 1910, p. 30. As to registration of judgments for alimony: see R. S. O. 1914, ch. 56, sec. 73; see also notes to secs. 23 (8) and 43 *ante*. As to registration of notice of seizure by Sheriff of a mortgage: see R. S. O. 1914, ch. 80, sec. 25.

59. The memorial of a deed executed by the grantor may be treated as an original instrument affecting lands under sec. 2 of this Act, and where the deed of bargain and sale of which it is a memorial is not produced, that fact should be noted in the abstract index: Guthrie, 1899, p. 26.

60. The old law required the production of the original instrument and the memorial. The memorial was left in the Registry office and the original instrument handed back. The new law (in force generally speaking since 1st January, 1866) requires duplicate originals: Guthrie, 1899, p. 19.

62. The owner of an equity of redemption is not bound to accept a statutory discharge. He may at his own expense insist on a reconveyance with a covenant against incumbrances: McLennan v. McLean, 27 Gr. 54. A Registrar cannot be required to register a certificate applying to more than one instrument. Eact mortgage to be discharged should have a separate certificate. *Quære* as to validity of a certificate embracing several mortgages: In re Smith and Shenston, 31 U. C. R. 305; see Guthrie, 1897, p. 16. Where a mortgage was paid off and a certificate of discharge, given and registered about 4 years after the mortgagor's death, stated that the mortgagor had paid the mortgage money, etc. Held sufficient also even if the payer's name was altogether omitted: Carrick v. Smith, 35 U. C. R. 348. A discharge of mortgage not being under seal is not an estoppel as to the fact of payment: Bigelow v. Stanley, 14 C. P. 276. Where the affidavit of execution is defective and yet has been accepted by the Registrar, though he should properly have refused to register it, being registered it is an effectual reconveyance of the legal estate: Magrath v. Todd, 26 U. C. R. 87; see also Stoddart v. Stoddart, 39 U. C. R. 203. Where a mortgage given to Elizabeth S. was discharged by Eliza S., it was no valid objection where the identity of the person signing was established to the satisfaction of the Registrar: Re Clarke and Chamberlain, 18 O. R. 270. A discharge of mortgage referred to the mortgage as 5746, whereas it was registered as 5746 C. W. Held a valid discharge properly registered. The Act says nothing about letters, which are arbitrary marks added by officials for convenience of reference. The Act requires numbers only: Re Clark and Chamberlain, 18 O. R. 270. Where the whole mortgage and whole debt is assigned the assignee can discharge even if it appear on the face of the instrument that the assignment is

to secure a debt lesser in amount: Re Bland and Mohun, 5 O. W. N. 522. The change of wording in this section should be noted. Formerly (10 Edw. VII., ch. 60, sec. 62) it read, "Executed by the morgtagee, or if the mortgage has been assigned, then by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage and duly prove," etc. Can one of several excutors validly discharge a mortgage under the present wording of the section? See Re Johnson, 6 P. R. 225: see 47 C. L. J. 322; see also R. S. O. 1897, ch. 121, secs. 11 and 12, R. S. O. 1914, ch. 112, sec. 10, and sec. 65 *post*. The Registrar should refuse registry to a certificate of discharge of mortgage which contains an erroneous description of the mortgage: Guthrie, 1895, p. 26. Where a mortgagee assigns the mortgage and afterwards gives a certificate of discharge, the Registrar should so note on the abstract index and in all certificates which he gives: Guthrie, 1897, p. 44. On an assignment of mortgage part of the lands mortgaged were omitted. This does not affect the validity of a discharge executed by the assignee where the whole mortgage money was assigned to the assignee: Guthrie's 1913, No. 4. A certificate of discharge may be given of a mortgage created by an assignment of a mortgage by way of mortgage. Remarks on the effect of registration of such a certificate: Guthrie, 1913, No. 2. A statutory discharge of a derivative mortgage may be registered: re-assignment not necessary: Guthrie, 1898, p. 18. The original mortgage and the derivative mortgage can be discharged in one certificate of discharge, being that of the original mortgage, the derivative mortgagee joining: Guthrie, 1898, p. 26. A registered agreement by a mortgagee to accept a less sum than the mortgage debt, is not a cloud on the title after the mortgage is discharged: Guthrie, 1900, p. 10. A notarial instrument executed in Quebec and called a "final acquittance of mortgage" may be entitled to registration, (see sec. 45), though not in the form of a statutory discharge: Guthrie, 1910, p. 25. Discharge of mortgages by married women under former law: Armour, Titles, pp. 256-267; R. S. O. 1897, ch. 136, sec. 81. See Interpretation Act, R. S. O. 1914, ch. 1,

sec. 28 (d), as to application of forms and deviations from them.

63. Where two loan companies are amalgamated under a Dominion Act, there should be a recital of this fact in discharge of mortgages of either company by the amalgamated company: Guthrie, 1900, p. 13, see also p. 9.

64. See Armour, Titles, pp. 252, 261.

65. A purchaser, being entitled to a registered title, can insist that the probate of the will of a deceased mortgagee whose executor had given a discharge of mortgage, be registered: Re Taylor and Martyn, 14 O. L. R. 132. As to particulars required to be given in certificate of discharge when assignee of mortgage is giving discharge: see Re Mara, 16 O. R. 391. Where parties had a right under the former law to register a discharge without registering the will or probate of a deceased mortgagee, this enactment is not retrospective to deprive them of the right so to register a discharge prepared, executed and proved before the present law came into effect: Guthrie, 1895, p. 7. Heirs at law who have not taken out administration are not entitled to grant certificates of discharge: Guthrie, 1895, p. 30. It is not sufficient to recite in the discharge the fact of registration of the will in another county: Guthrie, 1895, p. 32. Where a mortgage is given to the executor as such, it is not necessary to register the probate of the will under which he acts when he comes to grant a discharge: Guthrie, 1897, p. 22. The administrator of the real estate only of a deceased mortgagee is not entitled to give a discharge: Guthrie, 1898, p. 26. The requirement for insertion of the registration date and number of the power of attorney under which a discharge is given is not retrospective and does not apply to a discharge executed before the amendment came into force: Guthrie, 1899, pp. 8, 23. Where the title of an assignee of a mortgage was complete under the registration law existing when he became assignee, no further prior registrations are required when he comes to give a discharge: Guthrie, 1899, p. 13. Where a will had been

registered and afterwards admitted to probate, probate should be registered before a certificate of discharge given by an executor is registered: Guthrie, 1899, p. 20. Where a mortgage is to be discharged by the assignee of a legatee thereof, probate of the will should first be registered: Guthrie, 1899, p. 26. Under R. S. O. 1914, ch. 295, sec. 36, the Inspector of Prisons and Public Charities can give a statutory discharge of mortgage and need not file any documents shewing his right: Guthrie, 1899, p. 28. Where the certificate of discharge is not made by the mortgagee, e.g., by his attorney, that fact should be stated in the abstract index: Guthrie, 1897, p. 52. Where a new trustee has been appointed, the appointment must be registered before a discharge of mortgage by the new trustees can be registered: Guthrie, 1898, p. 15. The section does not apply to the old form of release and reconveyance which may be resorted to, and the deed may contain the necessary facts in recitals: Guthrie, 1898, pp. 15, 25. Where mortgage is made in error to B. instead of to C., it cannot be discharged by C.: Guthrie, 1898, p. 20. A surviving mortgagee must now register under this section, prior to registration of the discharge, the documents by which he claims interest in the mortgage money. This must be done apparently whenever the person or persons granting the certificate of discharge are not identical with the original mortgagees: Guthrie, 1898, p. 24; see R. S. O. 1914, ch. 112, sec. 10. This section does not apply to the acts of a liquidator of a loan company executing discharges of mortgages. The liquidator is substituted for the original officers of the company and he is not bound to register proof of his powers to execute in the name of the mortgagees: Guthrie, 1898, p. 23, 1913, No. 10. A mortgage made to a partnership may be discharged by one of the members of the partnership under the general provisions of the law of partnership without the necessity for the registration of the co-partnership. This section does not apply to such a discharge: Guthrie, 1913, No. 14. A discharge of mortgage executed by the committee of a lunatic, especially where the discharge is by the Official Referee, may be registered without requiring

registration of the order of the Court appointing the committee. The committee does not execute under power of attorney or anything like it: Guthrie, 1913, No. 11. A discharge of mortgage executed and completed in 1895 may be registered without complying with amendments to the Act since that date. The discharge was a complete instrument at the time it was executed. An assignment of such a mortgage must be registered before the discharge can be registered: Guthrie, 1913, No. 17. This section does not compel registration of instruments, the registration of which was unnecessary prior to its enactment. A certificate of discharge of mortgage by assignees of executors of a mortgagee where assignment by executors was executed in April, 1889, could be registered without registration of the original mortgagee's will: Guthrie, 1910, p. 32. Where a mortgage was made by A. to B., and B. died appointing D. his sole executrix and devisee. D. died intestate and a discharge after the lapse of 7 years was tendered by E., the administrator of D. Though E. was not the legal personal representative of B., the lapse of time was held by the inspector as giving rise to presumptions of payment of debts, etc., entitling the discharge to registration: Guthrie, 1911, p. 8. Where a mortgage was taken by a mortgagee described as "administrator of A. B.," the administrator of such mortgagee may give a certificate of discharge by virtue of the Registry Act, though not having at common law power to reconvey: Guthrie, 1910, p. 12. Executors of a will proved in Great Britain and registered with the foreign probate in Ontario, can discharge a mortgage without proving the will in Ontario or having the probate resealed here. *Aliter* as to administrators: Re Green and Flatt, 29 O. L. R. 103. A foreign administrator cannot discharge a mortgage of land in Ontario: Re Thorpe, 15 Gr. 76; Re Green and Flatt, 4 O. W. N. 1388, 29 O. L. R. 103. Can one of several executors execute a valid discharge of mortgage? See Ex parte Johnson, 6 P. R. 225; but see notes to sec. 62 *ante*. Sub-sec. 4 does not permit the formal part of a probate to be registered without the will: Guthrie, 1895, p. 33. In registering an abbreviated form of the probate, the original

probate must be produced as required by sec. 56, and the certificate endorsed should state that it is registered under this section: Guthrie, 1899, p. 17. Where a Registrar is tendered a short form of will for registration, he must register it or return it if defective: Guthrie, 1911, p. 9. A discharge of a lien under sec. 36 by the assignee thereof may be registered without prior registration of the assignment as the section only refers to discharges of mortgages: Guthrie, 1901, p. 5.

66. The Registrar is bound to register a certificate of discharge of part of the lands contained in a mortgage: Re Ridout, 2 C. P. 477.

67. History of statutory discharge and its effect: Noble v. Noble, 25 O. L. R. 379, 27 O. L. R. 342. What the Registry Act makes tantamount to a reconveyance is the registration, not the excecution, of a certificate of discharge of mortgage: Re Music Hall Block, 8 O. R. 225. The certificate of the Registrar of the discharge of the mortgage endorsed on the mortgage deed, is sufficient evidence of the reconveyance without shewing the execution of the discharge itself: Doe d. Crookshank v. Humberstone, 6 O. S. 103; see also Lee v. Morrow, 25 U. C. R. 604. An unregistered certificate of discharge operates only as a receipt: Trust & Loan v. Gallaher, 8 P. R. 97. Where an unregistered discharge is lost, the disclaimer of the mortgagees and the consent of their solicitor are not sufficient to enable the Court to declare the legal estate revested: Re Moore, 8 P. R. 471. Where a deed from the mortgagor to a purchaser and a certificate of discharge of mortgage to the mortgagor are registered in that order, the discharge operates as a conveyance to the purchaser as the mortgagor's assignee: Imperial Bank v. Metcalfe, 11 O. R. 467. The discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail: Lawlor v. Lawlor, 10 S. C. R. 194; but see Re Dolsen, 4 Ch. Ch. 36. Where a father owned, subject to a mortgage, a farm on which his son lived for a number of years and then father and son paid off the mortgage and the son continued in possession, the registration

of the statutory discharge was held to give a new starting point to the Statute of Limitations: Henderson v. Henderson, 23 A. R. 577. A. paid off a first mortgage on certain lands, procured its discharge and took a new mortgage to himself for the amount of the advance, not knowing of a second mortgage. On ascertaining this he notified B., the second mortgagee, that he would pay it off, and B., relying on this, took no steps to enforce his security. It was held that by his acts and conduct A. had precluded himself from being entitled to stand in the position of first mortgagee: McLeod v. Wadland, 25 O. R. 118. An intending purchaser, A., searched in the Registry Office and found two incumbrances on the property. The next day B. registered a lien. Shortly afterwards A. completed his purchase, paid off the incumbrances and registered discharges thereof without further search and without knowledge of B.'s lien. A. was held entitled to subrogation in the place of the discharged incumbrancers and to priority over B.'s lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact, and the Court was not compelled as a conclusion of law that A. had notice and could not plead mistake: Abell v. Morrison, 19 O. R. 669. Where the plaintiff advanced money to pay off existing mortgages and took and registered new mortgages and discharges of the old mortgages, the defendant having all the while an execution in the Sheriff's hands of which the plaintiff knew nothing, not having searched, he was held entitled to be subrogated to the rights of the original mortgagees over the defendant's execution on the ground of mistake, and was not disentitled to relief because by using ordinary care he might have discovered the mistake, the defendant not being prejudiced thereby: Brown v. McLean, 18 O. R. 533. Where a mortgage was held by an assignee for the benefit of the mortgagee and the mortgagor paid the mortgagee without notice of the assignment and obtained a statutory discharge, the Court ordered a release to be executed, being in doubt whether, under the circumstances, the discharge would revest the lands: McDonough v. Dougherty, 10 Gr. 42. As to effect

of statutory discharge: see Armour, Titles, pp. 251-256. Assignment in lieu of reconveyance: see R. S. O. 1914, ch. 112, sec. 3; Armour, Titles, pp. 256-261. Discharges given by surviving mortgagees and executors: see R. S. O. 1914, ch. 112, sec. 10; Armour, pp. 261-265; see also *ante* sec. 62, notes. Right of married women: see Armour, pp. 265-267. Notwithstanding R. S. O. 1914, ch. 70, sec. 10, a married woman is not entitled to dower in an equity of redemption purchased and sold by her husband in his lifetime when the legal estate never vested in him. Where a purchaser of mortgaged lands procured a discharge in favour of the mortgagor, took his conveyance from him and gave back a mortgage with bar of dower, registering the instruments in the above order, the wife of the purchaser was held not entitled to dower out of a surplus arising on a sale under a subsequent incumbrance: Re Luckhardt, 29 O. R. 111. 42 Vic., ch. 22, became law on 11th March, 1879, and was not retroactive. A wife having joined in a mortgage prior to that date could become entitled to dower in the equity of redemption only in case the husband died beneficially entitled, and so long as the mortgage existed the husband could, by a subsequent conveyance, defeat her dower in the equity, which in this case he did by a second mortgage: Anderson v. Elgie, 6 O. L. R. 147. Where a second mortgage was executed and delivered before the execution of the discharge of the first, the effect of registration was not to revest the premises in the mortgagor but in the second mortgagee: Anderson v. Elgie, 6 O. L. R. 147. As to effect of registration of discharge of mortgage where wife joined to bar her dower and the wife's right to surplus money arising from sale under mortgage: see R. S. O. 1914, ch. 70, sec. 10 and notes. Where at the time of giving the mortgage some person was in possession adversely to the mortgagor: see Thornton v. France, 1897, 2 Q. B. 143, note to R. S. O. 1914, ch. 75, sec. 23. As to effect of registration of discharge of mortgage by mortgagor where a tenant at will has acquired possessory title against him, and what rights, if any, the mortgagor has: see Noble v. Noble, 25 O. L. R. 379, 27 O. L. R. 342; see R. S. O. 1914, ch. 75, secs. 16, 23, notes; and see article 49 C. L. J. 290.

68. Where a purchaser under an execution paid off a mortgage and took a certificate in the usual form in lieu of the one provided, it was held that the purchaser's title would not thereby be defeated by vesting the lands in the mortgagor, but that it enured to the purchaser as assignee of the mortgagor: Lee v. Howes, 30 U. C. R. 292; see also Howes v. Lee, 17 Gr. 459.

70. History of section: see Re Cameron and Hagarty, 10 O. W. R. 357; see also Harding v. Cardiff, 2 O. R. 329. By-law providing for the opening of a road and not conforming to and referring to plans filed with the Registrar of lands through which it passes: see Re Henderson, 29 O. R. 669. The former requirement of the Municipal Act and the requirement of this section that certain by-laws must be registered, is not merely for the purpose of notice under the registry laws: Re Henderson, 29 O. R. 669. A by-law declaring a bridge to be a county bridge may be registered as a matter of public record and not affecting any particular land: Guthrie, 1910, p. 23.

See provisions of R. S. O. 1914, ch. 192, sec. 296, for registration of money by-laws. The method of registration of by-laws creating debts under R. S. O. 1914, ch. 192, sec. 296, is a matter of special statutory provision under that section and is a special and distinct sort of registration. The object of registration is apparently only to shorten the time for moving against such a by-law. The charge against the land involved is created by the Municipal Act and not by registration. The duty of the Registrar is not to enter such a by-law in the abstract index of the lots affected, but to enter it in a special book kept for the purpose: see *ante* sec. 23 (5); Guthrie, 1897, p. 38. A Registrar may for the usual fee give a certificate of the filing of a certified copy of a debenture by-law: Guthrie, 1897, p. 53. In regard to the method to be adopted in registering money by-laws, the provisions of this section appear to be in fact the same as were the provisions of the Consolidated Municipal Act, of 1903, sec. 396, sub-secs. 3 and 4. Sec. 296 of the Municipal Act, of 1913, (R. S. O. 1914,

ch. 192, sec. 296) in regard to the registration of money by-laws must be taken to contain the settled requirements of the legislature as to the registration of money by-laws. Compliance with sec. 296 must be sufficient, especially in the absence of the Mayor, or where there is difficulty in obtaining his signature: Guthrie, 1913, No. 6. See provisions of Municipal Act in regard to matters consequent upon the formation of new corporations and registration of by-laws: R. S. O. 1914, ch. 192, sec. 31, *et seq.* A proclamation annexing township lands to a city does not require to be registered against each lot separately. It should be registered in the book for the city, not with the debenture by-laws: Guthrie, 1912, p. 23. Failure to register expropriation by-law: Grimshaw v. Toronto, 4 O. W. N. 1124, 28 O. L. R. 512.

71. A patent of Indian lands was obtained under assignments registered with the Indian Department. A prior assignee had executed a mortgage of the lands to the plaintiff of which the patentee had no actual notice and which was not registered with the Indian Department, though it was registered in the County Registry Office. The patentee was entitled to priority over the mortgagee. Registration in the County Registry Office was not notice to him: Re Reid and Wilson, 23 O. R. 552.

Registration of deed of patented lands; voluntary unregistered conveyance: McCarthy v. Arbuckle, 29 C. P. 529. Defective registration of patent: Campbell v. Fox, 17 C. P. 542, 26 U. C. R. 631.

The Registry Acts do not apply to instruments executed prior to the grant from the Crown. The holder of a bond to convey executed prior to the issue of the patent is entitled to specific performance as against a purchaser to whom the patentee had sold after patent issued: Casey v. Jordon, 5 Gr. 467. The only instruments executed before patent which can be registered are such as create a mortgage lien or incumbrance on the land: Holland v. Moore, 12 Gr. 296. See sec. 34 (7). Express notice of an unregistered assignment of unpatented land has the same

effect as the like notice of an unregistered conveyance after patent: Goff v. Lister, 13 Gr. 406, 14 Gr. 451; see Vance v. Cummings, 13 Gr. 25.

A woman wishing to convey an interest in land in contemplation of her marriage, conveyed the lands to S., who then conveyed to her and her intended husband as tenants in common. The deed to S. was registered, but S. fraudulently omitted to register the deed back. The husband and wife went into possession at once. S mortgaged the lands and the fraud was not discovered until an action was brought to enforce the mortgage. The avoidance by the Registry Act of the prior unregistered deed was held to date back to the time of its execution which was sufficient in this case to bar the action, (see R. S. O. 1914, ch. 75, sec. 23; Thornton v. France, 2 Q. B. 143): McVity v. Trenouth, 9 O. L. R. 105; See (1908) A. C. 60.

To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable: New Brunswick Ry. v. Kelly, 26 S. C. R. 341. Where a purchaser bought lands upon which an annuity was charged by an unregistered agreement, he was told of the agreement, but was told at the same time that it in no way affected the land, being a mere personal agreement, and made no further inquiry. He was held not to have purchased the lands with actual notice of the contents of the agreement: Coolidge v. Nelson, 31 O. R. 646. Where A., the purchaser under an unregistered agreement for sale, assigned his interests to his son who went into possession, and A. subsequently mortgaged to a person who had made him a previous advance which had been repaid, it was held that the assignment gave the son an equitable title and the registration of it was notice to the mortgagee whose mortgage did not affect the son's title or right to possession: Cope v. Crighton, 30 O. R. 603. A. agreed to purchase land from B, giving a mortgage back for one-half the purchase money. The deed was executed and delivered to the purchaser and the mortgage to B.'s agent. In the meantime A. had negotiated with C. and procured a

loan of the cash payment which he made to B. on the supposed security of a first mortgage on the lands. C.'s mortgage was registered first, then B.'s mortgage, and lastly the deed to A. was registered by C.'s agent. B. and C. acted in good faith and without knowledge of each other. Held that the Registry Act did not apply. C.'s mortgage was good only by estoppel and was fed by estoppel only to the extent of A.'s interest, and that interest was subject to B.'s right to have a mortgage for the unpaid balance of purchase money: McMillan v. Munro, 25 A. R. 288. Where the purchaser registered his deed and the vendor omitted to register his mortgage back until a *bona fide* mortgagee had registered a later mortgage from the purchaser, the later mortgage had priority in spite of a technical omission of receipt then required in the deed: Baldwin v. Duigan, 6 Gr. 595. A. conveyed lands to B. taking a bond for the payment of $30 a year which was to form a first charge on the farm. Before the bond was registered, B. mortgaged to C. who subsequently sold for the amount of his claim to D. who had notice of the bond. Held that D. was liable to be redeemed on payment of what should be found due on C.'s mortgage: Waddell v. Corbett, 21 Gr. 384. Registration of a subsequent deed will not give priority over a prior unregistered deed from the same grantor, unless a valuable consideration is proved. Production of the registered instrument is not sufficient for this purpose: Barber v. McKay, 19 O. R. 46; Leech v. Leech, 24 U. C. R. 321; Doe d. Major v. Reynolds, 2 U. C. R. 311; Wilkinson v. Conklin, 10 C. P. 211; Doe d. Russell v. Hodgkiss, 5 U. C. R. 348; Doe d. Prince v. Girty, 9 U. C. R. 41; Doe d. Cronk v. Smith, 7 U. C. R. 376; Miller v. McGill, 24 U. C. R. 597.

A mortgage to creditors to secure their debts is a sufficient valuable consideration to give a registered conveyance priority over a conveyance previously executed but registered subsequently: Fraser v. Sutherland, 2 Gr. 442. A. and B., owners of land subject to dower of their mother, R., and to an annuity in her favour, mortgaged to C. to secure advances. R. knew of this mortgage but refused

to sign it. Subsequently A. and B. mortgaged to D., R. joining to release her claims for the purpose of this mortgage. D.'s mortgage was registered ahead of C.'s and gained priority to it. The lands were sold under D.'s mortgage and a surplus resulted. The Court of Appeal held that D.'s priority having been gained by the Registry Act did not enure to R.'s benefit, but the Supreme Court reversed this and held that the security for which she released her claims having been satisfied, R. was entitled to the fund in priority to C.: Maclennan v. Gray, 16 A. R. 224, *sub. nom.*; Gray v. Coughlin, 18 S. C. R. 533. Mortgage registered without notice of parol trust was held free from it: Bank of Montreal v. Stewart, 14 O. R. 482. But where the party registering has notice of an equitable charge or interest although created only by parol, section 73 will not apply in his favour: Peterkin v. McFarlane, 9 A. R. 429: (S. C.) Rose v. Peterkin, 13 S. C. R. 677. Possession is not such notice of title as will affect the right of a person claiming under a registered conveyance: Grey v. Ball, 23 Gr. 390; Cooley v. Smith, 40 U. C. R. 543.

Actual notice of title of an adverse claimant is required to affect the grantee under a registered instrument. Actual possession by the adverse claimant is not in itself such notice; nor is it sufficient notice if the grantee is aware that some other than his grantor is in possession: Roe v. Braden, 24 Gr. 589; Sherbonneau v. Jeffs, 15 Gr. 574; Building and Loan v. Poaps, 27 O. R. 470. But see earlier case: Moore v. Bank B. N. A., 15 Gr. 308, where possession of the property by a person having an unregistered interest is held constructive notice. "Actual" notice: see Winters v. McKinstry, 14 Man. L. R. 294; Sydney v. Lyons, 1899, A. C. 260; Maclennan v. Foucault, 11 O. W. R. 659. To postpone a registered title on the ground of notice of a deed having been previously executed, though not registered, the evidence of notice must be quite satisfactory and distinct: Hollywood v. Waters, 6 Gr. 329; New Brunswick Ry. v. Kelly, 26 S. C. R. 341. Express notice of an unregistered assignment of unpatented lands has the same effect as after patent issued: Goff v. Lister, 13 Gr. 406. Actual

notice of an unregistered deed of unascertained land saddles the purchaser with notice of its contents, and his erroneous supposition as to the land involved or the persons interested does not vary the case: Severn v. McLellan, 19 Gr. 220. Effect of Statute; purchaser for value without notice: Bridges v. Real Estate Loan, 8 O. R. 493; Canada Permanent v. McKay, 32 C. P. 51. Surety; registered title prevailing over equitable: Care v. Ontario Loan and Deb. Co., 9 O. R. 236. Purchaser for value by registration will defeat a prior unregistered grant of an easement: Ross v. Hunter, 7 S. C. R. 289. To defeat a registered deed there must be actual notice or fraud: Ross v. Hunter, 7 S. C. R. 289. The grantee in a subsequent conveyance registered in priority to a previous conveyance from the same grantor and of which the grantee had no actual notice, can maintain an action to have his grant declared entitled to priority and the Court has power to so order: Weir v. Niagara Lake Co., 11 O. R. 700. Where two mortgages on different properties by the same mortgagor came into C.'s hands before the Registry Act of 1865, and the mortgagor after the passing of that Act conveyed the equity of redemption to M. by an instrument which was registered. M. was held entitled to redeem, his registered conveyance having priority over C.'s right to consolidate: Miller v. Brown, 3 O. R. 210. An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; he may be defeated by a deed made before though registered after the lodging of his execution with the Sheriff: Russell v. Russell, 28 Gr. 419. The registration of a mortgage covering several parcels is notice to a purchaser of one parcel of the rights of persons who purchased other parcels before his purchase, and of a mortgage on the other parcels and the right it gave to throw the first mortgage on his parcel: Clark v. Bogart, 27 Gr. 450. A married woman, while an infant, represented that she was of full age and conveyed to a purchaser for value who duly registered. On reaching her majority the woman conveyed to a trustee who sold the lands, and his vendee made a mortgage. The married woman, notwithstanding her non-age, was bound by her representations, and the

other parties having notice of the first purchaser took subject to his rights: Benetto v. Holden, 21 Gr. 222. Registration was made notice by 13 and 14 Vic., ch. 63, sec. 8. Where the registered owner of land had parted with his interest by an unregistered deed a person who afterwards took and registered a deed (prior to 1865) believing that the registered owner had parted with his interest, was entitled to no priority over the true owner, though he had no information who the true owner was: McLennan v. McDonald, 18 Gr. 502. Such circumstances as are sufficient to put a party on enquiry will not prevail over a registered title: Soden v. Stevens, 1 Gr. 346. Constructive notice is insufficient in any case to postpone a registered conveyance executed *bona fide*: Ferass v. McDonald, 5 Gr. 310; Foster v. Beale, 15 Gr. 244. A purchaser for value at a Sheriff's sale was held entitled to priority over a non-registered grant made by the owner prior to the sale: Bruyere v. Knox, 8 C. P. 520. Where unregistered land is sold at a tax sale, the tax deed does not require registration to preserve its priority: Jones v. Cowden, 34 U. C. R. 345. Registration is notice of all instruments registered before as well as since registration was made notice: Vance v. Cummings, 13 Gr. 25 Effect of priority of registration: see Pirie v. Parry Sound Lumber Co., 11 O. W. R. 11. Position of plaintiff assignee of mortgage with assignment unregistered: Pringle v. Hutson, 12 O. W. R. 1186; 13 O. W. R. 484, 617; 14 O. W. R. 1083. The possession of an estate by the first but unregistered purchaser from a registered owner is not of itself notice to a subsequent purchaser: Waters v. Shade, 2 Gr. 457; see also as to possession as notice: Grey v. Coucher, 15 Gr. 419.

Land subject to a vendor's lien for unpaid purchase money was sold under execution to a purchaser without notice. The execution debtor repurchased in the name of a third person, who conveyed to another in trust for the debtor. The debtor having become insolvent, it was held that the vendor's lien attached on the lands in the hands of the assignee, but that the Sheriff's vendee could have held free from it: Van Wagner v. Findlay, 14 Gr. 53. Where vendors allow purchasers to register conveyances

before being paid, they preclude themselves from asserting their lien for unpaid purchase money against *bona fide* sub-purchasers without notice: Kettlewell v. Watson, 26 Ch. D. 501.

Where the owner of two adjoining lots of land conveys one of them, he impliedly grants all those conditions and apparent easements, including rights of drainage and aqueduct over the other lot which are used at the time of the grant by the owner of the entirety for the benefit of the part granted. The grant of such an easement is not within the Registry Act, and if implied, prevails against a subsequent purchaser of the other lot without notice. If express its due registration on the lot is notice to the purchaser: Israel v. Leith, 20 O. R. 361. See R. S. O. 1914, ch. 109, sec. 15, notes; see also ch. 75, secs. 35, 37, notes. Privilege of posting bills on walls: Connor-Ruddy v. Robinson-Whyte, 14 O. W. R. 284. The defendant's predecessor in title was given permission by the plaintiff's predecessor in title (at first orally and afterwards by deed) to lay pipes through the plaintiff's land to take water from a spring on the defendant's land. The conveyance to the plaintiff was registered before the registration of the grant of the easement. The plaintiff knew as a fact that the pipes were there and presumed that they were there by permission, but did not know of the deed. He was held entitled to priority under the registered conveyance to him: Harrington v Spring Creek Co., 7 O. L. R. 319.

An assignee for benefit of creditors occupies no higher position than his assignor and cannot be regarded as a subsequent purchaser for value within the meaning of the Registry Act, so as to avail himself of its provisions with regard to the registration of the assignment before a mortgage: Craig v. McKay, 12 O. L. R. 121. As to pleading the Registry Act and its effect, see Building and Loan v. Poaps, 27 O. R. at p. 476. An unregistered conveyance is valid as between the parties: see as to effect of this on running of Statute of Limitations: McVity v. Tranouth, 1908, A. C. 60. Unregistered titles: see Campbell v. Fox, 26 U. C. R. 631; Doe d. Matlock v. Disher, 4 U. C. R. 14; Dig. Ont. Case Law,

col. 6094. See Armour, Titles, "Claimants under competing instruments," "purchasers," pp. 90-97; "volunteers and purchasers," p. 97; "registered owners and equitable interests," p. 98.

Where land is transferred under the Registry Act by means of a forgery, the forged deed is an incurable defect and the status of a transferee as a *bona fide* purchaser for value is of no avail because it rests on a void instrument which does not carry the title: Re Cooper, Cooper v. Vesey, 1881, 20 Ch. D. 611. As to similar case under the Land Titles Act: see Gibbs v. Messer, 1891, A. C. 248; Fawkes v. A. G., 6 O. L. R. 490; note to R. S. O. 1914, ch. 126, sec. 124.

71.—(2) A lease for four years with a covenant for renewal for four more, possession having gone with it, does not require registration, and is valid as regards the covenanted renewal as between the lessee and a subsequent mortgagee of the lessor: Latch v. Bright, 16 Gr. 653. And where a lease is unnecessarily registered, the fact of registration does note make it necessary to register an assignment of it: Doe d. Kingston v. Rainford, 10 U. C. R. 236; see Davidson v. McKay, 26 U. C. R. 306; Armour, Titles, pp. 71-73; see also Armour, R. P., p. 500. A lease for less than seven years is capable of registration, even where the tenant has actual possession: Guthrie, 1897, p. 41.

72. The Registry Acts do not affect the underlying jurisdiction of Courts of Equity as expressed by Lord Hardwicke in Le Neve v. Le Neve, 3 Atk. 646, 651. (approved in Chandos v. Brownlow, 2 Ridg. P. C. 428). These acts do not affect the fundamental principles of equity, but every purchaser under a registered deed is left open to any equity which a prior purchaser or incumbrancer may have: Maclennan v. Foucault, 11 O. W. R. 659. The purchaser from the mortgagor takes subject to the true state of accounts as between the mortgagor and mortgagee. The Registry Act affords him no protection: Thomson v. Stikeman, 4 O. W. N. 1546. Purchase of lands without knowledge of streets laid out on registered plan: Peake v. Mitchell, 24 O. W. R. 291,

4 O. W. N. 988. Claim on unwritten equity, of which a subsequent registered purchaser has notice: see White v. Neaylon, 11 App. Cas. 171. See corresponding section of Mines Act: R. S. O. 1914, ch. 32, sec. 74. See Armour Titles, p. 60, "What constitutes registration," esp. p. 67, also pp. 88 and 90.

73. The Registry Act does not avoid a prior equity against a subsequent registered deed, where the latter was taken with actual notice: Wigle v. Letterington, 19 Gr. 512; see also McMaster v. Phipps, 5 Gr. 253. Priority may be gained by means of prior registration as between equitable incumbrancers. But this priority will be defeated by notice: Bethune v. Caulcutt, 1 Gr. 81. Section 73 is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests: Jarvis v. Toronto, 21 A. R. 395, 25 S. C. R. 237, Where three persons were induced by R. to purchase after a pretended sale under power in a mortgage and a conveyance for value was taken to the three and R., and registered, they not suspecting that the transaction was other than appeared on the face of it, and as represented to them by R., it was held that they were not affected by the equity of the mortgagor to set aside the sale nor by R.'s knowledge nor by the knowledge of their solicitor, the same solicitor having acted for them as had acted for R. in the sale proceedings. R. was guilty of fraud on the mortgagor and on his associates as well, and notice could not be imputed to them of what it was R.'s interest to conceal: Smith v. Hunt, 2 O. L. R. 134. See same case in appeal: 4 O. L. R. 653. The relationship arising under a contract for sale of land on payment of the purchase money, is that of trustee and *cestui que trust*. A mortgagee from the trustee under such circumstances who takes and registers his mortgage in ignorance of and without notice of any equitable right of the *cestui que trust* is entitled to set up the provision of the Registry Act: Building and Loan v. Poaps, 27 O. R. 470. A testator devised the north half of his farm to one son and the south half to another, the latter half being subject to a mortgage. The first son made payments on the mortgage on the south half, without demand. The second son placed

another mortgage on his portion, the mortgagee enquiring from the first mortgagee the amount due and being informed correctly. Subsequently, the owner of the north half paid the balance due on the first mortgage and took an assignment of it and claimed to hold the assignment for the full amount paid by him. The right to the assignment was an equitable one and could not prevail against the duly registered second mortgage: McMillan v. McMillan, 23 O. R. 351, 21 A. R. 343. Where a mortgage was registered without notice of a parol trust, the trust could not prevail against it: Bank of Montreal v. Stewart, 14 O. R. 482. A. and B., owners of land subject to the dower of R., their mother, and an annuity in her favour, mortgaged to C., with her knowledge but without her joining, and subsequently mortgaged to D., R. joining to bar her rights. D.'s mortgage was taken without knowledge of C.'s and was registered ahead of it. D. having sold under his mortgage, a surplus resulted. It was held that R. was entitled to this surplus in priority to C. as the security for which she barred her dower and annuity was satisfied: Maclennan v. Gray; Gray v. Coughlin, 16 A. R. 224, 18 S. C. R. 553. Registered title prevailing over equitable right to charge lands: Care v. Ontario Loan and Deb. Co., 9 O. R. 236. A., owning lands, mortgaged to B. and afterwards arranged to release a portion and give B. another mortgage for the balance. By mistake the new mortgage contained the same description as the former one. C., aware of the arrangement but unaware that the new mortgage covered the same lands, bought the lands thought to be released. B. assigned his mortgage and C. sold the lands. It was held that the assignees, having the legal estate, were purchasers for value without notice and could avail themselves of the Registry Act against a purchaser under the original mortgagor: Bridges v. Real Estate Loan, 8 O. R. 493. This section does not apply to the case of a person registering who has notice of an equitable claim though created merely by parol: Rose v. Peterkin, 13 S. C. R. 677.

The plaintiffs owned lot 19 and the defendant owned lot 20. Lots 19 and 20 were previously owned by the

same person, who built a house partly on both lots. The plaintiff's brought an action to have it declared that the house belonged to them as the original owner had obtained a loan on lot 19 to build it and that the owner of lot 20 had constructive notice. It was held that the defendant being the registered owner of lot 20, was not in any way affected by the relations between the original owner of lots 19 and 20 and the plaintiffs. (Case under the B. C. Land Registry Act): Canadian Birkbeck v. Ryder, 12 B. C. R. 92, 2 W. L. R. 158. Notice to a solicitor acting for a would-be purchaser of a prior agreement of sale is notice to his client who cannot, upon an agreement for sale being entered into with him, claim the benefit of the Registry Act: Green v. Stevenson, 9 O. L. R. 671. The purchaser of a legal estate having express notice of a prior equitable conveyance by registered deed and purchasing from a vendor out of possession is not entitled to the property as against the equitable purchaser: Trinidad Asphalte Co. v. Coryat, 1896, A. C. 587, An unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the Registrar subsequently to the creation of the equitable mortgage: Sawyer-Massey v. Waddell, 6 Terr. L. R. 45. Deposit of title deeds as security for money; equitable second mortgage: Zimmerman v. Sproat, 26 O. L. R. 448. What constitutes notice of equitable claim to defeat registered title: Ihde v. Starr, 19 O. L. R. 471, 14 O. W. R. 710, 1 O. W. N. 64.

The rule of equity which allows the holder of several mortgages made by the same mortgagor on separate properties to consolidate the debts and insist on being redeemed on all before releasing any of his securities is not "tacking" and is not against the provisions of the Registry Act: Dominion S. and I. Soc. v. Kittridge, 23 Gr. 631. A mortgagor's devisee was held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not "tacking" such as the Act forbids: McLaren v. Fraser, 17 Gr. 533. Limits of the exercise of the equitable right to consolidate: not allowed in favour of the holder of mortgages against a

puisne incumbrancer of one of the mortgaged properties without notice, though enforceable against the mortgagor himself: Brewer v. Canada Permanent, 24 Gr. 509. Before this section it was held that an equitable mortgage did not require registration to secure its priority: Harrison v. Armour, 11 Gr. 303. Whether the section is or is not retrospective: see McDonald v. McDonald, 14 Gr. 133; Building and Loan v. Poaps, 27 O. R. 470. Effect of Statute when purchasers for value without notice claim against persons who have acquired title by possession: Canada Permanent v. McKay, 32 C. P. 51. The policy of the Registry Act is to give no effect to hidden equities. Where a mortgagee had two mortgages given by the same mortgagor over two properties and an execution creditor of the mortgagor obtained and registered without notice a second mortgage on one of the properties, the first mortgagee could not as against the execution creditor consolidate his mortgages so as to make good the loss on one sale out of the surplus from another sale: Johnson v. Reed, 29 Gr. 293. Consolidation; where there is an express contract for: Hughes v. Britannia Permanent Benefit, 1906, 2 Ch. 607. Armour, Titles, p. 42, as to requisitions on title under this section, p. 77; tacking, p. 78; consolidation, pp. 77, 98.

74. The doctrine of Hopkinson v. Rolt (9 H. L. C. 514) according to which a prior mortgagee whose mortgage is taken to cover further advances cannot claim priority in respect of advances made after notice of a second mortgage, applies as well to a case where the prior mortgagee has covenanted to make the further advances as to a case where the further advances are voluntary: West v. Williams, 1899, 1 Ch. 132. Before this section it was held that further advances upon a mortgage providing for further advances and to secure which the legal estate had been conveyed, were protected both at law and in equity as against a subsequent mortgage, even though registered where notice had not been as a fact communicated to the first mortgagee: Pierce v. Canada Permanent, 24 O. R. 426, 25 O. R 671, 23 A. R. 516. Armour, Titles, pp. 159-162. See Mechanics' Lien Act, R. S. O. 1914, ch. 140, sec. 8 (3) and 14 (1).

75. The principle of the Registry Act is that every one who is acquiring land ought to see what is registered against the land he is about to acquire and he is assumed to search the registry for that purpose. This does not apply to one who is parting with an interest. Registration is not notice in such a case: Trust and Loan v. Shaw, 16 Gr. 446. Registration is notice of all instruments registered before as well as since registration was made notice. Registration of a mortgage of unpatented lands is notice to subsequent purchasers, whether the patent was issued under or without a decision of the Heir and Devisee Commission: Vance v. Cummings, 13 Gr. 25. The registry law is binding on railway companies: Harty v. Appleby, 19 Gr. 205. Where at the time of execution and registration of a mortgage it was ineffectively executed to pass the wife's estate, but subsequently it was properly executed but not registered, the registration was held sufficient under the Statute, but the re-execution could not date back so as to gain priority over an instrument which in the meantime had been registered properly executed: Beattie v. Mutton, 14 Gr. 686. Where two mortgages were successively taken by distinct creditors and by mistake a piece of land which the mortgagor held under contract to purchase was omitted from each, the first mortgagee has a prior equity over the second mortgagee to rectify his mortgage and avail himself of the legal estate of such omitted lands as against an heir who has completed the purchase: Merchants Bank v. Morrison, 19 Gr. 1. Where a person executed a mortgage and had it registered but did not give it to the mortgagee for some time and it was subsequently sold to a third person without notice of the facts, it was held entitled to priority over another mortgage previously executed but registered after, though before it had been delivered to the mortgagee: Muir v. Dunnett, 11 Gr. 85. Constructive notice is insufficient to postpone a prior registration: Foster v. Beall, 15 Gr. 244. A subsequent mortgagee who had not actual notice was held not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises: Reid v. Whitehead, 10 Gr. 446. Where an agreement to charge lands in the form of a letter was signed and afterwards registered, and a question

arose whether the solicitor who signed did so as witness or as the person to whom the letter was addressed, the Court held that whether or not the registration was regular, the document being on the registry was notice to a subsequent purchaser notwithstanding the informality in the proof of execution, which did not make the registration a nullity: Hoofstetter v. Rooker, 22 A. R. 175, 26 S. C. R. 41. An attorney under irrevocable power for sale, etc., and entitled to a share in the proceeds, agreed to pay out of the owner's share the amount of a further charge made by the owner and afterwards purchased the lands himself. Execution of the document creating the further charge was duly proved and attached to it was the attorney's agreement without any proof of execution. All the documents were received by the Registrar and registered. Held that the defect in registration was cured by this section and the attorney who subsequently became the purchaser of the lands was affected with notice of the plaintiff's rights: Armstrong v. Lye, 27 O. R. 511, 26 A. R. 543. Registration in the County Registry Office of a mortgage on unpatented Indian lands is not notice to a patentee procuring title under assignments registered in the Indian Department: Re Reed and Wilson, 23 O. R. 552. The mortgagee under a mortgage providing for further advances was formerly protected at law and in equity against a subsequent mortgagee though registered, in respect of advances made after the registration of the second mortgage, where notice was not as a fact communicated to the first mortgagee and the Registry Act did not apply: Pierce v. Canada Permanent, 24 O. R. 426, 25 O. R. 671, 23 A. R. 516; but see now section 74. Where a conveyance was made absolute in form and it was afterwards declared to be a mortgage only in a redemption action and a conveyance made pursuant to the decree, a person who claimed certain easements under the original conveyance was held affected by notice under the Registry Acts that the grantee was a mortgagee only and that those who redeemed him were the owners of the equity of redemption: McKay v. Bruce, 20 O. R. 709. An intending purchaser searched in the Registry Office and found two incumbrances which shortly after he paid off, and taking discharges, registered them and

his purchase deed without making further search. In the meantime a lien had been registered. The purchaser was held entitled to be subrogated to the position of the mortgagees whom he had paid off and to priority over the lien. The Registry Act does not preclude enquiry as to whether there was knowledge in fact and the Court is not compelled as a conclusion of law to say that the purchaser had notice of what he was doing: Abell v. Morrison, 19 O. R. 669. A person who was in exclusive possession of a part of a farm occupied by him for the statutory period so as to acquire title thereto by possession is not estopped from setting up such title by acting as witness, during the running of the statute, to a mortgage given by the legal owner covering the lands in question as well as other lands. Being in fact ignorant of the contents of the mortgage, its registration was held not to be notice to him so as to create an estoppel: Western Canada v. Garrison, 16 O. R. 81. Payment of a mortgage by the purchaser of the equity of redemption to the original mortgagee and taking a discharge in no way releases the lands or the mortgage when it has been previously assigned and the assignment registered. In addition to the effect of the Registry Act, the party making payment is affected with constructive notice by omission to enquire for the mortgage: Gilleland v. Wadsworth, 23 Gr. 547, 1 A. R. 82. A. owned lots 25 and 26. He sold part of lot 26 to B., but by mistake the description was such as to pass the whole lot. A. subsequently sold to C. lot 25 and the part of lot 26 not sold to B. The registration of the deed from A. to C. was notice to a purchaser from B. of A.'s claim to part of lot 26 and C. was entitled to a reconveyance thereof: Haynes v. Gillen, 21 Gr. 15. Where a life tenant sells with the knowledge of the remainderman, and the purchaser goes on and makes improvements, the acquiescence of the remainderman amounts to nothing more than an assent to the life tenant disposing of his interest. The registration of the conveyance granting the life estate and remainder is actual notice to the purchaser of the remainderman's title: Bell v. Walker, 20 Gr. 558. In an action similar in its facts to Gilleland v. Wadsworth, 1 A. R. 82, that

is, where A. had given a mortgage to B., which, unknown to A., B. had assigned to C., the assignment being registered, and A. subsequently sold to D., who paid off the mortgage to B., Riddell, J., held that the registration of the assignment was notice to D., but held that the decision in the Gilleland Case must not be pushed forward a hair's breadth, the result otherwise being that no one would be safe in selling an equity of redemption without searching in the Registry Office, and, both A. and D. being before the Court as original defendants, C.'s action for foreclosure was dismissed: Watson v. Grant, 9 O. W. R. 53. The omission of a deed from the abstract index does not vitiate registration nor deprive the deed of its priority: Lawrie v. Rathbun, 38 U. C. R. 255; see Armour, Titles, p. 87, *et seq.* See corresponding section of Mines Act: R. S. O. 1914, ch 32, sec. 75.

77. "Inevitable difficulty;" infancy; will refused probate; conveyance of infant's estate by their father and guardian: O'Neill v. Owen, 17 O. R. 525. Infancy is not an "inevitable difficulty:" McLeod v. Truax, 5 O. S. 455; Mandeville v. Nicholl, 16 U. C. R. 609. Persons dying abroad: Doe d. Eberts v. Wilson, 4 U. C. R. 386. Destruction of will: Re Davis, 27 Gr. 199. Where land was left in fee to widow under a will which remained unregistered, the heir at law after her death gave a mortgage which was held good as against the widow's heirs: Stephen v. Simpson, 12 Gr. 493, 15 Gr. 594. Where the plaintiff claimed under a will and the defendant under a deed from the heir at law registered before the will: see Bondy v. Fox, 29 U. C. R. 64. Deed by devisee and prior unregistered deed by testator: McDonald v. McDonald, 44 U. C. R. 291. Unregistered will charging annuity on real estate; partition amongst heirs and devisees; knowledge of attorney: Rykert v. Miller, 14 Gr. 25. Direction to entail in will; unregistered deed: Dumble v. Johnson, 17 C. P. 9. Conveyance by heir at law for nominal consideration registered prior to will, held not to cut out will: Wilkinson v. Conklin, 10 C. P. 211. See Armour Titles, pp. 320-321, 360-361.

78. Armour, Titles, pp. 162-165, 172, 246, 397. Where the patent is unregistered when the tax deed is

given: see Jones v. Cowden, 34 U. C. R. 345. The provision as to registering deed given on a sale for taxes applies as well between several purchasers at successive tax sales as between a purchaser thereat and the vendee of the owner: Aston v. Innis, 26 Gr. 42. Delay in registering: see Smith v. McLandress, 26 Gr. 17; Carroll v. Burgess, 40 U. C. R. 381. Sheriff's vendee at sale under execution takes free of vendor's lien: Van Wagner v. Findlay, 14 Gr. 53. Proceedings for sale of lands for taxes: see R. S. O. 1914, ch. 195, sec. 141, *et seq.* Tax deed: ch. 195, sec. 171, 173, 177-180. Competing registrations of tax deeds: see McConnell v. Beatty, 1908, A. C. 82. (Reported also 11 O. W. R. 1).

80. See Armour, Titles, p. 60, "What constitutes registration," also p. 99. Where a Registrar is handed for registration and registers instruments which are not duplicates, he should not allow them to be withdrawn, as other instruments might gain priority: Guthrie, 1895, p. 11. See also secs. 31, 47, 52, and notes. "Instrument capable of registration," see also secs. 2 (*d*) and 33, notes.

81. The provisions of this section do not apply to the Crown nor to a patent from the Crown of lands heretofore unpatented: Guthrie, 1912, p. 8.

81.—(6) Where a space is left vacant on a plan and not marked as a lot or as a road or lane, the owner may close it up or otherwise utilize it. Any restriction on the owner's free use of the land must be clearly mainfested: Re Scottish Ontario Inv. Co. and Bayley, 12 O. W. R. 130. Effect of registration of plan showing spaces marked "private entrance" and "park;" easements acquired by lot owners: Ihde v. Starr, 19 O. L. R. 471, aff. 1 O. W. N. 909, 21 O. L. R. 407; see *post*, sec. 86 notes.

81.—(9) Where a plan has been amended by Judge's order, and a number of lots have been made into one block, a new page in the abstract index is to be opened for the new block and no instruments subsequent to the Judge's order entered in the lots. And this ruling would include a discharge of an old mortgage describing the lots as previously subdivided: Guthrie, 1899, p. 5.

81.—(10) A *lis pendens* must conform and refer to plan of lots as subdivided and a mandamus will not be granted to compel a Registrar to register a certificate which does not so conform. Where the certificate partly conformed or referred to lots not subdivided it was allowed registration in respect of this portion: Re Thompson and Webster, 25 U. C. R. 237. In applications under the Quieting Titles Act, where there is a plan, the description of the land in the petition must conform to the plan: Re Morse, 8 P. R. 475. The surveyor's certificate given in Form 13 does not indicate that it should be witnessed or verified by affidavit: Guthrie, 1897, p. 27. It is not necessary to refer to any plan except the last: Guthrie, 1912, p. 12.

81.—(11) A municipal by-law providing for the opening of a road was received at a Registry Office and the fee paid, but the by-law was never entered or registered because it did not conform and refer to plans filed of the lands through which the road was opened. The Registrar was right in refusing it; it was not an instrument capable of registration within the meaning of section 80: Re Henderson, 29 O. R. 669. Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots as originally described being sold under execution and the purchaser at Sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding that the Sheriff's deeds do not comply with this section of the Registry Act in not conforming to the registered plan: Rathbun v. Culbertson, 22 Gr. 465.

81.—(14) In respect of plans filed with the Registrar under the Railways Acts, the Registrar's duties and emoluments are dependent on those Acts: Guthrie, 1897, p. 48. Under the provisions of the Municipal Act, R. S. O. 1914, ch. 192, sec. 479, the Council is deprived of the power it formerly possessed under the Registry Act to give its assent to a plan shewing a road less than 66 feet wide. The provisions of section 479 of the Municipal Act supersede this sub-section inferentially. The registration might be void even if the plan had the sanction of the

Council: Guthrie, 1913, No. 16; see also notes to R. S. O. 1914, ch. 166, sec. 44. As to dedication and acceptance of roads: see R. S. O. 1914, ch. 192, sec. 432 notes.

81.—(16) Owners of adjoining lands may make a joint plan comprising lands of both of them, although as to the lands of each owner it would be his own plan: Re Ontario Silver Co. and Bartle, 1 O. L. R. 140. Where parties sign as owners who do not appear by the books to be owners, the Registrar should object to the plan: Guthrie, 1897, p. 27. A Registrar should deal with the Act reasonably and not refuse registration of a plan because of the lack of the signature of an apparent mortgagee under a mortgage almost 100 years old: Guthrie, 1899, p. 25. A person not an owner might formerly, *semble*, register a plan and although this would have been at the time a futile proceeding, yet if he afterwards became the owner and adopted the plan, he would be entitled under the Act to have it amended: Re Chisholm and Oakville, 12 A. R. 225. Registration of plan and mortgage pursuant to it before title; estoppel of real owner by creating status of owner in mortgagor: Nevitt v. McMurray, 14 A. R. 126. Where a plan is tendered by an owner for registration the books of the Registry Office are to be referred to to ascertain who are owners and all owners should sign even where they own as executors: Guthrie, 1901, p. 12, 1913, No. 8. The registration of a joint plan by several owners should shew what lands affected by the plan each claims to own: Guthrie, 1910, p. 34. On registering a subdivision plan, the Registrar is not settling the question of title. The registration of the plan does not prove, admit or establish that the persons registering have a good title. By receiving the plan the Registrar merely treats them as the apparent owners, but they may not, in fact, have title, and it may not, in fact, be free of encumbrance: Guthrie, 1913, No. 8. This clause is intended to prevent registration of plan by persons without apparent title. The Registrar should see that the person tendering the plan has a sort of *prima facie* title. Registering the plan confers no title: Guthrie, 1910, p. 16. Duty

of Registrar on registration of sub-division plan is to consider the deeds appearing on the Abstract Index, but he may and should disregard entry of deed which, while it is entered in the Index, does not in fact affect the actual title to the property: Guthrie, 1913, No. 3. The person entitled to an easement is an owner within this sub-section: Guthrie, 1912, p. 17. Registration of a plan was permitted where owner's title was derived under a deed twenty years old, although his grantor's title was not apparent from the abstract: Guthrie, 1912, p. 11.

81.—(18) The registration of a plan of sub-division of a town lot and the sales made in accordance with it do not constitute a dedication of the lanes thereon to the public: Re Morton and St. Thomas, 3 A. R. 323. A municipality is not free to deal as they please with lands dedicated by a private owner for park purposes. Whether the dedication arises only from the act of the owner or by express grant, the municipality must accept it, if at all, for the purpose indicated. Where the owner of land dedicated to the public a square by filing a plan upon which were the words " square to remain always free from any erection or obstruction " it was held that the municipality had no power to close up a part and dispose of another part to trustees of a church: Re Peck and Galt, 46 U. C. R. 211; see Public Parks Act, R. S. O. 1914, ch. 203; and R. S. O. 1914, ch. 192, sec. 398. The right vested in a municipality to convert into public highways, roads laid out by a private person on his property can only be exercised in respect of private roads, to the use of which the owners of property abutting thereon were entitled: Gooderham v. Toronto, 25 S. C. R. 246. The City and Suburbs Plans Act has no retroactive effect: Toronto v. Hill, 24 O. W. R. 388, 4 O. W. N. 1076. A refusal by the Town Council to approve a plan does not preclude application to the District Court Judge for approval: Re Royston Park and Steelton, 4 O. W. N. 1273, 28 O. L. R. 629. A plan of a number of lots laid out as a summer resort and shewing a private way, boulevard or place of recreation, less than the width of a street, may be registered without the consent of the municipality: Guthrie, 1913, No. 5.

84. Though a plan not certified as required has, even when deposited in the Registry Office, no effect under the registry laws, yet in a deed reference may be made to it as it may to any other document in the Registry Office or elsewhere for the description or designation of a lot: Ferguson v. Winsor, 10 O. R. 13, 11 O. R. 88. No obligation to register a plan which is only referred to; title complete by registration on the township lot: Muttlebury v. King, 44 U. C. R. 355. See also Ferguson v. Winsor 10 O. R. 13, 11 O. R. 88. Plans attached to deeds to elucidate description and which do not subdivide property into lots need not be separately registered, but are parts of the deeds: Guthrie, 1897, pp. 10, 19, and see *ante*, sec. 34 (1), note. Where a deed refers to an unregistered plan and is entitled to registration, it must go on the index of original lots: Guthrie, 1899, p. 14.

86. A plan of subdivision of land by adjoining owners prepared and registered upon their joint request, may, upon compliance with statutory conditions, be amended on application of either owner, as far as his own land is concerned, without the consent of the other owner; but the other owner is a "party concerned" and entitled to notice: Re Ontario Silver Co. and Bartle, 1 O. L. R. 140. All persons who buy lots according to a registered plan are not *ipso facto* "parties concerned" in every street shewn on it. Whether they are concerned or not is a question of fact: Re McIlmurray and Jenkins, 22 A. R. 398. Where a petition under this section is presented to the County Judge, the Judge of another County Court has jurisdiction on the request of the first Judge to hear and adjudicate thereon: Re McDonald and Listowel, 2 O. W. R. 1000, 6 O. L. R. 556. To hear petitions under this section is one of the judicial duties to be performed by a County Court Judge where application is made to him: Re McDonald and Listowel, Ib. Although the application is interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned: Re McDonald and Listowel, Ib. The effect of the section is that though a registered plan is binding, it is not irrevocably so, but may be amended on a proper

case being made out. Notice of any proposed amendment or alteration must be given to all purchasers, who are entitled to oppose the amendment or alteration. The application may be made not only by the person registering the plan, but also by a purchaser or anyone claiming under him. But where it is sought to close a lane laid out on a plan, the title to the soil of which remains in the person registering it, a purchaser seeking to close the lane must shew that he represents the title of the person who registered: Re Hamilton Terminal, 14 O. L. R. 117, 9 O. W. R. 463. The evidence should as a general rule be given *viva voce* and not in the form of affidavits: Re McDonald and Listowel, 2 O. W. R. 1000, 6 O. L. R. 556. By order of a County Judge a certain street on a registered plan was closed. Thereafter the defendant municipality passed a by-law declaring it open. The by-law was quashed as having been passed in disregard and contempt of the order, and as the order shewed jurisdiction on its face, the evidence on which it was made was not gone into on the application to quash: Waldie v. Burlington, 7 O. R. 192, 13 A. R. 104. The status of A. as a person or the assignee of a person who registers a plan is a question of combined law and fact for the County Judge on an application to him to amend the plan, and his decision is not examinable in prohibition: Re Chisholm and Oakville, 9 O. R. 274, 12 A. R. 225. The registration of a plan of a subdivision of a town lot and sales made in accordance with it, do not constitute a dedication of the lanes thereon to the public: Re Morton and St. Thomas, 6 A. R. 323. The plaintiff purchased a lot which was part of an estate laid out under a building scheme. Upon the plan the adjoining plots were shewn as a vacant space, such space being used as a road though only a *cul de sac*. In an action to restrain the defendants from building on the vacant space it was held that the plan did not amount to a binding representation, that the vacant space would always remain so: Whitehouse v. Hugh, 75 L. J. Ch. 677, 1906, 2 Ch. 283. Possessory title to strip of land on plan: Currah v. Ray, 13 O. W. R. 652. Where park reserves and entrance marked on plan, purchaser according to plan gets easement: Ihde v. Starr, 19 O. L. R. 471, 21

O. L. R. 407. What streets can be closed under the statute and what streets must be closed by proceedings under Municipal Act: Re Toronto Plan, M. 188, 4 O. W. N. 662, 28 O. L. R. 41. Where roads or streets laid out on a plan are public highways, but the municipality has not assumed them, then, in case they are closed up, the land becomes the land of the adjoining owners: Surveys Act, R. S. O. ch. 166, sec. 44; Armour, Titles, p. 231; and see R. S. O. 1914, ch. 192, sec. 433, notes. Plan amended by Judge's order may be filed without consent of apparent owners or mortgagees being endorsed. Fees for searches and abstracts in connection with amended plan not allowed unless specially ordered by the inspector: Guthrie, 1897, p. 6, 1899, p. 14. The order made by the Judge may be noted on the plan itself, say in red ink, following the practice of the Court in amending pleadings. The amendments may also be made by subsequent plan: Guthrie, 1898, p. 8. If the owner of the soil of a street laid out on a plan makes a conveyance of his right in the street, the Registrar should record the instrument, being not concerned with its legal effect: Guthrie, 1910, p. 20. As to appeals under this section: see R. S. O. 1914, ch. 56, sec. 26 (2d).

88. "Townsite" plans: Re Western, etc., Corporation and Goodwin, 13 O. W. R. 177. There is no authority under which a town can designate a person's unnumbered lot by a particular number without his consent. The County Judge has the right however under sub-sec. 13 to number the parcels: Guthrie, 1901, p. 23.

92.—(*b*) Where a deed is registered in more than two parts the Registrar is entitled to the usual charges for the first two parts and 25 cents for each certificate on extra parts, and not to fees per folio as for certified copies: Guthrie, 1897, p. 35. A deed of exchange though it operates as a double conveyance is only one instrument: Guthrie, 1898, p. 6. In a deed of family settlement where all the different parties are really both grantors and grantees, the Registrar should treat them and make his entries on each particular lot according to the fact:

Guthrie, 1898, p. 7. Endorsements on probates should not be counted in reckoning folios: Guthrie, 1898, p. 9. Where a Judge's order amending a plan is registered it is entered like any other instrument affecting lands. Where a lane is closed in the rear of lots, the lots are not so affected as to require the order to be abstracted on them though they are mentioned in the order so as to identify the position of the lane: Guthrie, 1900, p. 8. The words "not to exceed $5" at the end of the sub-section mean "in each municipality." So where a deed is registered embracing numerous lots in 10 municipalities the Registrar is entitled to a maximum fee of $5 "for each municipality:" Guthrie, 1901, p. 5. Fees for registration of mortgages "not in full:" see sec. 48 (3) *ante*. The fee of 5 cents for each parcel over four is in addition to the fees allowed in the first part of the sub-section: Guthrie, 1895, p. 7. The Registrar is entitled to no greater fee than that prescribed by the Railway Act for registering a special railway deed with special covenants varying from the form given in the Act: Guthrie, 1895, p. 15. Where an assignment of lease is produced for registration having the landlord's consent endorsed or attached, the assignment and consent are separate instruments. The assignment however may be registered without registering the endorsed consent, and the certificate should read "I certify that the within assignment of the lease (but not the consent purporting to be endorsed thereon) is duly registered, &c.:" Guthrie, 1897, p. 24. The Registrar is entitled to fees for registering an order under the Dower Act, R. S. O. 1914, ch. 70, sec. 14, permitting sale free from dower and endorsed on the conveyance: Guthrie, 1911, p. 11.

92.—(*c*) Search to ascertain persons interested subsequent to mortgage: see Morse v. Lamb, 23 O. R. 167, 23 O. R. 608, before this amendment. The Registrar is bound to exhibit the abstract index when required. Where an abstract index containing 31 entries was shewn to an applicant who looked at it and examined 4 registrations, the fee was properly 25 cents and not as for a search on 31 entries: Ross v. McLay, 26 C. P. 190; see also

MacNamara v. McLay, 8 A. R. 319. Searches of plans: see Lindsay v. Toronto, 25 C. P. 225. Omission of instrument from abstract index: see Green v. Ponton, 8 O. R. 471. The language of the section as to searches for the purpose of foreclosing a mortgage on lands subsequently divided, refers to persons attending the Registry Office and making searches for the accuracy of which the Registrar is not responsible and not to the preparation of certified abstracts by the Registrar. No reduction is provided for in the latter case: Guthrie, 1895, p. 9. Solicitor's brief memoranda are "extracts" and when they exceed 300 words in respect of one lot extra fees are payable: Guthrie, 1895, p. 24. A "reference" means a reference to the registry books, not to the abstract index: Guthrie, 1897, p. 20. A Registrar's duty is not to express opinions on title or as to who is the "owner" of a lot, and he should not give any such information: Guthrie, 1897, p. 20. Where a solicitor has procured a certified abstract of title and desires to verify it by searches he must pay for such searches: Guthrie, 1897, p. 30, 1901, p. 7. Where a certified abstract of title is ordered, the Registrar should prepare it by referring to the registered instruments themselves. He is entitled to be paid for the searches involved. Sec. 21 probably will not protect him when there are mistakes in the abstract index and not in the registered instrument: Guthrie, 1897, p. 10. Searches begun in one of the Toronto divisions and continued in the other should be treated as continued searches in the latter division: Guthrie, 1897, p. 11. A search made by a solicitor to verify a prior search must be paid for as a new search: Guthrie, 1901, p. 13. A Registrar is entitled to a fee of 25 cents on each occasion that the abstract index is searched: Guthrie, 1913, No. 7.

92.—(*e*) A search in the general register is a separate search and is not included in the 25 cents paid for a search of a lot, or in the 5 cents charged for references: Guthrie, 1901, p. 12.

92.—(*f*) Abstract when required for purposes of foreclosure of mortgage on lands subdivided subsequent to the mortgage: see Morse v. Lamb, 23 O.

R. 167, 23 O. R. 608. Where an abstract of title is applied for and the Registrar furnishes only a copy of the abstract index, making no search or reference to the registrations, he can only charge as for a copy, 25 cents for the first 100 words and 15 cents for each subsequent 100: Ross v. McLay, 26 C. P. 190. A Registrar in making an abstract is not bound to rely on the correctness of the abstract index, but may properly test it by making all searches necessary. He may rely on the abstract index and charge as for searches, but for a certified copy of the abstract index be can only charge at the rate per folio: MacNamara v. McLay, 8 A. R. 319. The Registrar's right is to charge for copies of instruments certified by him although prepared by the solicitor for the parties: Guthrie, 1895, p. 17, 1899, p. 21, 1913, No. 1. Where a copy of the abstract index only is required the Registrar merely charges as for copy, and his responsibility is less. Where he is required to pick out the deeds entered on a page of the abstract index and ascertain which of them refer to the particular land, he is entitled to charge for his searches: (see MacNamara v. McLay, 8 A. R. 319 *ante*); Guthrie, 1895, p. 21. Where a copy of a mechanic's lien is required and the applicant does not know the number, the proper charge is 25 cents for search and the usual folio charge. No charge for "exhibiting" the original to the Registrar to enable him to make the copy: Guthrie, 1897, p. 15. A certified abstract required for foreclosure proceedings where the land covered by the mortgage has been subdivided, must be paid for in the ordinary way and is not within the provision of sub-sec. (c) which applies to searches only: Guthrie, 1895, p. 9. Where an abstract is ordered of part of a lot patented as a whole and afterwards subdivided, the Registrar is entitled to make searches of all registrations and charge for them in order to find which do and which do not affect the land: Guthrie, 1895, p. 22. Unnecessary entries on an abstract will be disallowed: Guthrie, 1898, p. 10. The number of references which may fairly be allowed in case of dispute depends on the condition of the abstract index: Guthrie, 1899, pp. 10, 12. In every

case of doubt the Registrar should make a reference. Where the description is clear and definite it is the duty of the Registrar so to enter it in the abstract index: Guthrie, 1900, p. 5. Copies of registered instruments affecting the same lot may be verified in one certificate of the applicant does not require separate certificates on each copy: Guthrie, 1900, p. 5. Where abstracts of several lots are partly identical, unnecessary references will not be allowed nor will repetitions of lengthy descriptions of land: Guthrie, 1900, p. 14. Proper fees for abstract of title of closed road allowance: Guthrie, 1912, p. 21.

92.—(*g*) Where a special form of certificate is required the Registrar's right to fees is not lessened by it being prepared by solicitors and tendered for signature. The Registrar is entitled to reasonable fees along the lines of the tariff for work not strictly his duty: Guthrie, 1895, p. 18: MacNamara v. McLay, 8 A. R. 319. Where information is sought as to whether any instruments are registered subsequent to a given deed, the Registrar should not give an abstract if a certificate that there are no instruments will cover the point: Guthrie, 1897, p. 18. A Registrar should not express opinions as to title and should refuse to give a certificate that a particular person is the "owner" of a lot: Guthrie, 1897, p. 20. A Registrar may properly certify that there are or are not mortgages appearing registered against a lot: Guthrie, 1897, p. 20. Where the Registrar pursuant to request endorses and delivers a certificate on a final order of foreclosure or vesting order of the registration of a certificate thereof, such certificate is "furnished" within the meaning of this sub-section and such certificate on the original order is not that referred to and is not included in the 50 cent fee provided in sub-sec. (p): Guthrie, 1897, p. 29. A Registrar for the fee authorized by the sub-section should give a certificate of the registration of a debenture by-law; he may be entitled to charge also a fee for search: Guthrie, 1897, p. 53. There is no provision for the Registrar giving information in writing save by certificate, for which he is entitled to charge under this provision: Guthrie, 1911, p. 29.

92.—(*h*) No one is entitled, except for the Registrar, to make a copy of a registered plan. If one is desired the Registrar should permit it to be made for a reasonable charge: Guthrie, 1899, p. 21. Where a plan is attached to a deed to elucidate a description, the Registrar is not entitled to a fee under this provision: Guthrie, 1912, p. 13.

92.—(*o*) *Quære*, is a plan an "original instrument" within the meaning of the Act? Lindsey v. Toronto, 25 C. P. 225. Where a question arises whether instruments registered are correct duplicates, the Registrar is entitled to charge for exhibiting the original filed for purposes of comparison: Guthrie, 1895, p. 11.

92.—(*p*) A "caution" under the Devolution of Estates Act in spite of the use of the word "certify" is not a "certificate" within this sub-section, but an instrument within sub-sec. (a): Guthrie, 1895, p. 23. For registration of sheriff's notice to Registrar of seizure of mortgage and of certificate of withdrawal, etc., of writ: see R. S. O. 1914, ch. 80, secs. 25 and 28. A certificate from the H. C. J. discharging four mechanic's liens and a *lis pendens* registered in respect of one lot, is only to be charged the usual fee for one certificate: Guthrie, 1899, p. 28.

93. Where a Registrar collects a fee for doing what he is not bound to do, if the fee collected is reasonable in view of the principle of the tariff, it cannot be recovered back: MacNamara v. McLay, 8 A. R. 319. A Registrar is within the provision of the Public Authorities Protection Act in respect of an action to recover back fees charged in excess of the tariff; but not in respect of an action for refusing to furnish a statement in detail of the fees charged by him: Ross v. McLay, 40 U. C. R. 83, 87. Nor in action by the municipality for their proportion of fees, though such action is not maintainable until the day fixed by statute for making the return, though the Registrar is out of office: County of Bruce v. McLay, 11 A. R. 477. Fees under the Mechanics' Lien Act: see R. S. O. 1914, ch. 140, sec. 20.

101. Each Registrar is bound to account to the county only after he has first received $1,500 and not before, and this whether there be successive holders during the year or not: Re Ingersoll, 16 O. R. 194. A Registrar dismissed during a year after he has received in fees an amount in excess of that specified in this section is bound to pay over a proportionate amount of such excess, though not in office at the time prescribed for making the return; but an action on the part of the municipality is not maintainable until after the day fixed by statute for sending in the return: Bruce v. McLay, 11 A. R. 477.

103. Damages paid by Registrar for having furnished a defective abstract cannot be deducted by him in ascertaining his net income: Guthrie, 1910, p. 6. The premium on a guarantee bond is a proper disbursement to the office of Registrar within the meaning of this section in ascertaining "net income:" Guthrie, 1910, p. 6. Proper deductions to be made by Registrar in arriving at net income: see Guthrie, 1912, p. 9; and see notes to sec. 7 (1) *ante*.

112.—(*h*) Power of the Inspector to direct the Registrar to amend or correct the abstract index in the case of a deed which is in fact entered in the abstract index, but which is incapable of registration by reason of uncertainty: Guthrie, 1913, No. 3.

116. Armour, Titles, p. 99.

CHAPTER 125.

The Custody of Documents Act.

CHAPTER 126.

The Land Titles Act.

Refer to Thom, The Canadian Torrens System; Coultlee, Manual (Torrens System) of the Law of Registration of Titles in Manitoba, etc.; Jones, Torrens System of Land Transfer; Hogg, The Australian Torrens System; Hunter, Cases upon the Torrens Land and Transfer Acts.

4. Judges of District Courts who are Local Judges of the High Court have no jurisdiction to deal with applications under the Land Titles Act: In re Michell and Pioneer, 31 O. R. 542.

10. See as to rectification of register, sec. 115, *et seq.*, and notes. See also notes to sec. 42. Where patents affected, see note to R. S. O. 1914, ch. 28, sec. 16, See also ch. 56, sec. 16 (*a*), (note 8), Con. Rule 241, (1913) Rule 5 (2) .

14. Cancellation of certificate obtained by fraud: Coventry v. Annable, 1 West W. R. 148, 46 S. C. R. 573. When a certificate can be attacked for fraud: Assets Co. v. Mere Rohi, 1905, A. C. 176. An order barring holders of paper title from bringing "action" for possession will prevent them registering objections to issuance of certificate of title: Re Woodhouse and Christie Brown, 4 O. W. N. 1265, 24 O. W. R. 619, 5 O. W. N. 148, 25 O. W. R. 117. Effect of issue of Land Titles certificate where, by fraudulent transfer by vendor to another, a purchaser has been deprived of his lien: Bucovetsky v. Cook, 1 O. W. N. 998; and see secs. 42 and 115, notes.

18. Construction of this section and section 159: see McLeod v. Dawson, 7 O. W. R. 519, 8 O. W. R. 213; note to sec. 159.

22. Land was devised to a petitioner for life with remainder in fee to her children surviving her. The

petitioner's children conveyed to her, and she applied to be registered with an absolute title. Evidence was adduced that the woman was past childbearing. Held, that the evidence adduced was sufficient proof, and the Master should have acted on it and granted registration: Re G———, 21 O. R. 109. See on some points arising under this section, notes to R. S. O. 1914, ch. 122. (Vendor and Purchasers Act), and R. S. O. 1914, ch. 123. (Quieting Titles Act); also H. & L. notes, pp. 1225-1242.

24.—(1) Where a certificate of title issues to an applicant against whom there are executions, to make the certificate subject to the executions is unauthorized when the debts represented by the executions were incurred prior to the issue of the applicant's patent: Yemen v. Mackenzie, 7 O. W. R. 701.

24.—(1)(*b*) Unity of ownership extinguishes all pre-existing easements, such as a private right of way over one portion of the land for the benefit of another portion. Nothing in this section affects this principle: McClellan v. Powassan Lumber Co., 15 O. L. R. 67, 12 O. W. R. 473, 17 O. L. R. 32.

24.—(1)(*c*) This sub-clause is not intended to apply to an adverse claim to the title founded on rights alleged to have arisen before the land was registered: Farah v. Glen Lake Mining Co., 17 O. L. R. 1.

24.—(1)(*h*) Subject to "public highway:" Larcher v. Sudbury, 4 O. W. N. 1289, 24 O. W. R. 659.

29. Acquisition of title by possession adversely to registered owner: Smith v. National Trust, 45 S. C. R. 618. See Armour on Real Property, pp. 431-2; Titles, p. 295. Consideration of this section in view of the Statute of Limitations: 47 C. L. J. 5.

30.—(3) Power of sale in mortgage and legal considerations governing its exercise: Smith v. National Trust, 45 S. C. R. 618; and see notes to R. S. O. 1914, ch. 112, sec. 19, *et seq.*, and ch. 117. Sched. B., cl. 14.

31. In an action by an assignee of a charge to recover money due under the covenant implied in this section, there being no entry in the register negativing the implication, the defendant in answer to a motion for summary judgment swore that it was clearly understood between him and the original chargees, that the land only should be liable, which evidence was corroborated by one of the original chargees, the plaintiff swearing that he was a *bona fide* purchaser for value without notice. It was held that the defendant should be free to have the matter litigated in the usual way: Wilkes v. Kennedy, 16 P. R. 204. A covenant by a mortgagor to observe all the rules and by-laws of a loan company does not have the effect of incorporating them in the mortgage: Wilkins v. Deans, 6 N. Z. L. R. 425; Re Kelly and Colonial Loan, 3 W. L. R. 62. But where the mortgage is expressed as given as collateral security for a stock subscription: see Lee v. Canadian Mutual, 3 O. L. R. 161. Implied covenant in charge: Beatty v. Bailey, 26 O. L. R. 145.

38. Under the land system of Ontario it is one of the terms of a contract of sale when nothing is said to the contrary that the sale should be completed by a proper conveyance susceptible of registration: Owen v. Mercer, 12 O. L. R. 529. Where a transfer with forfeiture clause in it objectionable to the purchaser was registered without the clause being noticed, on application to the Master of Titles to have it expunged, the Master directed an action to be brought. The conveyance was cancelled and registration vacated: Owen v. Mercer, 12 O. L. R. 529.

42. The effect of a conveyance is to vest in the grantee the absolute property of him or her conveying, free from all rights of anyone else than the grantee, unless otherwise expressed: Fraser v. Douglas, 40 S. C. R. 384, at p. 391. A transferee for valuable consideration has higher rights than are conferred on a first registered owner: Farah v. Glen Lake Mining Co., 17 O. L. R. 1. For the question of the invasion by the Torrens Title system of a husband's rights at common law in his wife's estate: see Re Wildash and Hutchison, 5 Queens. S. C. Rep. 46; Grimish v. Scott, 4 Queens. L. J. Rep. 57; Fraser v.

Douglas, 40 S. C. R. 384. What, if any, effect is given to the common law, notwithstanding the change in the mode of conveyance effected under this Act: see Le Syndicat Lyonnais du Klondyke v. McGrade, 36 S. C. R. 251. Where land is transferred by a forged deed, under the Registry Act, this would form an incurable defect in title, and the status of a subsequent grantee as a *bona fide* purchaser for value would not avail him, because it would rest on a void instrument, which would not carry the title out of the owner's reach: In re Cooper, Cooper v. Visey, 1881, 20 Ch. D. 611; but, under the Land Titles Act, this otherwise fatal defect would seem to be cured in the hands of an honest holder for value: Gibbs v. Messer, 1891, A. C. 248. This may give rise to a claim under sec. 124: Fawkes v. Atty. Gen., 6 O. L. R. 490; and see also sec. 121, and notes. A *bona fide* purchaser for value of land from patentees is absolutely protected by virtue of his certificate of title from any claim or rights of persons holding an unpatented mining claim filed with the mining recorded in respect of a discovery duly inspected and passed: Farah v. Bailey, 10 O. W. R. 252. Unity of ownership extinguishes all pre-existing easements, such as a private right of way over one part of the land for the accommodation of the other. Nothing in this section affects this general principle: McClellan v. Powassan Lumber Co., 17 O. L. R. 32, 15 O. L. R. 67, 12 O. W. R. 473. Filing of a counterclaim in an action in which the title to the lands is brought in question, is not notice to a transferee who at the time of the transfer was not a party to the action, no caution having been registered: Farah v. Glen Lake Mining Co., 17 O. L. R. 1. Jurisdiction of Court to open up foreclosure, notwithstanding the issue of a certificate of title upon the same grounds as in the case of an ordinary mortgage: Williams v. Box, 44 S. C. R. 1. To ascertain what is included in sub-sec. (*b*), resort is to be had to sec. 24: Farah v. Glen Lake Mining Co., 17 O. L. R. 1. Construction of deed in accordance with the intention of the parties: Re Casci and Hill, 1 O. W. N. 1083. See secs. 10, 14, 115, and notes.

47. See R. S. O. 1914, ch. 70, sec. 10, and notes.

62. Renewal of writ: right of execution creditor to be notified of confirmation of tax sale: Re Town of Prince Albert, 4 Terr. L. R. 510. Renewal of writ: expiry: Re Blanchard Estate, 5 Terr. L. R. 240.

66. Certificate of title to purchaser at Tax Sale where land was subject to mechanic's lien: Re Clendenan, 2 O. W. N. 750, 18 O. W. R. 666. Tax sale: right of execution creditor to be notified: Re Town of Prince Albert, 4 Terr. L. R. 510. Tax sale transfer: non-prosecution of appeal: In re Donnelly, 5 Terr. L. R. 270, 6 Terr. L. R. 1.

72. Having regard to the provisions of this Act respecting cautions, especially secs. 73, 78, 82, 88 and 140, and the provisions in the L. T. Rules for taking evidence *viva voce* or by affidavit, the Act contemplates that questions which arise in its administration are to be dealt with as the Act provides. A caution is not entitled to register his caution, issue a writ and on proof thereof rest his case, and stay the action of the Master until the disposition of his action. He should proceed with his claim before the Master and obtain, if he may, a direction to have the disputed question tried by action or issue: Re Herbert and O'Brien, 9 O. W. R. 172. The provision permitting registration of cautions applies to "any person interested in any way" in the lands. As the Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for and receive a conveyance is an "interest" within the scope of the statute, and an appointee or nominee in writing of the purchaser of an interest has a *locus standi* as a caution, and where such an appointee registered a caution as "owner," and his claim was substantial, his caution was supportable against any objection in point of form under sec. 142. Re Claystone and Hammond, 28 O. R. 409. A caution was registered against dealings by the registered owner, the cautioner alleging that the registered owner held as trustee for another against whose lands the cautioner had an execution. An action had been brought for a declaration to that effect. The Master of Titles made an order that an entry of the cessation of the caution should be made upon the registered owner giving security for the amount claimed

by the cautioner: that payment should be made according to the result of the pending action, and that until such entry the caution should continue to have effect. It was held that the scheme of the Act contemplates such a course of procedure, although not specifically provided for, and that the order made was the simplest and most effective that could be made: Re Macdonald and Sullivan, 14 P. R. 60. As to effect on title of a caution: see Atty. Gen. v. Hargrave, 11 O. L. R. 530, 8 O. W. R. 127, 10 O. W. R. 319 (C.A.), note to sec. 86. See also as to *lis pendens* and notice: McGrade v. Syndicat Lyonnais du Klondyke, 36 S. C. R. 251; Assets Co. v. Mere Rohi, 21 Times L. R. 311; 1905, A. C. 176. Where notice is served on the cautioner, the Master is not to try out the rights between the parties, but merely to satisfy himself that a *bona fide* claim has been sworn to for registration: see Rule 22: Re Kay and White Silver Co., 9 O. W. R. 712, 10 O. W. R. 10. The cautioner may have a valid claim for compensation and yet have no right to tie up lands: Re Kay and White Silver Co., 9 O. W. R. 712, 10 O. W. R. 10. An agent claiming commission on the sale of lands is not a person interested, and not entitled to register a caution: Re Kay and White Silver Co., 9 O. W. R. 712, 10 O. W. R. 10. Where a caution was registered by the owner and his wife, pending a transfer from husband and wife, an unregistered mortgagee has no status to apply to discharge it (see Rule 22), and the Master has not authority to deal with the merits of the case so as to decide that the mortgage in question is void against the owner's wife, as executed without independent advice and without consideration: Yemen v. Mackenzie, 7 O. W. R. 701, 866. Where a caution has been registered and the owner applies for the cesser of the caution, the Master of Titles has jurisdiction to refuse to vacate it: (see sec. 78, *infra*), and it is proper to allow the caution to stand, pending diligent prosecution of the action, without requiring security: Re Skill and Thompson, 12 O. W. R. 361, 17 O. L. R. 186. Even if the Master were to order a cesser of the caution, in such a case another might be at once lodged under sec. 86: Re Skill and Thompson, 12 O. W. R. 361, 17 O. L.

R. 186. Whatever dealing gives a valid claim to call for or receive a conveyance of land is an interest within the scope of the statute: Re Claystone and Hammond, 28 O. R. 409. The plaintiff in an action against the owner for specific performance of an agreement to sell is a competent cautioner: Re Skill and Thompson, 12 O. W. R. 361, 17 O. L. R. 186. The direction as to stating the name of the applicant for a caveat is not imperative, and where the name was illegibly written so as to be misread by the Registrar, it was held only an irregularity, and the caveat not void on account of it: McKay v. Nanton, 7 Man. L. R. 250. The statute requires that a place be named at which notices may be served, and this direction is imperative: McKay v. Nanton, 7 Man. L. R. 250; McArthur v. Glass, 6 Man. L. R. 224. Caveat as notice: see N. W. Construction Co. v. Valle, 4 W. L. R. 37. Effect of caution or caveat: Alexander v. McKillop, 45 S. C. R. 551. Caveats and caveatable interests: 7 D. L. R. 675.

75. Refusal to order security pending diligent prosecution of action under caution: Re Skill and Thompson, 12 O. W. R. 361, 17 O. L. R. 186, note to sec. 72, *ante*.

81. See notes to secs. 72, 82, 85.

82. A *bona fide* purchaser for value from the registered owner of land subject to the operation of the statute is not bound or affected by notice of litispendence, which has been improperly filed and noted on the folio of the register containing the certificate of title as an incumbrance or charge on the land: McGrade v. Le Syndicat Lyonnais du Klondyke, 36 S. C. R. 251 The bringing of an action is enough to found a caution, and on a motion to vacate the caution the merits will not be gone into: Skill v. Thompson, 17 O. L. R. 186; Brown v. Clendennan, 2 O. W. N. 1013, 19 O. W. R. 19. See notes to sec. 72, *ante*.

85. No proceedings have been taken under this section: Atty. Gen. v. Hargrave, 11 O. L. R. 530, at p. 533. The claim for damages or compensation by reason

of lodging a caution without reasonable cause is a matter of distinct claim, and, as against the Crown, where the Attorney General lodged the caution, matter proper for petition of right, and therefore not proper to be set up by way of counterclaim: see Con. Rule 923; (1913), Rule 739: Atty.-Gen. v. Hargrave, 11 O. L. R. 530, 8 O. W. R. 127, 10 O. W. R. 319 (C.A.) As to other plaintiff, other than the Crown: see Con. Rule 251; (1913), Rule 115.

86. A caution amounts to no more than the notice of an adverse claim equivalent to a *lis pendens*, and expires by lapse of time or otherwise, as may be directed by the Court. It does not form a blot on the title, and no pleading is necessary in order to have it vacated: Atty. Gen. v. Hargrave, 11 O. L. R. 530, 8 O. W. R. 127, 10 O. W. R. 319 (C.A.) See McGrade v. Syndicat Lyonnais du Klondyke, 36 S. C. R. 251; Assets Co. v. Mere Rohi, 21 Times L. R. 311 (1905) A. C. 176.

87.—(1) A Local Master of Titles has power under secs. 87 and 150, in ordering that a caution be vacated to direct payment by the cautioner of costs as between solicitor and client and by Rule 18, has power to give a special direction that costs as of a Court motion may be taxed. And where a Master in his discretion so ordered, a Judge in chambers refused to interfere: Re Ross and Stobie, 14 P. R. 241.

87.—(4) A person entitled to payment of costs under an order of the Master of Titles under sec. 87, can have execution issued by the proper officer upon the order and certificate of the Master without any order of the High Court directing or permitting it, but the words of the section do not include that mode of enforcing payment by way of a receiver called "equitable execution," and even if an application to the Court were necessary in order to have "execution issued," these words would not include the appointment of a receiver: Re Craig and Leslie, 18 P. R. 270.

88. In a case under the West Australian Act, it was held that the Commissioner is not bound to register title merely by reason of the issue of the prescribed

notices and the non-appearance of a caveat. Such notices may produce information and the Commissioner in consequence thereof or of reconsideration has a discretion to refuse to register subject to the opinion of the Supreme Court: Manning v. Commissioner of Titles: 15 App. Cas. 195, 59 L. J. P. C. 59. Security for costs on issue directed to be tried: Boyle v. McCabe, 19 O. W. R. 449, 540, 2 O. W. N. 1248, 1293, 24 O. L. R. 313. *Ex parte* application, special case: Re Hewitt, 3 O. W. N. 902.

94. Where a mining lease was cancelled on account of untrue affidavit of discovery, the protection afforded by the Land Titles Act was held not to apply as against the Crown: A. G. Ontario v. Hargrave, 8 O. W. R. 127; 10 O. W. R. 319; 11 O. L. R. 530; 10 O. W. R. 319.

95. Where in a marriage settlement in England a wife covenanted to settle her after acquired property on the trustees of the settlement and she subsequently acquired lands in Jersey where, under the system of land transfer, no entry of trust can be made on the register, it was held that such lands were not caught by the covenant because they could not be vested in the trustees as trustees: Re Pearse, Pearse v. Pearse, 1909, 1 Ch. 304. See also McLeod v. Dawson, 7 O. W. R. 519, 8 O. W. R. 213, note to sec. 159.

99. Notice to interested parties required on motion to discharge building condition: Re Baillie, 2 O. W. N. 816, 18 O. W. R. 642.

102. Seal on land titles charge: effect on covenant: section considered: Beatty v. Bailey, 3 O. W. N. 990, 21 O. W. R. 848, 26 O. L. R. 145.

105. What roads must be shewn: Laicher v. Sudbury, 4 O. W. N 1289, 24 O. W. R. 659.

109. The City and Suburbs Plans Act, R. S. O. 1914. ch. 194, has no retroactive effect: Toronto v. Hill, 24 O. W. R. 388, 4 O. W. N. 1076. Road less than 66 feet wide: Laicher v. Sudbury, 4 O. W. N. 1289, 24

O. W. R. 659; see now R. S. O. 1914, ch. 192, sec. 479. See also R. S. O. 1914, ch. 194, ch. 166, sec. 44, and ch. 124, sec. 81 (14), (16), (18), 86 notes.

110. All persons who buy lots according to a registered plan do not become *ipso facto* " parties concerned " in every street shewn on it. Whether they are " concerned " or not is a question of fact: In re McIlmurray and Jenkins, 22 A. R. 398. Where a space is left vacant on a plan and not marked as a lot or a road or a lane, the owner may utilize it as he pleases: Re Scottish Ontario Inv. Co., and Bayley, 12 O. W. R. 130. Streets to which the statute refers and streets which must be closed by proceedings under the Municipal Act: Re Toronto Plan, M 188, 4 O. W. N. 662, 28 O. L. R. 41. Allowance for roads laid out by private owners are highways: see R. S. O. 1914, ch. 166, sec. 44; ownership of same when closed: see sub-sec. 6 *et seq.;* and see R. S. O. 1914, ch. 192, sec. 433.

115. Issue of certificate with knowledge by the applicants of unregistered rights. Rectification of the register: Loke Yew v. Port Swettenham Rubber Co., 1913, A. C. 491. Fraudulent transfer by vendor to another, depriving purchaser of lien. Effect of issue of Land Titles certificate: Bucovetsky v. Cook, 1 O. W. N. 998. In a proper case where a patent from the Crown has misdescribed lands, the register can be rectified: Zock v. Clayton, 28 O. L. R. 447. When a certificate of title can be attacked; fraud: see Assets Co. v. Mere Roihi, 1905, A. C. 176; see also Owen v. Mercier, 12 O. L. R. 529, note to sec. 38 *ante.* As to cancellation of certificate in certain cases: see notes to sec. 10 and 14 *ante.*

120. As to cancellation of patents: see R. S. O. 1914, ch. 28, secs. 16, 19 *et seq.*, H. & L. notes, pp. 24-25; Con. Rule 241 (1913) Rule 5 (2). See also sec. 10 *ante,* note.

121. The Privy Council on an appeal under the New Zealand Act of 1885, and which is substantially the same as The Land Titles Act, 57 and 58 Vic., ch. 28 D, and this Act, expressed themselves thus: " By

fraud in those Acts was meant actual fraud, i.e., dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flowed from fraud. Further it appeared to their Lordships that the fraud which must be proved to invalidate the title of a registered purchaser for value, whether he bought from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title was impeached or to his agents. Fraud by persons from whom he claimed did not affect him unless knowledge of it was brought home to him or his agents. The mere fact that he might have found out the fraud if he had been more vigilant or if he had made further enquiries which he omitted to make, did not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused and he abstained from making enquiries for fear of learning the truth, the case was different and fraud might properly be ascribed to him. A person who presented for registration a document which was forged or which had been fraudulently or improperly obtained, was not guilty of fraud if he honestly believed it to be a genuine document which could properly be acted on. In dealing with colonial titles depending on the system of registration which they had adopted, it was most important that the foregoing principles should be borne in mind, for if they were lost sight of, that system would be rendered unworkable:" The Assets Company v. Mere Roihi, 21 Times L. R. 311, 1905, A. C. 176. The principles laid down in: The Assets Company v. Mere Roihi, 1905, A. C. 176, were approved: McGrade v. Le Syndicat Lyonnais due Klondyke, 36 S. C. R. 251. " The Land Titles Act is not an Act to abolish the law of real property, it is no part of its purpose to protect a registered owner against his own obligations, much less against his own fraud:" per Meredith, J.A., re Skill and Thompson, 17 O. L. R. 186, 12 O. W. R. 361; see also Fawkes v. A. G., 6 O. L. R. 490, note to sec. 123 *infra*. Purchaser for value without notice: see notes to

secs. 42 and 124; and also to R. S. O. 1914, ch. 124, sec. 71.

123. A transfer of charge was forged. The transferee acted *bona fide*, but after the owner of the charge had secured rectification of the register, the transferee of the charge under the forged transfer was held not entitled to indemnity, as by bringing in the transfer and requesting registration of it, he affirmed and warranted that it was genuine. Further he could not shew any beneficial interest in the charge and had not suffered loss by the rectification of the register: A. G. v. Odell, 1906, 2 Ch. 47; see also Sheffield Corporation v. Barclay, 1905, A. C. 392. A "disposition" (sec. 121), which if properly attacked would be fraudulent and void, is not a "deprivation," (sec. 123): Fawkes v. A. G., 6 O. L. R. 490.

124. Land was conveyed to trustees in trust for a married woman, giving them the legal fee simple ancillary to the equitable fee simple vested in the woman and securing her the enjoyment of the property during her life and the power of disposing of it after her death. Subsequent to the deed to the trustees a mortgage was made and a marriage settlement on the woman's second marriage, upon trusts ultimately for the children of the second marriage. The husband and wife, the trustees and mortgagee conveyed to a purchaser in fee simple and afterwards a certificate issued to the purchaser. At the suit of a child of the second marriage, the certificate was held wrongly issued as the interests of those entitled in remainder under the settlement were unaffected by the conveyance and his title only commenced on his father's death in 1903, when the trust for sale in the settlement came into operation, and he was not disqualified from recovering damages under the West Australian Statute: Spencer v. Registrar of Titles, 1906, A. C. 503, 75 L. J. P. C. 100. Plaintiff A. being the owner of land registered under this Act was induced by the fraud of B. and C. to transfer her land to D. Subsequently a transfer purporting to be from D. to E. was registered, but D.'s signature was forged. E. then transferred to F. and F. to

G., both being parties to the fraud with B. and C., G. then transferred to H., an innocent purchaser for value without notice. All transfers were duly registered and none of the parties to the fraud being financially responsible, an action was brought by A. for compensation out of the Assurance Fund. It was held that A. had not been "wrongfully deprived" under this section and that she could not recover: Fawkes v. A. G., 6 O. L. R. 490. Comment on wording of section: see Fawkes v. A. G., 6 O. L. R. 490, at p. 492. The governing words of the section are "wrongful deprivation," importing some wrongful action *in invitum*, some transaction *ex parte* or behind the back of the true owner or wherein his existence is concealed, whereby he being in ignorance of what is going on, is deprived of his property: Fawkes v. A. G., 6 O. L. R. 490. The Land Titles System protects those who derive a registered *bona fide* title from a registered owner. Accordingly they need not investigate the title of such owner and are not affected by its infirmities: Gibbs v. Messer, 1891, A. C. 248. As to position of *bona fide* purchaser for value under a forged deed under the Registry Act: see Re Cooper, Cooper v. Vesey, 20 Ch. D. 611, note to R. S. O. 1914, ch. 124, sec. 71; also notes to secs. 42 and 121, *ante*.

140. Appeal regarding right to register objection to issue of certificate of title: Re Woodhouse and Christie Brown, 4 O. W. N. 1265, 5 O. W. N. 148, 24 O. W. R. 619, 25 O. W. R. 117.

142. Where an appointee of a purchaser under contract of sale registered a caution as "owner" this section covered the defect of form: Re Clagstone and Hammond, 28 O. R. 409.

150. See Re Ross and Stabie, 14 P. R. 241, note to sec. 87 *ante*.

159. "This section should be read in connection with sec.18 and has a material bearing in modifying its provisions as applicable to letters patent from the Crown demising land or mining rights in the District of Nipissing. This section puts Crown demises of this kind apparently on the same footing as

letters patent granting the land in fee in certain districts—Nipissing among others. And it seems that sec. 18 is intended to apply to leases and leasehold interests created after the issue of letters patent from the Crown. The rights that are reserved by that section are in respect of the person who becomes the first registered owner of leasehold land. As against him, where he is not entitled for his own benefit, the registration as first registered owner does not make him the owner or cut out the unregistered estates, rights, interests and equities of persons who are entitled to the land registered. But this does not, at all events in the case of land or mining rights in the District of Nipissing, demised by letters patent from the Crown, affect the rights of a registered owner to deal with third persons or the right of third persons to deal with them in the absence of a caution or unless in case of fraud. The provisions of secs. 96 *et seq.*, indicate the intention of the Act to permit registered owners to deal with lands, and third persons to deal with them in respect of lands, although it appear that the registered owner is a trustee, and it could scarcely have been intended that a purchaser of leasehold lands under sec. 18 was to be obliged to take the lands subject to unregistered estates, rights, interests, or equities, even though he had no notice of the existence of any. The effect would be that no person could safely deal with a registered owner lest claims, the existence of which there were no means of ascertaining, should be set up:" McLeod v. Dawson, 7 O. W. R. 519, 8 O. W. R. 213. Title of first patentee. Stay of Master's proceedings on certificate of Minister of Lands: Zock v. Clayton, 3 O. W. N. 1611, 4. O. W. N. 1047, 22 O. W. R. 813, 28 O. L. R. 447.

CHAPTER 127.

The Ferries Act.

2. As to the respective rights of the Dominion of Canada and the Provinces in respect to Ferries: see B. N. A. Act, secs. 91 (13), 108, 109, 117. The right to create and license a ferry is a franchise or liberty, a species of incorporeal right or hereditament and a branch of Royal Prerogative: Stephens' Commentaries, Vol. 1, p. 608; see also Enc. Laws of England, Article "Ferry." In the B. N. A. Act, sec. 91 (13), exclusive legislative authority is given to the Dominion over "ferries between a province and any British or foreign country, or between two provinces," but it is now well established that exclusive right of jurisdiction over a particular class of matters does not necessarily carry with it any right of ownership in them: Atty. Gen. for Canada v. Atty. Gen. for Ontario, 1898, A. C. 700; see also B. N. A. Act, secs. 102, 108, 109, 117. As to the question of "Royalties": see Atty. Gen. for Ontario v. Mercer, 1883, 8 App. Cas. 767, at p. 778; Atty. Gen. for British Columbia v. Atty. Gen. for Canada, 1889, 14 App. Cas. 295, at p. 304. The right to create and license a ferry as one of the "*jura regalia*" which remained with the Province at Confederation notwithstanding B. N. A. Act, 91 (13). The Dominion has undoubted right to make laws or rules with regard to ferries for the purpose of regulating them, but a lease of a ferry granted by the Dominion is invalid: Perry v. Clergue, 5. O. L. R. 357. The grant of a license for a ferry to the Town of Belleville to ferry "between the town of Belleville to Ameliasburg," was held a sufficient grant of a right of ferriage to and from the two places named: Anderson v. Jellatt, 9 S. C. R. 1. Revocation of right of ferry: R. v. Davenport, 16 U. C. R. 411. Informal authority: Jones v. Fraser, 6 O. S. 426: see generally, Dig. Ont. Case Law, Title "Ferry," cols. 2787-2790. Constitutional question: see Dig. Ont. Case Law, cols. 1173-1181.

4. Termini defined by user: see Anderson v. Jellett, 27 Gr. 411, 7 A. R. 341, 9 S. C. R. 1.

5. Municipal liability in managing ferries: City of St. John v. Macdonald, 14 S. C. R. 1.

8. Using boat within ferry limits: Ives v. Calvin, 3 U. C. R. 464.

9. Action for disturbance: see Burford v. Oliver, Dra. 9; Jones v. Fraser, 6 O. S. 426; see also Dinner v. Humberstone, 26 S. C. R. 252.

CHAPTER 128.

The Millers' Act.

CHAPTER 129.

The Water Privileges Act.

1. Operation of this Act: see Cain v. Pearce Co., 1 O. W. N. 1133, 2 O. W. N. 887, 3 O. W. N. 1321; Neely v. Peter, 4 O. L. R. 293.

17. See Judicature Act, R. S. O. 1914, ch. 56, sec. 27 (2*r*).

CHAPTER 130.

The Rivers and Streams Act.

3. This section, commonly known as the Rivers and Streams Bill (47 Vic., ch. 17), was passed in consequence of the decision of the Supreme Court in McLaren v. Caldwell, 1882, 8 S. C. R. 435, as to the effect of R. S. O. 1877, ch. 115, sec. 1. By this enactment express power to remove obstructions from the stream was for the first time conferred upon persons using it for floating sawlogs, timber, rafts and crafts, though no doubt before then it had been assumed by the legislature that the rights conferred by sec. 5 of 12 Vic., ch. 87 (afterwards C. S. U. C., ch. 48, secs. 15 and 16, and R. S. O. 1877, ch. 115, secs. 1 and 2), carried with it the right to do so. The right to float timber and logs down stream conferred by this section is not limited to such streams as in their natural state without improvements, during freshets, permit logs to be floated, but extends without compensation to the user of all improvements upon such streams, even where such streams have been rendered floatable thereby. Such right is only conferred during freshets. *Quære* as to rights at other seasons of the year: Caldwell v. McLaren, 6 A. R. 456, 9 App. Cas. 392. The defendants in driving logs down stream made use of the plaintiff's improvements. In an action for tolls it was held, following Caldwell v. McLaren, 9 App. Cas. 352, that as to slides and improvements in the bed of the stream the plaintiff could not recover, but as to all such improvements outside the channel and upon the plaintiff's land, a recovery was proper. The absence of statutable aprons on the plaintiff's dams gave the defendants no right to use without compensation the plaintiff's improvements not in the bed of the stream: Mackay v. Sherman, 8 O. R. 28. Placing a dam on a river or stream by which the supply of water therein is diminished so as to interfere with the passage of logs is an obstruction under this Act: Farquharson v. Imperial Oil Co., 29 O. R. 206, 30 S. C. R. 188.

History of the section: Ib., pp. 214-217 "Whatever my own view may be as to the proper construction (of this section), unless the case is on the facts brought within the provisions of sec. 4, I am bound by the decision in Farquharson v. Imperial Oil Co., to hold that the right of the defendants to float their logs and timber down the stream across which the plaintiff's dam was erected was paramount to that of the plaintiff, and that the plaintiff's dam not being provided with the apron or slide required by law, the dam constituted an obstruction of the defendants' legal right and that the statute gave to the defendants a further remedy in addition to the recovery of the damage sustained by them owing to the obstruction, which enabled them to abate the nuisance by the removal of the obstruction": Meredith, C.J., James v. Rathbun Co., 11 O. L. R. 271; see also Little v. Ince, 3 C. P. 528, note to 21 *infra*. This section places the public advantage of allowing lumbermen to use the rivers and streams as highways for carrying logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so: Neely v. Peter, 4 O. L. R. 293. The rights given to persons desiring to float their own timber down a stream should not be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; this view is strengthened by R. S. O. 1897, ch. 194, sec. 15 (R. S. O. 1914, ch. 181, sec. 15); Neely v. Peter, 4 O. L. R. 293. Dam resulting in flooding lands: Cain v. Pearce Co. Ltd., 16 O. W. R. 846, 18 O. W. R. 595, 19 O. W. R. 904, 22 O. W. R. 174, 1 O. W. N. 1133, 2 O W. N. 887, 1496, 1498, 3 O. W. N. 1321. Flooding neighbours' lands: Doolittle v. Orillia, 2 O. W. N. 896. Although the public may have in a river an easement or right to float rafts or logs down and a right of passage up and down wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the rights of the owners of property opposite their respective lands *ad medium filum aquæ*: R. v. Robertson, 6 S. C. R. 52: see further, Dig. Ont. Case Law, cols. 7310-7314.

6. A fisherman lived on a small farm fronting on a navigable stream flowing into Lake Superior and about three miles from that lake. He used to go in his sailboat to Sault Ste. Marie and was also employed by his neighbours to bring in his sailboat supplies and provisions. He also used other boats for fishing. The defendants brought large quantities of lumber down the stream and kept it in booms at the mouth, so that all summer access to the stream by boat was cut off. It was held that the plaintiff had sufficient special interest to enable him to maintain an action for damages: Drake v. Sault Ste. Marie, 25 A. R. 251. Pollution of stream: Hunter v. Richards, 18 O. W. N. 813, 2 O. W. N. 855, 22 O. W. R. 408, 3 O. W. N. 1432, 26 O. L. R. 458.

11. It is only when improvements in a stream are made for the express purpose of facilitating the floating of sawlogs, lumber and timber that tolls can be charged. A mill dam is not such an improvement: Re Little Bob River Dam, 23 A. R. 177. This section confers exclusive jurisdiction to fix tolls, etc., on the different tribunals mentioned in it. It is incumbent on any persons seeking to levy such tolls to produce as a condition precedent to recovery, an order or judgment by one of such tribunals fixing them: Beck v. Ontario Lumber Co., 10 O. L. R. 193, 12 O. L. R. 163, 8 O. W. R. 35. It seems that after the tolls are fixed, an action will lie for them, the parties not being confined to the remedy for distress under sec. 13: Beck v. Ontario Lumber Co., 10 O. L. R. 193, 12 O. L. R. 163, 8 O. W. R. 35. On an application for a writ of mandamus to compel the Judge to make an order fixing tolls under this section, it was held that such an order had effect only in case of logs floated down the river or stream after it was made: Beck Manufacturing Co. v. Valin, 9 O. W. R. 99, 193, 10 O. W. R. 711, 16 O. L. R. 21, 40 S. C. R. 523, and see note to sec. 12. Tolls under R. S. O. 1897, ch. 194: Pigeon River Lumber Co. v. Mooring, 13 O. W. R. 190, 14 O. W. R. 639.

12. As to whether a mandamus can issue, in view of the appeal given by this section, to compel a Judge

to make an order under sec. 11: see Beck Manufacturing Co. v. Valin, 9 O. W. R. 99, 193, 10 O. W. R. 711, 16 O. L. R. 21, 40 S. C. R. 523.

15. See Judicature Act, R. S. O. 1914, ch. 56, sec. 26 (2s).

13. See Beck v. Ontario Lumber Co., 10 O. L. R. 193, 12 O. L. R. 163, 8 O. W. R. 35, 40 S. C. R. 523 *ante*.

21. An action will lie against a mill owner for neglecting to make an apron, etc., in his mill dam, thus obstructing the descent of sawlogs to the special damage of a particular individual. Persons owning logs so obstructed may summarily remove the obstruction so far as necessary to enable them to enjoy their right: Little v. Ince, 3 C. P. 528; see also James v. Rathbun, 11 O. L. R. 271. It is only when improvements are made for the express purpose of facilitating the floating of sawlogs, etc., that tolls can be charged under sec. 11. A mill dam is not such an improvement, and the right of the lumberman under this Act to float logs, etc., over it is unaffected by that Act: Re Little Bob River Dam, 23 A. R. 177; see notes to sec. 3 *ante*, and particularly: Farquharson v. Imperial Oil Co., 29 O. R. 206, 30 S. C. R. 188; James v. Rathbun Co., 11 O. L. R. 271; Neely v. Peter, 4 O. L. R. 293; see also Dig. Ont. Case Law, cols. 7310-7314.

22. Up to the time of a spring freshet in 1904 a dam was provided with a slide in conformity with this section and was in good repair. The slide was partly carried away by that freshet. The evidence shewed that the owner could not have guarded against the injury which was the result of *vis major* and that it was not practicable for him to repair it before the defendants' logs came down the stream. The sluice-way did not then constitute a convenient passage for the defendants' logs. It was held that the defendants were in law justified in blowing up the slide and part of the dam to remove the obstruction offered to the passage of the drive: James v. Rathbun Co., 11 O. L. R. 271.

26. In an action by the owner of land on a river for damage by flooding, it was held that there is nothing in the Timber Slide Companies' Act, R. S. O.

1914, ch. 181, under which the defendants were incorporated, which confers on them the right of flooding property unless they shall have taken the steps authorized by the Act for expropriating or for settling compensation for flooding; nor were they assisted by the provisions of this Act, for even if the dam were erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence: Neely v. Peter, 4 O. L. R. 293. See R. S. O. 1914, ch. 181, sec. 27, and notes.

CHAPTER 131.

The Saw Logs Driving Act.

3. When logs being floated down stream are unreasonably detained by others being massed in front of them the owner is entitled to an arbitration under this Act to determine the amount of his damages for such detention, and is not restricted to his remedy under this section: Cockburn v. Imperial Lumber Co., 26 A. R. 19, 30 S. C. R. 80. A fisherman living on a small farm fronting on a river about 3 miles from its mouth, used a sailboat to go to the lake and to a nearby town, and was also employed by neighbours to bring them supplies in his sailboat. The defendants brought logs down the river in large quantities and kept booms at its mouth all summer so that the fisherman's access to the stream was cut off. It was held that he had sufficient special interest to enable him to maintain an action for damages: Drake v. Sault Ste. Marie, 25 A. R. 251; see also Crandell v. Mooney, 23 C. P. 212. Rights under this Act: Pigeon River v. Mooring, 14 O. W. R. 639. A local legislature may incorporate a boom company but cannot give it power to obstruct a tidal navigable river: Queddy River v. Davidson, 10 S. C. R. 222, 3 Cart. 243; but see McMillan v. Southwest Boom Co., 1 Pugs. and Burb. 715, 2 Cart 542; In re Provincial Fisheries, 26 S. C. R. 444; Atty. Gen. for Canada v. Atty. Gen. for Ontario, 1898, A. C. 700.

13. In line 6, for " detain " read " detained:" 4 Geo. V. ch. 2 Schedule (25).

16. See Cockburn v. Imperial Lumber Co., 26 A. R. 19, 30 S. C. R. 80, note to sec. 3. As to whether this section ousts jurisdiction of Division Courts to award damages independent of the Statute: see Re Boyd and Sergeant, 10 O. L. R. 377, 521; and see Re Long Point and Anderson, 18 A. R. 401, 408.

18. Objections to arbitrator: Plaunt v. Gillies Bros, 3 O. W. N. 921, 21 O. W. R. 509.

CHAPTER 132.

The Definition of Time Act.

2. See R. S. O. 1914, ch. 1, secs. 28 (k), 29 (e), (u), and (ii); Con. Rules 9, 342, H. & L. notes, pp. 550-551; 1913 Rule 172, *et seq.*; see also Armour, R. P., pp. 139-140.

CHAPTER 133.

The Mercantile Law Amendment Act.

Refer to Bicknell and Kappele Practical Statutes, pp. 437-438; Anger, Digest of Canadian Mercantile Laws; Smith's Mercantile Law; Blackburn on Sale; Scrutton on Charter Parties and Bills of Lading.

2.—(*a*) Bill of lading: At common law the property in the goods could be transferred by indorsement of the bill of lading, but the contract created by the bill of lading could not, and the endorsee could not sue in his own name: Thompson v. Dowing, 14 M. & W. 403. For decisions on Bills of Lading see Lickbarrow v. Mason, 1 Sm. Lead. Cas. 737. See as to how long the voyage is deemed to continue and the bill of lading kept alive, and also as to rights *inter se* of two or more *bona fide* transferees for value:

Barber v. Meyerstein, L. R. 4 H. L. 317. To whom custodian of goods may safely deliver them: Glynn Mills and Co. v. East & West India Docks (1882), 7 App. Cas. 591. A contract to deliver a bill of lading is complied with by delivering one "part": Saunders v. Maclean, 11 Q. B. D. 327. Except for the purposes of R. S. O. 1914, ch. 137 and of defeating the right of stoppage *in transitu*, the transferee of a bill of lading acquires no better title to the goods than the transferor had: Gurney v. Behrend, 3 E. & B. 622. As to fraud: see, The Argentina, L. R. 1 Adm. 370. Stoppage *in transitu* is wholly defeated when the bill of lading is assigned absolutely for a consideration fully paid: Lickbarrow v. Mason, 1 Sm. Lead Cas. 737; Leask v. Scott, 2 Q. B. D. 376. Where consideration partly paid: Ex p. Golding Davis & Co., 13 Ch. D. 628; Ex p. Falk, 14 Ch. D. 446; Kemp v. Falk (1882), 7 App. Cas. 573; see also Sale of Goods Act (Imp.) 1893, secs. 47, 48: see note to R. S. O. 1914, ch. 137, secs. 2 (1*a*), (2), and 9.

2.—(*b*) "Goods, wares and merchandise" does not include debts: Rennie v. Quebec Bank, 3 O. L. R. 541. The definition probably incorporates the decisions on the meaning of "goods, wares and merchandise" under the 17th section of the Statute of Frauds. See R. S. O. 1914, ch. 137, sec. 2 (1*b*).

2.—(*c*) Warehouse receipts: see R. S. C. ch. 29, sec. 86; Peuchen v. Imperial Bank, 10 O. R. 325. Bought and sold notes for flour: Brunskill v. Chumasero, 5 U. C. R. 474. Stamping logs: King v. Dupuis, 28 S. C. R. 388. Description of goods in warehouse receipt: Bank of Hamilton v. Noye Mfg. Co., 9 O. R. 638; Llado v. Morgan, 23 C. P. 517.

3. Cp. Imperial Statute 19 and 20 Vic., ch. 97, sec. 5, (1856). Upon payment of the debt the surety has the same rights as those possessed by the creditor to whom he has paid the obligation and is entitled to have placed in his hands all securities given by the principal debtor to the creditor: Burnham v. Peterborough, 8 Gr. 366; Trerice v. Burkett, 1 O. R. 80. See also Duncan, Fox & Co. v. N. & S. Wales Bank, L. R. 6 A. C. 1. Position of creditor of a firm where

one partner retires and his duty (if any) to preserve collateral security taken for the debt for the benefit of the remaining partners: Allison v. McDonald, 23 O. R. 288, 20 A. R. 695, 23 S. C. R. 635. A partner paying off a judgment against the firm is entitled to stand in the place of the original judgment creditor and enforce the judgment as to one half against his co-partner. The Act applies to the case of partners: Honsberger v. Love, 16 O. R. 170. Right of a partner paying a judgment against a firm to enforce it for his own benefit: London Canadian v. Murphy, 14 A. R. 577; Scripture v. Gordon, 7 P. R. 164; Potts v. Leash, 36 U. C. R. 476; Small v. Riddell, 31 C. P. 373. In Honsberger v. Love, 16 O. R. 170, the Court followed the remarks of the Court of Appeal in London Canadian v. Murphy, 14 A. R. 577, and did not follow Scripture v. Gordon, 7 P. R. 164; Potts v. Leash, 36 U. C. R. 476; and Small v. Riddell, 31 C. P. 373.

The surety is entitled to all securities held by the creditor, including the judgment, although obtained in the same action. The judgment may be enforced without obtaining an assignment of it: Re McMyn, Lightbourn v. McMyn, 33 Ch. D. 575. A surety is entitled to his interest: Petre v. Duncombe, 2 L. M. & P. 107. But not to his costs of defence unless his defence was reasonable: Gillett v. Ripon, Moo. & M. 406; Leblanche v. Wilson, 21 W. R. 109. Where surety against whom judgment was obtained and who paid creditors their debts and costs, took an assignment of the judgment and enforced it against his principal, he was held entitled to recover his costs as well as his debt: Victoria Mutual Ins. Co. v. Freel, 10 P. R. 45; but see Whitehouse v. Glass, 7 Gr. 45. Enforcement of counter securities: Moorehouse v. Kidd, 28 O. R. 35, 25 A. R. 221. Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such money to the creditor or to the co-surety himself if the creditor has already been paid by him: Whitfield v. Macdonald, 27 S. C. R. 94. Contribution among co-sureties: see Devy v. Earl of Winchelsea, II White and Tudor's Leading Cases, 535. Rights of surety in collateral security held by the

creditor: Milne v. Yorkshire Guarantee Co., 37 S. C. R. 331. Right of surety to have account taken and security realized where the surety's agreement was to make up deficiency: Teeter v. St. John, 10 Gr. 85. Scope of section and scope of recovery against co-surety: Bank of Hamilton v. Kramer Irwin Co., 2 O. W. N. 1432, 3 O. W. N. 73, 19 O. W. R. 745, 20 O. W. R. 46. Release of a surety by giving time to the principal debtor: see Rees v. Barrington, II White and Tudor's Leading Cases, 568, and cases cited. See also Ross v. Burton, 4 U. C. R. 357; Darling v. McLean, 20 U. C. R. 372; Hooker v. Gamble, 12 C. P. 512; Bailey v. Griffith, 40 U. C. R. 418. It does not need to be shown that the surety was in fact injured by the delay: Canniff v. Bogert, 6 C. P. 474; Agricultural Ins. Co. v. Sargeant, 26 S. C. R. 29. Covenant not to sue: Hall v. Thompson, 9 C. P. 257. A guarantor to a bank which holds a security under sec. 88 of the Bank Act, R. S. O. 1906, sec. 29, is not subrogated to the rights of the bank in the security on payment of the debt by him. The purpose of the security is satisfied when the debt it is given to secure is paid to the bank: Re Victor Varnish Co., 16 O. L. R. 338, 11 O. W. R. 717. For difference between a guarantee and an indemnity: see e. g., Thomas v. Cook, 8 B. & C. 728; Wildes v. Dudlow, L. R. 19 Eq. 198; Guild and Co. v. Conrad, 71 T. L. R. 140. The Mercantile Amendment Act applies only to securities which are legally assignable: Re Russell, Russell v. Schoolbred, 29 Ch. D. 254. A right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Amendment Act: Re Russell, Russell v. Schoolbred, 29 Ch. D. 254. Time given to one co-judgment debtor is not within the rule that time given to a principal debtor without the surety's consent discharges the surety: Re A Debtor, 1913, 3 K. B. 11. Time given by a creditor to his principal debtor after judgment recovered against the surety does not release the surety: Duff v. Barrett, 17 Gr. 187; Bell v. Manning, 11 Gr. 142.

4. Where a mortgage is made to several persons as joint tenants and one dies, the estate vests in the

survivors, but the mortgage debt is presumed to belong to them as tenants in common. In the case of mortgages made before 1886 (1882 in England) the survivors cannot give a discharge of it nor make title under power of sale unless the mortgage contained a proper joint account clause or power to the survivors to give receipts: Steeds v. Steeds, 22 Q. B. D. 537; Hind v. Poole, 1 K. & J. 383. This enactment does not authorize payment to one mortgagee although he afterwards becomes the survivor: Powell v. Broadhurst, 1901, 2 Ch. 160. Where a mortgage was assigned to two persons as trustees, no trust appearing on the face of the assignment the personal representatives of a deceased assignee were held not to be necessary parties to the foreclosure of the mortgage, as under this section the mortgage was vested in the assignees jointly so that the survivor was entitled to receive the money and enforce payment: Plenderleith v. Smith, 10 O. L. R. 188; see Armour, Titles, pp. 261, 357-8.

5. The common law rule as to joint contracts has been superseded by this statutory enactment: Cook v. Dodds, 6 O. L. R. 608. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which attaches to the promise which a bill contains whether that of joint or several liabilities. This will be determined according to the local law when the liability is sought to be enforced: Cook v. Dodds, 6 O. L. R. 608. This section is declaratory of what is the Dominion law relating to bills of exchange: Macdonald v. Whitfield (1883), 8 A. C. 733. Death of one of several co-guarantors: Fennell v. McGuire, 21 C. P. 134.

7.—(1) Non-liability of pledgee of bill of lading for freight: Sewell v. Burdick, (1884) 10 App. Cas. 74. Pledge of bill of lading and conversion before plaintiff's title accrued: Bristol Bank v. Midland Ry., (1891) 2 Q. B. 653. Endorsement of bill of lading a condition precedent to passing property: Gosselin v. Ontario Bank, 36 S. C. R. 406. Necessity for shippers to see bill of lading produced by the consignee in order to protect themselves: Stewart v. Peoples National Bank of Charleston, Cass. Dig., p. 81. See

R. S. C. 1906, ch. 118, sec. 2; 18, 19 Vic. (Imp.) ch. 111, sec. 1. See also notes to sec. 2 (*a*), *ante*.

7.—(2) When sale *in transitu* for nonpayment of freight amounts to wrongful conversion: Wilson v. Canadian Development Co., 33 S. C. R. 432. See R. S. C. 1906, ch. 118, sec. 3, 18 & 19 Vict. ch. 111, sec. 2. See also notes to sec. 2 (*a*) *ante*.

7.—(3) Conclusiveness of bill of lading as against persons signing: Parsons v. New Zealand Shipping Co., (1901) 1 K. B. 548. Apart from fraud or mistake, a shipper who accepts a bill of lading cannot escape liability because he has not read it; but where the bill of lading is not given in the usual course of business: see N. W. Transportation Co. v. McKenzie, 25 S. C. R. 38. Where there is a conflict between the bill of lading and the custom of the port of consignment, the terms of the bill of lading prevail: Parsons v. Hart, 30 S. C. R. 473. Where there is conflict as to standard of capacity and weight between the port of shipment and the port of consignment, the question of freight is governed by the *lex loci contractus*: Melady v. Jenkins S. S. Co., 18 O. L. R. 251. See R. S. C. 1906, ch. 118, sec. 4, 18 & 19 Vict. (Imp.), ch. 111, sec. 3.

10. Manufactured from the goods: see Molsons Bank v. Beaudry, Q. R. 11, K. B. 212. "Produced": see Re Goodfellow, 19 O. R. 299.

12. Preference over claim of unpaid vendor: see Tennant v. Union Bank, 1894, A. C. 31.

13. Sale of goods: Peuchen v. Imperial Bank, 20 O. R. 325.

15. This section was formerly in the Judicature Act, R. S. O. 1897, ch. 51, sec. 58 (7). See H. & L. notes, p. 74.

16. This section was formerly in the Judicature Act, R. S. O. 1897, ch. 51, sec. 58 (8). See H. & L. notes, pp. 74, 75.

CHAPTER 134.

The Assignments and Preferences Act.

Refer to Cassels, The Ontario Assignments Act; Parker, Frauds on Creditors and Assignments for Benefit of Creditors; Bicknell and Kappele, Practical Statutes, pp. 460-474; Kerr on Fraud; Burrill on Assignments.

2. The functions exercised by the Judge under this Act are those of a *persona designata* and not subject to appeal, unless under the special provision of R. S. O. 1914, ch. 79, sec. 4.

4. A withdrawal of defence under sec. 102 of the Division Court Act, R. S. O. 1914, ch. 63, is not a confession of debt or *cognovit actionem* within the meaning of this section: Bailey v. Bank of Hamilton, 21 A. R. 157. As to confessions of debt in the Division Court: see D. C. Act, R. S. O. 1914, ch. 63, sec. 169; and Bicknell and Seager, notes pp. 371 and 189 (R. S. O. 1897, ch. 60, sec. 211). Where appearance entered and defendant consented to order striking out defence (Turner v. Lucas, 1 O. R. 623); where defendant allowed judgment by default to be entered before credit period expired (Macdonald v. Crombie, 2 O. R. 243, 10 A. R. 92, 11 S. C. R. 107; Bowerman v. Phillips, 15 A. R. 679); and where a defence was put in to one action and another creditor permitted to obtain judgment in his action by default (Heaman v. Seale, 29 Gr. 278; Labatt v. Bixell, 28 Gr. 593), there was no violation of the section. As to confessions of action or judgment in the High Court: see Con. Rules, 597-602, H. & L. notes, pp. 791-794. Since the Rules of 1913 came into force, no *cognovit actionem* or warrant of attorney to confess judgment has any validity, 1913 Rule 397. A transaction which might not be considered voluntary by reason of pressure, is void if collusive: Meriden Silver Co. v. Lee, 2 O. R. 451; Edison G. E. Co. v. Westminster Tr. Co. (1897) A. C. 193. See sec. 5 (1), note "Pressure."

5.—(1) An assignment under this Act is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not. But the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary: Re Unitt and Prott, 23 O. R. 78. As this Act merely aims to enable insolvents to place their creditors on an equal footing and does not interfere with after acquired property or relieve the debtor from arrest, it was held *intra vires*: Clarkson v. Ontario Bank, 15 A. R. 166, 4 Cart. 499; Atty-Gen. Ontario v. Atty.-Gen. Canada, (1894) A. C. 189. In order to render a transfer void there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. This is the case even within the 60-day limit, as the statutory presumption will be rebutted if any of the factors, necessary under the former law to the success of an attack upon the transaction, do not exist. Benallack v. Bank of British North America, 36 S. C. R. 120. See also Langley v. Palter, 13 O. W. R. 951. Intention to defeat, hinder, and delay, and intent to prefer: Stecher Lith. Co. v. Ontario Seed Co., 22 O. L. R. 577, 24 O. L. R. 503, 46 S. C. R. 540, 16 O. W. R. 766, 17 O. W. R. 1021, 20 O. W. R. 1, 1 O. W. N. 1113, 2 O. W. N. 503, 3 O. W. N. 34. The effect of the transaction is not evidence of the intent: Allan v. McTavish, 8 A. R. 440; Carr v. Corfield, 20 O. R. 218; Randall v. Dopp, 22 O. R. 422. A grantor believing himself solvent conveyed lands voluntarily to his daughter. At the time he owned shares in the plaintiff company upon which he had borrowed from them, but which shares were worth more than par and, at the time, ample security. It was held that although the plaintiffs were hindered in recovering their claim by reason of the impeached conveyance, this was not the necessary consequence of the grant within the meaning of this Act, and in the absence of fraudulent intent, the conveyance was upheld: Elgin Loan v. Orchard, 7 O. L. R. 695. The section does not apply to a chattel mortgage given for a *bona fide* actual advance. If part of the consideration for a chattel mortgage is a *bona fide* advance and part such as

would make the conveyance void as against creditors the mortgage may still be upheld to the extent of the *bona fide* consideration: Campbell v. Patterson, 21 S. C. R. 645. Where valuable consideration has been given, clear evidence of actual intent to defraud the creditors is necessary to have the deed declared void: McDonald v. Haran, 12 O. W. R. 1151, and see notes to sec. 6 (1) *post*.

"Insolvent:" A man may be deemed in insolvent circumstances within the meaning of the act, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent: Warnoch v. Kloepfer, 14 O. R. 288, 15 A. R. 324; see also Rae v. McDonald, 13 O. R. 352; Clarkson v. Sterling, 14 O. R. 460; Dominion Bank v. Cowan, 14 O. R. 465; Bell v. Robinson, 13 O. W. R. 676; Wade v. Elliott, 10 O. W. R. 206, 11 O. W. R. 38; Casserley v. Hughes, 5 O. W. R. 599, 6 O. W. R. 70. Good will may have a financial value in estimating the fact of insolvency: Ottawa Wine Vaults v. McGuire, 24 O. L. R. 591; 27 O. L. R. 319; 48 S. C. R. 44. Where the agent is aware of the debtor's insolvent circumstances, his principal has constructive knowledge: Housinger v. Kuntz, 14 O. W. R. 233. The creditor is put on reasonable enquiry as to the debtor's circumstances: Spotton v. Gillard, 18 O. W. R. 510; Cole v. Racine, 4 O. W. N. 1327. See also as to knowledge on the part of the transferee: Allen v. Bank of Ottawa, 11 O. W. R. 148.

Pressure: Formerly it was necessary to show an intent by the debtor to give a preference and a concurrence in that intent by the creditor. Then as the law was changed, the doctrine of pressure was invoked, and it was permitted to be shown that if the creditor (in good faith) used threats or brought influence to bear on the debtor it was sufficient to rebut an intent to prefer on the debtor's part. The Courts went far in the direction of allowing a very slight "pressure" as sufficient to prevent the transaction being regarded as purely voluntary. Then, in 1885, the Act was amended and the words "or which has such effect" were inserted near the end

of sub-sec. (1). As a result of this it was finally held that knowledge by the creditor of the debtor's insolvent condition must also be shown, and in the result the amendment became practically nugatory after the decisions in Johnson v. Hope, 17 A. R. 10; Ashley v. Brown, 17 A. R. 500; Merchants Bank v. Halter, 18 S. C. R. 88; Gibbons v. McDonald, 20 S. C. R. 587. A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over the other creditors if given as a result of pressure and for a *bona fide* debt and if the mortgagee is not aware that the debtor is in insolvent circumstances: Gibbons v. McDonald, 18 A. R. 159, 20 S. C. R. 587. And even where the mortgagee knew that the debtor was insolvent, that the necessary result would be to defeat, delay and prejudice creditors of the mortgagor and took their mortgage with full knowledge of these facts and the mortgage covered all the mortgagor's assets it was held that the mortgage having been obtained by pressure was unassailable: Davies v. Gillard, 21 O. R. 431, 19 A. R. 432; Hickerson v. Parrington 18 A. R. 635. The preference provided against is a voluntary preference and a conveyance obtained by pressure would not be within its terms: Molsons Bank v. Halter, 18 S. C. R. 88. But if the statement of the consideration is untrue the onus is on the grantee to prove good consideration beyond reasonable doubt: Gignac v. Iler, 29 O. R. 147; 25 A. R. 393. A mere demand by the creditor without threat of legal proceedings is sufficient pressure to rebut the presumption of a preference: Stephens v. McArthur, 19 S. C. R. 446. The pressure must be real: Clemmow v. Converse, 16 G. R. 547. And see cases cited Dig. Ont. Case Law, col. 468-472; H. & L. notes, p. 1249. The present statute has not abolished the doctrine of pressure. The doctrine of pressure may still be invoked to uphold a transaction impeached as a preference when it is not attacked within 60 days or when an assignment is not made within that time: Beattie v. Wenger, 24 A. R. 72; Morphy v. Colwell, 3 O. L. R. 314. And it also seems that where a transaction is attacked within 60 days, evidence of pressure is not admissible to rebut the statutory presumption: Webster v. Crickmore, 25 A. R. 97.

A *bona fide* previous agreement to convey land in consideration of the grantee maintaining the grantor for life though not of sufficient clearness to have enabled either party to have enforced specific performance in an answer to a charge of fraud: Montgomery v. Corbit, 24 A. R. 311. In case of a voluntary conveyance, fraudulent intent on the part of the grantor is fatal: Oliver v. McLaughlin, 24 O. L. R. 41. A voluntary conveyance made by a man about to embark in a speculative undertaking may be set aside by persons who become his creditors in the transaction in question: Ottawa Wine Vaults Co. v. McGuire, 24 O. L. R. 591, 27 O. L. R. 319, 48 S. C. R. 44; Alexandra Oil Co. v. Cook, 13 O. W. R. 405, 14 O. W. R. 604. (See R. S. O. 1914, ch. 105, sec. 3, notes). A voluntary conveyance of part of his estate by a retired and successful hotelkeeper made to his wife when he was solvent, but about to go into business again, was upheld as against subsequent creditors: Fleming v. Edwards, 23 A. R. 718. An assignee for benefit of creditors is entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor would be: Kerry v. James, 21 A. R. 338; see R. S. O., 1914, ch. 135, notes to sec. 7. Mortgage given to secure existing debt not yet payable: Munro v. Standard Bank, 5 O. W. N. 508. Where an insolvent debtor transferred to a creditor by way of security an interest in the profits he expected to earn under a contract, it was held that as the assignment did not consist of assets which could be reached by creditors at the time it was made, it did not come within the act: Blakeley v. Gould, 24 A. R. 153, 27 S. C. R. 682. A trader in difficulties transferred his assets to a company in the *bona fide* hope of benefiting his creditors. The consideration was an undertaking to pay debts and an allotment of shares and debentures of the nominal amount of the debts. The debentures could not be enforced until interest was two months overdue, that is, eight months from their issue. Held that this transfer did not necessarily tend to defeat or delay creditors and was not a fraudulent conveyance: In re Harris, 54 W. R. 460. Where a limited liability company has been regularly formed for the purpose of taking

over the business of an insolvent debtor, the conveyance of the assets to the company, though it may be open to attach as fraudulent and void as against creditors under the Statute of Elizabeth or this act, cannot be set aside at the instance of the creditors on the principle of the company (being composed of his wife and some others) being merely his alias or agent. A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent and in this case the creditors having seized the stock in the company allotted in consideration of the conveyance, they could not attack it: Rielle v. Reid, 28 O. R. 497, 26 A. R. 54; see also Wood v. Reesor, 22 A. R. 57, note to sec. 12, *post*. A trader, who had two stocks, mortgaged them to B. to secure endorsements on composition notes and afterwards procured further advances unsecured. With the consent of B., the trader sold one stock, B. taking the proceeds and applying them on his debt generally. B. shortly afterwards seized the other stock and sold it, applying the proceeds on the balance of his mortgage. The mortgagor assigned for the benefit of creditors and the assignee attacked the first sale as a preference. Held that B.'s position was the same as if the whole debt, secured and unsecured, had been overdue and there had been one sale of both stocks realizing an amount equal to the debt, in which case he could have appropriated a part to his second debt and would have had the benefit of the law of set-off as to the unsecured part under sec. 31. The assignee's remedy was to redeem before sale: Stephens v. Boisseau, 26 S. C. R. 437. In order to give a particular creditor a preference, a debtor in insolvent circumstances gave a moneylender a chattel mortgage on his stock. The money was paid by the mortgagee's solicitor to the preferred creditor, the same solicitor acting for him. The preferred creditor gave a bond in escrow left with the solicitor, indemnifying the mortgagor in respect of the mortgage. The mortgagee was not informed that the transaction was being carried out so as to avoid the appearance of violating this act and to bring the case within the ruling in Gibbons v. Wilson, (17 A. R. 1). The

solicitor's knowledge of the circumstances was imputed to his client, the mortgagee, and the advance held not a *bona fide* payment of money within the statutory exceptions: Burns v. Wilson, 28 S. C. R. 207. The effect of this decision seems to be to overrule Gibbons v. Wilson. See Stoddart v. Wilson, 16 O. R. 17, where it had previously been questioned. See also (similar cases) Stecher Litho. Co. v. Ontario Seed Co., 22 O. L. R. 577, 24 O. L. R. 503, 46 S. C. R. 540; Allan v. McLean, 8 O. W. R. 223, 761.

"Delivery," "delivery over" of goods: see sec. 13 (1); and Robinson v. Wilson, 12 O. W. R. 198. Payment of supposed right of dower where debtor *bona fide* believes that he is bound to make it though in fact he is not legally bound to do so, not a fraudulent preference: McDonald v. Curran, 14 O. W. R. 838, 1 O. W. N. 121, 389. See H. & L. notes, pp. 1242-1254, esp. pp. 1245 and 1249.

"Null and void": "Void" means "voidable": Meriden Britannia Co. v. Braden, 21 A. R. 352. Position of innocent mortgagee taking mortgage from transferee under a transaction which was afterwards set aside: Crawford v. McGee, 6 O. W. R. 44.

5.—(2) Where a creditor had advanced money with the promise of security, which was not again definitely mentioned and was not pressed for and the debtors sold their business for a payment, consisting of cash, a cheque and some notes. The creditor endorsed and discounted the notes with a stranger, retiring the notes on which he was liable. It was held that the cash payment could not be attacked. That the transfer of the cheque was not a payment in cash, but the transfer of a security and the creditor was liable to repay the proceeds of it. As to the note, what the stranger did, was done for the creditor and not for the firm, and must be treated as if done by the defendant himself: Armstrong v. Johnston, 32 O. R. 15. S. gave notes under a composition agreement with his creditors due the following March. One creditor, insisting on more prompt payment, took a note due in September previous, which S. paid when due. In November S. assigned and the assignee sued to

recover the amount of the note. S. having paid the amount without oppression or coercion, could not himself have recovered it, and his assignee was in no better position: Langley v. Van Allen, 32 O. R. 216, 3 O. L. R. 5, 32 S. C. R. 174.

5.—(3) "Has the effect of giving:" Under the Revised Statute of 1887, ch. 124, sec. 2, it was held that the words, "or which has such effect," used in that enactment, applied to a case where that has been done indirectly, which if done directly, would be a preference: Stephens v. McArthur, 19 S. C. R. 446. "Unjust preference" is no more than "preference": Lawson v. McGeoch, 20 A. R. 464. "*Prima facie*": These words did not appear in R. S. O., 1887, ch. 124, sec. 2, but were introduced in consequence of the conflict of decision arising over the question whether or not the statutory presumption was rebuttable. It was held that where an instrument made by a person in insolvent circumstances had the effect of giving one creditor a preference over others and the instrument was attacked within 60 days after it was made, there was an incontrovertible statutory presumption that the instrument has been made with intent to give an unjust preference and it was void: Cole v. Porteous, 19 A. R. 111; but in Lawson v. McGeoch, 22 O. R. 474, 20 A. R. 464, it was held (per Hagarty, C.J.O., and Burton, J.A.), that the presumption spoken of was a rebuttable one, the onus of proof being shifted in the cases within the sub-sections; per Maclennan, J.A., that the presumption was limited to cases of pressure and as to that was irrebuttable. Per Osler, J.A., that the presumption in question was general and irrebuttable, but the security in question was supportable under a previous promise. Also in Kirby v. Rathbun, 32 O. R. 9, under a similar provision, (Dominion Winding-up Act), the presumption was regarded as rebuttable: see Craig v. McKay, 12 O. L. R. 121, where the matter is reviewed. The statutory presumption of the invalidity of a preferential transfer of goods is rebutted by shewing that it was entered into by the transferee in good faith and without knowing or having reason to believe that the transferor was insolvent: Dana v. McLean, 2 O. L. R. 466; see Bellanoch v. Bank B. N. A., 36 S.

C. R. 120, noted *ante* sec. 5 (1). A trader, on the eve of insolvency, made a chattel mortgage at the instance of his banker, which mortgage was given as the chattel mortgagee knew, for the express purpose of paying off the trader's indebtedness to the bank. The banker knew the trader's circumstances, though the chattel mortgagee did not. The creditor assigned within 5 days. The transaction was held void: Allan v. McLean, 8 O. W. R. 223. G. had assisted S. with loans and guaranteed his credit with the bank in $3,000. His own cheque having been refused payment until the indebtedness of S. of $1,900 was satisfied, S. arranged it by transferring to G. goods pledged to another bank, G. paying off both banks. Shortly after S. absconded, being insolvent. It was shewn that G.'s cheque had not been refused payment from any doubt of S.'s solvency, but because S. was dealing with another bank. It was held that G. had not reason to suppose S. insolvent and had satisfied the onus placed on him by the Provincial statute: Baldocchi v. Spada, 7 O. W. R. 325, 8 O. W. R. 705, 38 S. C. R. 577. A merchant then insolvent sold his stock at 50 cents on the dollar and received the purchaser's cheque on the defendant's private bank for $1,100, payable to his own order, which he took to that bank where he had an account, and deposited it to his own credit. The defendants knew the circumstances and had lent the purchaser the money to make the purchase, and also, knowing that the insolvent would make the deposit with them, had charged up his account with an overdue note for $1,000. The deposit of the purchaser's cheque was attached within 60 days as a preference, but it was held that there was no pre-arrangement nor any intent to prefer and that the transaction was not within the scope of the act: Robinson v. McGillivray, 7 O. W. R. 438, 12 O. L. R. 91, 13 O. L. R. 232, 8 O. W. R. 602, 39 S. C. R. 28. Antecedent promise as rebutting statutory presumption: A chattel mortgage given in pursuance of a previous agreement therefor to cover an antecedent debt and advance made at the time after agreement, both the mortgagor and mortgagee believing the mortgagor to be solvent when the mortgage was actually made, was held valid though impeached within 60 days: Lawson v. McGeoch, 22 O.

R. 474, 20 A. R. 464; see also Clarkson v. Stirling, 15 A. R. 234. Where the transaction in question is a renewal of, or is in substitution of, a transaction dating prior to the 60-day limit, the parties may rely on the earlier transaction: Fisher v. Bradshaw, 2 O. L. R. 128, 4 O. L. R. 162; Townsend v. Northern Crown Bank, 26 O. L. R. 291. Certain creditors believing the debtor to be insolvent, procured an agreement in writing to give a chattel mortgage on demand. Four months later the chattel mortgage was given and within 60 days the debtor assigned. It was held that the doctrine of pressure was not applicable and notwithstanding the previous agreement, a fraudulent intent was presumed: Bresse v. Knox, 24 A. R. 203; and see Armstrong v. Johnston, 32 O. R. 15. An agreement not to file a chattel mortgage renders it void *ab initio*: National Trust Co. v. Trusts and Guarantee Co., 3 O. W. N. 1093, 26 O. L. R. 279. But a *bona fide* agreement to give a chattel mortgage if demanded may be upheld: Wade v. Elliott, 10 O. W. R. 206, 11 O. W. R. 38. An agreement, which should have been filed under the Chattel Mortgage Act and was not, may be valuable evidence of *bona fides*: Webster v. Crickmore, 25 A. R. 97. Where the transaction is impeached within 60 days, the onus is on the transferee to rebut the presumption of fraud. This may be rebutted by shewing that the transaction did not in fact leave the creditors in any worse position, as where a large debt has been compounded for the transfer of a small piece of property: Thompson v. Morrison, 9 O. W. R. 179. What amounts to rebuttal of the statutory presumption: see Wade v. Elliott, 10 O. W. R. 206, 11 O. W. R. 38. "Presumed:" see Rogers v. McFarland, 14 O. W. R. 943, at 951. Displacement of onus of intent to gain illegal preference, where chattel mortgage attacked within 60 days: D'Avignon v. Bomerito, 3 O. W. N. 158, 438, 20 O. W. R. 211, 775. The interpretation of this section is now considered fixed in view of the decisions of the Court of Appeal. (Dig. Ont. Case Law, col. 465, 466; Bellanack v. Bank of B. N. A., 36 S. C. R. 120; Dana v. McLean, 2 O. L. R. 366; Robinson v. McGillivray, 12 O. L. R. 91, 13 O. L. R. 232, 7 O. W. R. 438, 8 O. W. R. 602, etc.); Allen v. Bank of Ottawa, 11 O. W. R. 148, 39 S. C. R. 281.

See H. & L. notes, pp. 1246-1247, 1249. "Within 60 days": a transfer is not "attacked" by the issue of a Division Court summons against the transferee as garnishee, nor until proceedings against the transferee for the purpose are begun: Morphy v. Colwell, 3 O. L. R. 314. See The Interpretation Act, R. S. O. 1914, ch. 1, sec. 28 (*h*), when time limited expires on a holiday.

5.—(4) Parties to action to set chattel mortgage aside as fraudulent: Kuntz v. Grant, 3 O. W. N. 237. See the provisions of the Criminal Code bearing on assignments, transfers, sales and dispositions of property in fraud of creditors and failure to keep books: Criminal Code, R. S. C. 1906, ch. 146, sec. 417.

5.—(5) "Creditor:" A conveyance made by a debtor in good faith of his assets to pay his existing debts cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment even though the conveyance is made because of the threatened action: Cameron v. Cusack, 18 O. R. 530, 17 A. R. 489. One who has a right of action for tort and subsequently recovers judgment is not a "creditor" within the meaning of the act to be able to attack a transaction made before action brought: Ashley v. Brown, 17 A. R. 500; Gurofsky v. Harris, 27 O. R. 201, 23 A. R. 717; H. & L. notes, p. 1247. A plaintiff in an action for breach of promise of marriage is not a "creditor" before judgment: Reg. v. Hopkins, 1896, 1 Q. B. 652. A plaintiff is not even within the Act when he has recovered a verdict, but entry of judgment is stayed: Burdett v. Fader, 6 O. L. R. 532, 7 O. L. R. 72; see also, Webb v. Hamilton, 10 O. W. R. 192. The Act is narrower than the Statute of Elizabeth, (R. S. O. 1914, ch. 105), Oliver v. McLaughlin, 24 O. R. 41. The plaintiffs, being creditors of a company, accepted an offer made by the company's president to "personally guarantee payment" upon an extension of time being given. To carry out the arrangement, notes were made by the company to the order of the plaintiffs, endorsed by the president, who made an assignment before maturity of the notes. It was held that although

the correspondence and the notes established an agreement of suretyship notwithstanding the statute of frauds, yet proof could not be made on such a contract when the notes guaranteed had not matured at the date of the assignment: Clapperton v. Mutchinson, 30 O. R. 595. Actual *bona fide* advance by officer of a company: Stecher Litho. Co. v. Ont. Seed Co., 22 O. L. R. 577, 24 O. L. R. 503, 46 S. C. R. 540. A mortgagee of land cannot attack a chattel mortgage as a fraudulent preference until his own security is proved of insufficient value: Clark v. Hamilton Prov. Loan, 9 O. R. 177. See notes to sec. 26; see also Kerry v. James, 21 A. R. 338; H. & L. notes, p. 1247.

6.—(1) Where an assignment is made to a sheriff it is made to him as a public functionary. On his death the care devolves on his deputy and thereafter on his successor. It is not competent for the sheriff to disclaim or decline to act (see sec. 18 (3) *post*): Brown v. Grove, 18 O. R. 311. It is sufficient if the consent of creditors to an assignment is given subsequently to an assignment being made, provided it is given before any assignment is made to the sheriff: Hall v. Fortye, 17 O. R. 435. An assignment not made to the sheriff and made without creditors' consent is superseded by a subsequent assignment made with creditors' consent: Anderson v. Glass, 16 O. R. 592. Where such assignment has been acted on by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it: Ball v. Tennant, 25 O. R. 50 (reversed in appeal on another ground); Nolan v. Donelly, 4 O. R. 440. An assignment not communicated to creditors is revocable: Rennie v. Block, 26 S. C. R. 356; Cooper v. Dixon, 10 A. R. 50; Clarke v. Reid, 27 O. R. 618. See further, Dig. Ont. Case Law, cols. 442-443.

Endorsing or giving to a creditor the unaccepted cheque of a third person in the debtor's favor is not a payment of money to the creditor by the debtor within the meaning of this section: Davidson v. Fraser, 23 A. R. 439, 28 S. C. R. 272; overruling Armstrong v. Hemstreet, 22 O. R. 336. The giving of value is important as evidencing the

intent: Stecher Litho. Co. v. Ont. Seed Co., 22 O. L. R. 577, 24 O. L. R. 503, 46 S. C. R. 540. Where valuable consideration has been given, the evidence of actual intent to defraud must be clear: McDonald v. Horan, 12 O. W. R. 1151. See also as to this, Langley v. Beardsley, 13 O. W. R. 349, 18 O. L. R. 67. A trader in insolvent circumstances sold his stock in trade in good faith and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held a chattel mortgage on the stock as collateral. The purchaser had an account with the same bankers and gave them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque. This was held payment of money to a creditor and not the realization of a security and the bankers were not liable in a creditor's action to account for the amount received: Davidson v. Fraser (*supra*), was distinguished on the ground that the cheque never was the property of or under the control of the insolvent: Gordon Mackay v. Union Bank, 26 A. R. 155; and see Robinson v. McGillivray, 13 O. L. R. 232, 39 S. C. R. 281. Goods supplied on understanding that chattel mortgage was to be given: Bell v. Robinson, 13 O. W. R. 676. "Payment of money to a creditor:" Langley v. Beardsley, 13 O. W. R. 349, at 355, 18 O. L. R. 67. Giving a chattel mortgage in consideration of an antecedent debt is not a transfer or delivery of goods within the meaning of this section: Reid v. Creighton, 24 S. C. R. 69. An assignee is entitled to take advantage of irregularities and defects in chattel mortgages to the same extent as an execution creditor: Kerry v. James, 21 A. R. 338; Reid v. Creighton, 24 S. C. R. 69. See R. S. O. 1914, ch. 135, sec. 7, notes. As against an assignee, an oral agreement of which he has notice by the assignor to give to an endorser a chattel mortgage to secure him against liability will be enforced: Kerry v. James, 21 A. R. 338. An assignee is not in the position of a purchaser for value without notice and takes no higher rights than his assignor, where an assignee notified certain book debtors of the assignment to him before they were notified by certain creditors to whom the book debts had been transferred, it was held that the assignee did not thereby gain priority:

Thibaudeau v. Paul, 26 O. R. 385. *Bona fide* advance: see Baldocchi v. Spada, 7 O. W. R. 335, 8 O. W. R. 705, 38 S. C. R. 577; Robinson v. McGillivray, 7 O. W. R. 438, 12 O. L. R. 91, 8 O. W. R. 602, 13 O. L. R. 232, 39 S. C. R. 281; Benallach v. Bank of B. N. A., 36 S. C. R. 120; Building and Loan v. Palmer, 12 O. R. 1; Harvey v. McNaughton, 10 A. R. 616; notes to sec. 5, *ante*.

6.—(2) See Burns v. Wilson, 28 S. C. R. 207; Breese v. Knox, 24 A. R. 203; notes to sec. 5, *ante*.

6.—(3) As to assignment made to sheriff: see Brown v. Grove, 18 O. R. 311, note to sec. 6 (1) *ante*. The meaning of the section is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent unless it be suspended by an assignment with such consent: Anderson v. Glass, 16 O. R. 592. A sheriff who has seized goods under an execution is not justified in not giving them up to an assignee who is not a sheriff and whose assignment has not been assented to by the requisite number of creditors: Anderson v. Glass, 16 O. R. 592.

6.—(4) The liability of the endorser of a promissory note made by the debtor and held by the creditor for part of his debt is not a "valuable security," and if such note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference, the liability cannot be "restored" or its value "made good" to the creditor or the endorser compelled again to endorse: Beattie v. Wenger, 24 A. R. 72. What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security on which the creditor if still the holder of it would be bound to place a value under sec. 20 (4): Beattie v. Wenger, 24 A. R. 72. An equitable lien on the debtor's goods may be within the section: Churcher v. Johnston, 34 U. C. R. 528. Acceptances of the debtor himself, or what is equivalent to them, are not "valuable securities": Meller v. Reid, 4 A. R. 479.

6.—(5) An assignment under this Act does not make insurance policies void where the insurer's consent has not been obtained: Wade v. Rochester German, 16 O. W. R. 1004, 2 O. W. N. 59, 19 O. W. R. 99, 2 O. W. R. 1076, 23 O. L. R. 635. Substitution of one security for another (sub-sec. c): Stecher Lith. Co. v. Ontario Seed Co., 22 O. L. R. 577, 24 O. L. R. 503, 46 S. C. R. 540. See also H. & L. notes, p. 1247. As to the provisions of The Wages Act: see R. S. O. 1914, ch. 143, sec. 3, notes.

7. Where an assignment for benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the province, the assignee cannot recover as against the assignor or retain out of his estate any commissioner or expenses: Tennant v. MacEwan, 24 A. R. 132.

8. For form of assignment for benefit of creditors: see O'Brien's Conveyancer, pp. 141, 144. The assignment need not be executed by the assignee: Haight v. Munro, 9 C. P. 462. The assignment has no extra-territorial effect: Macdonald v. Georgian Bay Lumber Co., 2 S. C. R. 364. If the debtor owns land, the assignment should be registered to prevent the operation of R. S. O. 1914, ch. 124 and ch. 126, whereby *bona fide* purchasers might gain priority. Execution of assignment by firm and by partners individually and what passes thereunder, see Bell v. Tennant, 25 O. R. 50, 21 A. R. 602; Nelles v. Maltby, 5 O. R. 263; Nolan v. Donelly, 4 O. R. 440. There is no dower in partnership lands: Re Music Hall Block, 8 O. R. 225. A company incorporated under the Companies Act may make an assignment: Whiting v. Hovey, 13 A. R. 7; 14 S. C. R. 515. Having made an assignment in due form with the approval of creditors as required, the Court may refuse a winding-up order unless there are special circumstances: Re Belding Lumber Co. 23 O. L. R. 255; Re Maple Leaf Dairy Co., 2 O. L. R. 590; Re Strathy Wire Fence Co., 8 O. L. R. 186.

Goods consigned by a manufacturer to a company to sell on the company's terms and account for the

proceeds according to the consignor's list price, with a right reserved by the consignor to withdraw and by the company to return any of the goods, do not pass to the assignee for benefit of creditors of the company but the property in the goods continues in the consignor: Langley v. Kahnert, 9 O. L. R. 164. Where land is held under an agreement whereby the owner is to allow another certain privileges and in the event of his "selling to any other person," to pay a sum fixed, an assignment for benefit of creditors is not a "selling" which will call for payment of the fixed sum: Ryan v. Malone, 11 O. W. R. 575. An assignment for benefit of creditors is revocable until the creditors either execute or otherwise assent to it. Where creditors refused to accept an assignment and the assignor was so notified, the assignment not having been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of the stock in trade for making an improvident sale: Rennie v. Block, 26 S. C. R. 356; see also Synnot v. Simpson, 5 H. L. C. 121; Garrard v. Lord Lauderdale, 3 Sim. 1; Johns v. James, 8 Ch. D. 744. Assignee's position in regard to shares in companies not fully paid up: see Armstrong v. Merchants Mantle Mfg. Co., 32 O. R. 387, note to Companies Act, R. S. O. 1914, ch. 178, sec. 60. An assignment for benefit of creditors though confined in its terms to the assignor's personal estate, professed to be drawn pursuant to this Act: Held it was not drawn under the Act and an action brought by the assignee to set aside a chattel mortgage was dismissed: Blain v. Peaker, 18 O. R. 109. See now the provisions of sec. 9, which overcome this difficulty. It is clear that it is intended under this Act to bring all the estate of the assignor into the hands of the assignee for general distribution: Blain v. Peaker, 18 O. R. 109. An assignment under this Act does not pass to the assignee, the benefit to which a debtor is entitled in the fund of a society incorporated under the Benevolent Societies Act, R. S. O. 1887, ch. 172: Re Unitt and Prott, 23 O. R. 78. The benefit of a covenant by a third person to indemnify the assignor against a mortgage made by him does not pass to his assignee under an assignment for general benefit of creditors, at all events not where

there has been no breach of the covenant before the making of the assignment: Ball v. Tennant, 25 O. R. 50, 21 A. R. 602; see also Sutherland v. Webster, 21 A. R. 228; McMichael v. Wilkie, 18 A. R. 464; Cohen v. Mitchell, 25 Q. B. D. 262.

Effect of the exception of goods, etc., "by law exempt from seizure:" see Reinhardt v. Hunter, 6 O. W. R. 421; Re Unitt & Prott (*supra*); Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, at pp. 136-7. The debtor may act as he pleases in reference to his exemptions: Field v. Hart, 22 A. R. 449. See also Temperance Ins. Co. v. Coombe, 28 C. L. J. 88; C. P. R. v. Rat Portage Lumber Co., 10 O. L. R. 273.

An assignment has not the effect of transferring to the assignee a cause of action to which the assignor was entitled to set aside a transaction as in fraud of creditors: Gage v. Douglas, 14 P. R. 126. Nor will it transfer to the assignee a right of action such as an action for damages for injury to credit: Tucker v. Bank of Ottawa, 4 O. W. N. 1189; slander and alienation of wife's affections: White v. Elliott, 30 U. C. R. 253; trespass: Smith v. Com. Union Ins. Co., 33 U. C. R. 529.

Where plaintiff makes assignment and subsequently sues in his own name, procedure: Tucker v. Bank of Ottawa, 4 O. W. N. 1090. Necessity to revive action when cause of action passes to assignee: Cameron v. Eager, 6 P. R. 117. A mortgagor having parted with his equity of redemption by assignment for benefit of creditors, has no right to redeem: Standard Realty v. Nicholson, 24 O. L. R. 46, 2 O. W. N. 1189. As to right to dower: Where the land assigned is an equity of redemption purchased as such by the assignor, no dower attaches: Re Luckhardt, 29 O. L. R. 111. But where the mortgage was placed by the assignor, and his wife joined to bar her dower, a release of dower must be obtained as the inchoate right still attaches: Standard Realty v. Nicholson, 24 O. L. R. 46; see notes to R. S. O. 1912, ch. 70, sec. 10.

Landlords' preferential lien, R. S. O. 1914, ch. 155, sec. 38, see notes to that section. Where goods in hands of assignee destroyed by fire, a landlord is

not entitled to a "preferential lien" on the insurance moneys: Miller v. Tew, 20 O. L. R. 77.

9. As to "assignment" of policies of insurance: see Wade v. Rochester German, 23 O. L. R. 635. See Blain v. Peaker, 18 O. R. 109, note *ante*, sec. 8.

10. The assets of the partnership are not to be used to pay the individual debts unless and until the partnership debts are provided for and *vice versa*: Gordon v. Matthews, 18 O. L. R. 340, 19 O. L. R. 564. Guarantee signed by firm and its individual members: debt both individual and partnership: election: section construed: Gordon v. Matthews, 14 O. W. R. 873, 18 O. L. R. 340, 19 O. L. R. 564. Where a debt is contracted in respect of a partnership, a creditor is entitled to rank on the debtor's individual estate only after his individual creditors have been paid in full: Gordon v. Matthews, *Ib.*, but see Frost and Wood v. Stoddart, 12 O. W. R. 230, 688, 1133. Where an assignment is made by an assignor carrying on business by himself creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate rateably with creditors having claims for goods sold to the assignor alone. This section does not apply to such a case but only to the case of an assignor who has both separate estate and joint estate: Macdonald v. Balfour, 20 A. R. 404; see also Moorehouse v. Bostwick, 11 A. R. 76; Re Walker, 6 A. R. 169. The criterion is the existence of joint and separate debts, not joint or separate property. If there are separate debts, they have the absolute preferential right to payment out of the separate estate and *vice versa* as to joint debts and joint property: Re Walker, 6 A. R. 169. Right of solvent partner to prove against estate of insolvent partner for partnership indebtedness: In re Head, (1894), 1 Q. B. 638. Right of retired partner to prove against insolvent continuing partner for sum due for his interest in the business: Hall v. Lannin, 30 C. P. 204. See also Re Ruby, 24 A. R. 509. See also Lindley on Partnership, 7th ed., p. 802.

11. Where the Judge of a County Court orders the removal of an assignee he exercises a statutory jurisdiction as *persona designata*: Re Young, 14 P. R.

303; as to costs in such matters: see now R. S. O. 1914, ch. 79, sec. 2. Where a summary motion is made under this section to remove an assignee the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure of an action is not applicable. An appointment cannot be taken out under Con. Rule 491 (1913 Rule 228) to examine the assignee, and if taken out and served, the assignee need not attend on it: Re Wilson, 6 O. L. R. 564. Remuneration of removed assignee: Re Tilsonburgh, etc., Ry., 24 A. R. 378. As to appeal from orders under this Act: see R. S. O. 1914, ch. 79, sec. 4; and Re Aaron Erb (No. 2), 16 O. L. R. 597, 12 O. W. R. 118.

12.—(1) "Whoever is party to an unlawful contract if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again:" Collins v. Blantern, 1 Smith L. C., 10th ed., 355. Where a debtor having made a preferential payment voluntarily and without oppression or coercion could not himself have recovered back the amount, his assignee is in no better position: Langley v. Van Allen, 32 S. C. R. 174. The debtor is (probably) not a necessary party to an action by his assignee against a creditor to set aside a transfer as preferential: Beattie v. Wenger, 24 A. R. 72: Crawford v. Magee, 6 O. W. R. 44; but see Kuntz Brewery Co. v. Grant, 3 O. W. N. 237; Urquhart v. Aird, 6 O. W. R. 155, 506. Where an assignment is made, but not registered, and is refused by the creditors, and the assignor so notified, the assignor is the proper person to bring an action against a chattel mortgagee for an improvident sale: Rennie v. Black, 26 S. C. R. 356. The assignee for benefit of creditors may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be: Macdonald v. Balfour, 20 A. R. 404. The assignee will not be ordered to give security for costs: Vars v. Gould, 8 P. R. 31; Major v. Mackenzie, 17 P. R. 18; but see Skill v. Lougheed, 3 O. W. N. 647. An assignee for benefit of creditors having brought an action for breach of contract, made a compromise with the defendants before delivery of pleadings, and without reference to the inspectors or creditors.

A new assignee having been appointed it was held the proper course for him to revive the action and continue it, leaving the defendants to move to stay it or plead the settlement in bar rather than to direct the trial of an issue on the point: Davidson v. Merriton Wood Co., 18 P. R. 139. A. mortgaged land to B. and then assigned to C. for benefit of creditors. C. conveyed to B. the equity of redemption in the land. B. and C. brought action to have a lease made by A. set aside as made voluntarily when A. was insolvent and with intent to defraud his creditors. It was held that this ground could only be taken by the assignee under this section and his right terminated when he had dealt with the estate so at to render the relief useless to it. The assignee's name was struck out: Bank of Hamilton v. Anderson, 7 O. L. R. 613, 8 O. L. R. 153. This section mentions only the assignee's right of suing, but if the assignee in any other lawful way can get possession of property fraudulently transferred by the assignor he may take it and deal with it as part of the estate: Sykes v. Soper, 4 O. W. N. 1554, 29 O. L. R. 193. When does sec. 6 (4) of the Creditor's Relief Act, R.S. O. 1914, ch. 81, override this section: Sykes v. Soper, 4 O. W. N. 1554, 29 O. L. R. 193. Compliance with provisions of this section: Lawless v. Crowley, 13 O. W. R. 358. Powers of assignee under Chattel Mortgage Act: see R. S. O. 1914, ch. 135, sec. 2 (*b*), and see ch. 135, sec. 7, notes.

12.—(2) If a preferential security is successfully attacked by a creditor suing on his own behalf under an order of the Court in the name of the assignee, he can recover no more than his own claim and costs. A creditor cannot after obtaining such an order increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to take part in the proposed proceedings. The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity: McTavish v. Rogers, 23 A. R. 17. A creditor may after an assignment and after the execution by him and the other creditors of a release of their debts in consideration of a compensation, bring an

action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment. Such an action may be brought with the assignee's consent in his name without any order, but without such order the recovery will be for the benefit of the estate: Doull v. Kapman, 22 A. R. 447. Certain creditors attacked a transaction in which an inspector was interested. It was held that he could not, as inspector, obtain any advantage for himself and the plaintiffs were entitled to a reference to ascertain what profit he had received. It was also held that the assignee was a necessary party to the action, as a plaintiff if he consented, as a defendant if he did not: Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699. A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent. An assignee has no higher right in this respect: Woods v. Reesor, 22 A. R. 57; see also Rielle v. Reid, 26 A. R. 54 (note to sec. 5 (1) *ante*). A creditor suing in the name of the assignee obtained judgment against third persons for the payment to him as part of the debtor's estate the proceeds of promissory notes given for purchase money of the debtor's stock in trade. It was held too late for him to attack the sale as fraudulent: Woods v. Reeser, 22 A. R. 57. Where a creditor obtains an order authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order. A creditor suing in the name of the assignor cannot attack the *bona fides* of a compromise between the assignee and the defendant where the defendant cannot be restored to his original position. Whether sub-sec. (2) is not confined to cases in which an exclusive right of suing is given to the assignee by sub-sec. (1), *quære*: Campbell v. Hally, 22 A. R. 217. Where proceedings are taken under this section by a creditor on behalf of himself and all those who within a limited time should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may while defending his security, join with the attaching creditors in indemnifying the assignee so that if he fails to retain his security he may participate in the fruits

of the litigation: Barber v. Crathern, 28 O. R. 615. Where creditors had commenced an action to set aside a transaction as fraudulent and the defendant afterwards assigned, the creditors could proceed with the action which did not become transferred to the assignee under sub-sec. (1). Sub-sec. (2) may be read to apply to pending litigation and an order was made adding the assignee as co-plaintiff and authorizing the creditors to continue the action: Gage v. Douglas, 14 P. R. 126. A creditor served notice on an assignee to compel him to take proceedings to set aside a bill of sale as fraudulent, and also served him with notice of motion for an order giving the creditors leave to bring an action. After this the assignee compromised the matter believing he had the approval of a majority of the inspectors and creditors. The compromise was in fact advantageous and was upheld as valid and binding: Keyes v. Kirkpatrick, 19 O. R. 572. The making of an assignment for the benefit of creditors does not deprive a judgment creditor of the assignor of his right to examine him, although it may in some cases be a reason why such examination should not be held: McEachern v. Gordon, 18 P. R. 459. For discussion of right of a dissentient creditor, against the wishes of the assignor and the majority of creditors, to take for his own benefit objection to a claim to rank and on what ground objection may be taken: see judgment of Burton, C.J.O., Small v. Henderson, 27 A. R. 492, at p. 499.

13. The plaintiff, a creditor of an insolvent alleged that in regard to certain pledges made by the latter to his bank there had been no contemporaneous advances and that the pledges were invalid under the Bank Act, and claimed to be entitled to obtain moneys received through disposal of the pledges and to apply them in payment of creditor's claims under this section. It was held that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors *qua creditors* and not extended to transactions declared invalid for reasons other than those designed to protect creditors: Conn v. Smith, 28 O. R. 629. See also Merchants Bank v. Hancock, 6 O. R. 285. It

was held that when an assignment of book debts was set aside as a preference in an action by an assignee, the preferred creditors must pay to the assignee moneys collected by him under the preferential security before the attack upon it: Meharg v. Lumbers, 23 A. R. 51. The section was then amended by inserting the words "realized or collected," and see now, Munro v. Standard Bank, 5 O. W. N. 508; Honsinger v. Kuntz, 14 O. W. R. 233. "Invalid as against creditors." This section applies as well to the case of a chattel mortgage, invalid by reason of non-compliance with statutory formalities, as to that of a chattel mortgage invalid as a fraudulent preference: Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, 11 O. W. R. 1110. The effect of the section is that if a person is in such a position as that if the property had remained in the possession of the debtor or mortgagee he would be entitled to seize or recover the property then he may— the property being converted into money or other property— seize or recover in an action this money or other property. The recovery must be "in an action:" Universal Skirt Co. v. Gormley, 17 O. L. R. 114, at 135, 11 O. W. R. 1110. "Delivery" "delivery over": see Robinson v. Wilson, 12 O. W. R. 198, *ante* sec. 5 (1). Creditor's right of set-off: Robinson v. Wilson, 12 O. W. R. 198. Recovery of moneys acquired by mortgagees under impeached mortgage: Munro v. Standard Bank, 5 O. W. N. 508. An execution creditor whose execution has ceased to be a lien, has the status only of a simple contract creditor: Scott v. Griffin, 7 O. W. R. 441. "Assignment or transfer which is invalid:" see Stecher Litho Co. v. Ontario Seed Co., 22 O. L. R. 577, 24 O. L. R. 305, 46 S. C. R. 540. A single creditor cannot take advantage of the section for his sole benefit: Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541. The right to follow proceeds is for the benefit of all creditors: Honsinger v. Kuntz, 14 O. W. R. 233; see also Langley v. Van Allen, 32 O. R. 216, 3 O. L. R. 5, 32 S. C. R. 174; Burns v. Wilson, 28 S. C. R. 207; Gordon v. Union Bank, 26 A. R. 155, noted *ante*; and see H. & L. notes pp. 1249, 1250. Representative action: McDonald v. Curran, 14 O. W. R. 838, 1 O. W. N.

121, 389. Costs: See McDonald v. McCall, 12 P. R. 9; Burns v. Wilson, 28 S. C. R. 207; Webster v. Crickmore, 25 A. R. 97. Right of creditors to follow profits: Fraudulent conveyance: see note to 1 D. L. R. 841.

14. The provisions of this section which relate to assignments purely voluntary and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law and as such are within the competence of a provincial legislature so long as they do not conflict with existing Dominion Bankruptcy legislation: Atty. Gen. for Ontario v. Atty. Gen. for Canada, 1894, A. C. 189, 5 Cart. 266 (reversing 20 A. R. 489 *sub nom.* In re Assignments and Preferences Act, and overruling Union Bank v. Neville, 21 O. R. 152). Under a writ of *fi. fa.* the Sheriff seized the interest of a judgment debtor in certain lands and advertised the interest for sale. Just prior to the sale the debtor made an assignment under this Act. The assignee notified the Sheriff but no tender of costs was made or undertaking given to pay them and the Sheriff sold the lands to the plaintiff. The assignee also assumed to sell the lands and conveyed them to the defendant who obtained possession. It was held that the assignment did not stand in the way of the Sheriff's sale and his vendor was entitled to possession and that the sale by the assignee was nugatory: Elliott v. Hamilton, 4 O. L. R. 585. Where an execution was levied by the Sheriff and the execution withdrawn after part payment by arrangement with the parties and with authority to the sheriff to re-enter, a trustee in bankruptcy was held entitled to the amount paid on account to the execution creditor: Re Ford exp. Official Receiver, 1900, 1 Q. B. 264.

The costs for which the execution creditor has a lien are the costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution: Ryan v. Clarkson, 16 A. R. 311, 17 S. C. R. 251. The lien of the plaintiff for costs under an execution in the Sheriff's hands at the time of assignment is

not superseded by the assignment and the Sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so and the plaintiff loses his lien, held per Armour, C.J., that he is not entitled to rank on the debtor's estate as a preferential creditor; per Street, J., that even if so entitled it could only be on net funds available after payment of proper charges incurred in the management of the estate: Gillard v. Milligan, 28 O. R. 465. See as to right of Sheriff to hold goods for his own poundage, etc., as well as the costs: Smith v. Antipitzky, 10 C. L. T. 368. Division Court costs, see R. S. O. 1914, ch. 63, sec. 187. Taxes: R. S. O. 1914, ch. 195, sec. 109 (4).

After a sale of mortgaged property in an action, the mortgagor made an assignment before certain execution creditors had established their claim in the Master's office to the balance of the purchase money. The assignee was held entitled to such balance free from any liability to pay the executions out of it: Carter v. Stone, 20 O. R. 340. The precedence given to an assignment over judgments "not completely executed by payment" does not extend to a judgment for alimony registered against lands prior to the registration of an assignment. The plaintiff in such a judgment is not obliged to rank with other creditors: Abraham v. Abraham, 19 O. R. 256, 18 A. R. 436; see Armour, Titles, p. 94, 174. The making of an assignment for the benefit of creditors does not deprive a judgment creditor of the assignor of his right to examine him, although it may in some cases furnish a reason why such examination should not be made: McEachern v. Gordon, 18 P. R. 459. In a foreclosure action, execution creditors were added parties in the Master's office and a day appointed for payment. The respondent became assignee of the judgments and was added a party, a subsequent account taken, and a new day fixed. Before this late day the mortgagor made an assignment for benefit of creditors to the appellant who applied to be added a party and be given a new day to redeem. Held that the assignee was not entitled to redeem by payment of the amount due on the mortgage only, and thus take priority

of the respondent's claim on the judgments, but could redeem only on payment of the total sum: Federal Life v. Stinson, 8 O. W. R. 929, 13 O. L. R. 127, 39 S. C. R. 229. Surplus afer sale in mortgage action: Carter v. Stone, 20 O. R. 340, *supra*. Executions completely executed by payment, *i.e.*, payment to the Sheriff: Clarkson v. Severs, 17 O. R. 592. Effect of sec. 6 of the Creditor's Relief Act, R. S. O. 1914, ch. 81, on this section: see Sykes v. Soper, 29 O. L. R. 193, where it was held that, where an interpleader issue had been directed between execution creditors and a chattel mortgagee, the issue being directed was not sufficient to overcome the effect of this section, but there must at least be judgment in favour of the execution creditors antedating the assignment. In Soper v. Pulos, 4 O. W. N. 1258, an assignment was held not to include goods where such an interpleader issue had been merely directed. This section does not take away the preferential lien given by R. S. O. 1914, ch. 81, sec. 6, (Creditor's Relief Act): Re Henderson Roller Bearings, 22 O. L. R. 306, 24 O. L. R. 356, S. C. *sub nom*, Martin v. Fowler, 46 S. C. R. 119. An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served on him and the garnishee and judgment obtained against the debtor, did not intercept or take precedence of the attachment of the debt: Wood v. Joselin, 18 A. R. 59; see also Re Thompson, 17 P. R. 109, but the statute was amended and made to apply to attachments. See R. S. O. 1914, ch. 81, sec. 38; ch. 63, sec. 160. A judgment was recovered in a Division Court against a primary debtor and garnishee, but before payment of the amount recovered the debtor made an assignment. Application was made to the Division Court Judge (under R. S. O. 1914, ch. 63, sec. 160), to discharge the debt from the attachment, but the Judge refused the order. Held that the matter was one within the jurisdiction of the Division Court Judge to decide whether rightly or wrongly: Re Dyer and Evans, 30 O. R. 637; see also Bicknell and Seager, pp. 358 and 418. Provision as to mechanics' liens, see R. S. O. 1914, ch. 140, sec. 14. See Roberts v. Bank of Toronto, 25 O. R. 194, 21 A. R. 629. Where lien not filed: Re Clinton, 1 O. W. N. 445. By

refusing to make assignment, a debtor may prejudice creditors not entitled to share under the Creditors Relief Act: see R. S. O. 1914 ch. 81, sec. 30 and notes. History and scope of this section: Rights of assignee and execution creditors: Re Henderson Roller Bearing, 18 O. W. R. 197, 515, 19 O. W. R. 822, 2 O. W. R. 162, 273, 1439, 22 O. L. R 306, 24 O. L. R. 356, 46 S. C. R. 119.

15. The Crown is not entitled to rank on an insolvent estate in priority for customs duties. If it elects to come under the assignment it is bound by the terms thereof and can only take rateably and proportionately with other creditors: Clarkson v. Atty. Gen., 15 O. R. 632, 16 A. R. 202. Crown as creditor of bank in liquidation: see Exchange Bank of Canada v. R. 11 App. Cas. 157. Prerogative of the Crown to payment in priority: see Maritime Bank of Canada v. New Brunswick Receiver General, 1892, A. C. 437. As to Crown bonds: see R. S. O. 1897, ch. 113; Armour on Titles, pp. 188, 189; Holmested and Langton, p. 955, 51 Vic. ch. 36 (d).

16. Where an assignment has been acted on by the creditors, it is not open to the objection even if made by an execution creditor, that no creditor executed it: Ball v. Tennant, 25 A. R. 50, 21 A. R. 682.

17.—(3) The fee for filing is 50c. After filing the assignee can renew a chattel mortgage: Fleming v. Ryan, 21 A. R. 39: see R. S. O. 1914, ch. 135, sec. 21 (9).

18. An instrument in writing whereby the debtor transfers all his assets to an assignee for the purpose of paying his creditors a fixed sum in the dollar, and of securing the debtor the residue in an arrangement by way of composition and not an assignment under this Act although purporting to be made under it. An action against the assignee for not advertising and registering will not lie: Gundry v. Johnson, 28 O. R. 147; see also Blain v. Peaker, 18 O. R. 109, noted *ante*. A Sheriff's

revenues are his "fees, perquisites, and profits" and as a Sheriff is bound by this section to act if required, the allowances made to him as assignee are "perquisites and profits" and therefore "revenues" of his office: Smart v. Dana, 5 O. L. R. 451. In selling by auction under an assignment, the Sheriff is not in the same position as if selling under an execution: McIntyre v. Flaubert, 26 O. R. 427.

21. An agreement for a payment to an inspector to influence his consent to an arrangement is a bribe and in itself sufficient reason to adjudge the transaction which it was given to induce fraudulent, corrupt, and void: Brigham v. Banque Jacques Cartier, 30 S. C. R. 429. The inspectors have no power unless specially authorized by the creditors to bring the latter to anything they do in disposing of the estate. The disposal of it is in the hands of the creditors and in default of directions by them in the hands of the Judge of the County Court: Morrison v. Watts, 19 A. R. 622. An inspector of an insolvent estate is a person having duties of a fiduciary nature and he cannot be allowed to become purchaser on his own account of any part of the estate of the insolvent: Gastonguay v. Savoie, 29 S. C. R. 613; Thompson v. Clarkson, 21 O. R. 421; see also Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699, noted *ante*. A sale in which an inspector is interested to some extent may be upheld if the price is fair, and all the facts known: Schantz v. Clarkson, 4 O. W. N. 1303.

23. The assignee cannot purchase even with the inspector's consent: Morrison v. Watts, 19 A. R. 622. Where such a sale is made: see liability at action of creditor: Atkinson v. Casserley, 22 O. L. R. 527.

25.—(4) The creditor having valued his security and the assignee having taken it over, the bonus of 10 per cent. is not credited on the creditor's unsecured balance: Deacon v. Driffil, 4 A. R. 335.

25.—(5) Right to re-value where there is increase in value of security: In re Fanshawe, 1905, 1 K. B. 170.

25.—(6) A creditor who holds as security for his debt a portion of the debtor's goods and promissory notes endorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated on the estate of the debtor in a voluntary assignment for the full amount of his claim but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods: Benning v. Thibaudeau, 20 S. C. R. 110. A. gave B. a guarantee in respect of goods to be sold to C. limited in amount to $2,500. C. became indebted to B. in $5,500 and then assigned. B. filed a claim with C.'s assignee but did not state whether he held any security or not. Afterwards A. paid B. the $2,500 and filed a claim with the assignee. The dividends were insufficient to pay the balance of B's claim. It was held that the guarantee was not a security which B. was bound to value and the omission of it from B.'s claim did not render it invalid. The guarantee being of a limited amount, that is, of an ultimate balance, A. was not entitled to rank on C.'s estate in respect of the $2,500, nor recover any part of the dividend which B. had received: Martin v. McMullen, 19 O. R. 230, 20 O. R. 257, 18 A. R. 559. See also as to guarantees: Re Stratford Fuel Co., 28 O. L. R. 481, and as to continuing guarantee: Struthers v. Henry, 32 O. R. 365. Where guarantor and purchaser have both assigned: position of vendors seeking to rank on guarantor's estate: Wyld v. Clarkson, 12 O. R. 589. The provision in the first part of this sub-section means that if as between the debtor and a third party the latter is primarily liable and the debtor only secondarily liable, the creditor must put a specific value on his security. The substance, not the form, of the transaction is to be looked at to ascertain who is primarily liable: Glanville v. Strachan, 29 O. R. 373. The liability of the endorser of a promissory note made by the debtor held by the creditor for part of his debt is not a "valuable security" within the meaning of sec. 6 (4). What is referred to is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the debtor if he is still the holder of it would

be bound to place a value under this section: Beattie v. Wenger, 24 A. R. 72. Under their father's will two sons were to receive shares on the death of their mother who still survived. They also owed the testator a debt which was payable in five yearly instalments. Two years after the testator's death the sons made an assignment. The effect of the assignment was to accelerate payment of the debt due the estate. The executors (being also trustees of the land of which the sons were to receive shares) held security for their claim within the meaning of the Act, having (under the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees should value pursuant to this Act: Tillie v. Springer, 21 O. R. 585. Right to withdraw claim and rely on security only: Re Beaty, 6 A. R. 40. Where creditor realizes on his security, the estate not having taken it over, he is entitled to any excess: Bell v. Ross, 11 A. R. 458. Where estate accepts the security the creditor cannot thereafter re-value it at a lower figure: Re Street, 15 C. L. T. 86. Proceedings by way of appeal from order of County Judge as to valuing of securities under this section: powers of High Court and Appellate Court: when appeal may be permitted: provisions of R. S. O. 1914, ch. 79, sec. 4: Re Aaron Erb (1), 16 O. L. R. 594 Re Aaron Erb (2), 16 O. L. R. 597.

26. A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Act, and cannot after the assignment bring an action to ascertain the damages and rank on the estate in the hands of the assignee: Grant v. West, 23 A. R. 533. A covenant to pay $100 per quarter during the term of the covenantee's natural life is a contingent claim and not a debt for which the covenantee could claim the present value of such payments from the covenantor's insolvent estate: Carswell v. Langley, 3 O. L. R. 261. A claim for damages against an overholding tenant for double the yearly value of the land under R. S. O. 1897, ch. 342 sec. 20, is an unliquidated claim and not provable against an estate in the hands of an assignee: Magann v. Ferguson,

29 O. R. 235. Where an estate is being administered under this Act, claims depending on a contingency cannot rank, but only debts strictly so called: Mail Printing v. Clarkson, 28 O. R. 326, 25 A. R. 1. Claim under marriage contract: O'Reilly v. O'Reilly, 21 O. L. R. 201, 44 S. C. R. 197. Wife's claim to rank, see Attwood v. Pett, 9 O. W. R. 173, 748; Warner v. Murray, 16 S. C. R. 720; Ellis v. Ellis 5 O. W. N. 561. See also as to claims which can and cannot rank: Beattie v. Wenger, 24 A. R. 72; Tillie v. Springer, 21 O. R. 585; Clapperton v. Mutchmor, 30 O. R. 595; Cameron v. Cusack, 17 A. R. 489; Ashley v. Brown, 17 A. R. 500; Gurofsky v. Harris, 23 A. R. 717, noted sec. 5 (5), *ante*. As to rights of landlord in case of assignment: see R. S. O. 1914, ch. 155, sec. 38, and note; also sec. 20 (9).

26.—(3) Where claim exists to the knowledge of the assignee, his proper course is to call on the creditor to prove it: Carling B. & M. Co. v. Black, 6 O. R. 441.

23.—(4) See notes to R. S. O. 1914, ch. 121, sec. 56.

26.—(5) Debt payable in annual instalments: Tillie v. Springer, 21 O. R. 585. Interest runs notwithstanding assignment: Stewart v. Gage, 13 O. R. 458. As to amendment of creditors' claims in similar matters: see H. & L. notes, pp. 179, 777.

27. A creditor is confined in an action to establish his contested claim to the *quantum* and items set out in the affidavit of claim filed with the assignee: Grant v. West, 23 A. R. 533. In an action brought against an assignee for benefit of creditors to establish the plaintiff's right to rank in the estate, the assignee as the party for whose immediate benefit the action is defended is to be regarded as a party for the purpose of examination: Garland v. Clarkson, 9 O. L. R. 281; Carter v. Lee, 8 O. W. R. 499. An action for a declaration of the right to rank against an insolvent estate was not within the jurisdiction of a Division Court: Re Bergman and Armstrong, 4 O. L. R. 717; but now see R. S. O. 1914, ch. 63, sec. 62 (1*e*). Jurisdiction of County Court: see R. S. O. 1914, ch. 59, sec. 22 (1*j*). The provision that if an action is not brought against the

assignee within a limited time the same shall be barred, only applies to the right to rank on the estate and does not affect the right to set off the claim so barred in an action against the claimant by the assignee of the estate or any one claiming under him: Johnston v. Burns, 23 O. R. 179, 582. Venue: Halliday v. Armstrong, 3 O. W. R. 285, 410.

28. Jurisdiction of High Court Judge as to appeals from County Judge's order under this section: see Re Aaron Erb, 16 O. L. R. 594, 597, 12 O. W. R. 108; R. S. O. 1914, ch. 79, sec. 4. See Small v. Henderson, 27 A. R. 492, noted *ante*.

30. If the assignee is in default, the Court will administer the estate: Lucas v. Tegart, 2 O. W. R. 548.

31. After recovery of judgment by A. against B. for debt and costs, B. recovered judgment against A. for malicious prosecution. Before the verdict for damages was actually given A. executed an assignment but this assignment was not delivered until judgment had been given in the damage action. Held that at the time of the assignment the damage claim had become a debt and should be set off under the principle of this section: Moody v. Canadian Bank of Commerce, 14 P. R. 258; See Con. Rule, 1165, H. & L. notes, p. 1383; 1913 Rule 666; see also Stephens v. Boisseau, 26 S. C. R. 437; Johnston v. Burns, 23 O. R. 179, 582, noted *ante*. Before an assignment for benefit of creditors a person indebted to the assignor and who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter which the purchaser claimed to set off against his debt to the insolvent. It was held that he was entitled to do so: Thibaudeau v. Garland, 27 O. R. 391. Claim against chattel mortgagee for surplus after sale under his chattel mortgage; mortgagee's right to set off unsecured debt: Robinson v. Wilson, 12 O. W. R. 198.

32. If distribution is not made within a year, the onus is on the assignee to justify the delay: Ontario Bank v. Lamont, 6 O. R. 147. A Sheriff selling lands as

assignee for creditors, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not as in the latter case agent for both vendor and purchaser: McIntyre v. Fairbert, 26 O. R. 427. *Locus standi* of shareholder in company to sue assignee to set aside sale: Schantz v. Clarkson, 4 O. W. N. 1303, 24 O. W. R. 596. A dividend paid by an assignee is not such a part payment as will take a debt, otherwise barred, out of the statute: Birkett v. Bisonette, 15 O. L. R. 93. By receiving his dividend a creditor does not thereby waive the right to call the assignee to account: Morrison v. Watts, 19 A. R. 622. Interest on dividends: R. S. O. 1914, ch. 56, sec. 35.

34. An order of a County Judge dismissing an application by a claimant to vary the scheme of distribution by the assignee of a debtor was made by him as *persona designata* and there was no appeal therefrom either under the Creditors' Relief Act or under the County Courts Act or otherwise: Re Simpson and Clafferty, 18 P. R. 402; see R. S. O. 1914, ch. 81, secs. 33, 39.

35. An assignee for benefit of creditors cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so too with regard to his remuneration and disbursements: Johnston v. Dulmage, 30 O. R. 233; see also Tennant v. McEwan, 24 A. R. 132, noted *ante*. The remuneration of the assignee is according to the principles governing the remuneration of trustees generally: see R. S. O. 1914, ch. 121, sec. 67, notes. The assignee may choose his own solicitor: Re Lamb, 17 C. P. 173; and any creditor may tax his bill: Sandford v. Porter, 16 A. R. 565.

38. A County Judge had no jurisdiction to commit an insolvent debtor for unsatisfactory answers on his examination under this Act: in Re Rochou, 31 O. R. 122, but now see sec. 2. Where a partnership has been dissolved, a former employee or servant of the firm may be examined under this section by the assignee

of the separate estate of one of the partners as to the affairs of such estate: Re Guinane, 18 P. R. 208. It is sufficient to serve a copy of the appointment of the special examiner on the assignor and it is not necessary to show him the original appointment, unless sight of it is demanded: Re Ferguson, 12 O. W. R. 1143, 17 O. L. R. 576; see Con. Rules 333, 900, 904, 906, 1913 Rules 203, 580, 583, 586.

40. Committal for defrauding creditors: see Re McLarty, 12 O. W. R. 1171. The section is not retrospective so as to cover acts done before its passing: (58 Vic.): Re Lucas Tanner and Co., 32 O. R. 1; see Re Rochon, 31 O. R. 122, noted *ante*.

CHAPTER 135.

THE BILLS OF SALE AND CHATTEL MORTGAGE ACT.

Refer to Barron and O'Brien on Chattel Mortgages; Bicknell and Kappele, Practical Statutes, pp. 349-359.

1. Necessity for legislation: see Dedrich v. Anderson, 15 S. C. R. 227, at p. 244. Method; publicity: Heward v. Mitchell, 10 U. C. R. 542; see 11 U. C. R. 625.

2.—(a) A sale of chattels consisting of household furniture in their residence between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for there cannot be said to be the actual change of possession open and sufficient to afford notice referred by the Act: Hogaboom v. Graydon, 26 O. R. 298. Where a chattel mortgagee under the power in an unregistered chattel mortgage entered and sold, and the purchaser went into possession, the goods were held not exigible by the sheriff as against such purchaser though change of possession was not "open." The change of possession mentioned does not refer to possession taken by a mortgagee after default: Gillard v. Bollert, 24 O. R. 147. Sufficient change of possession:

e.g., delivery to mortgagee's auctioneer: McMaster v. Garland, 8 A. R. 1; goods in vacant building and key handed over: McMartin v. Moore, 27 U. C. C., p. 397; delivery to vendor as purchaser's clerk, where change open: Kinlock v. Scribner, 2 O. R. 265, 12 A. R. 267, 14 S. C. R. 77. Insufficient change of possession: e.g., unsuccessful attempt to take possession: McKellar v. McGibbon, 12 A. R. 221; delivery by husband to wife, both living together: Hogaboom v. Graydon, 26 O. R. 298; marking sheep: Doyle v. Lasher, 16 U. C. C. P. 263; partial change: Taylor v. Whittamore, 10 U. C. R. 440; Olmstead v. Smith, 15 U. C. R. 421. Must be open and notorious: McKellar v. McGibbon, 12 A. R. 221. Depends on the nature, etc., of the goods: McMaster v. Garland, 8 A. R., at p. 5, and sec. 31 U. C. C. P. 320; see also Dominion Bank v. Salmon, 4 O. W. N. 460. As to what constitutes a sufficient change of possession: see further, Dig. Ont. Case Law, col. 790-796.

2.—(b) A liquidator was not a creditor or purchaser for value and could not take advantage of the provisions of this Act prior to amendment of 1913: Re Canadian Shipbuilding Co., 26 O. L. R. 564. Can an action be taken to set aside a mortgage by a simple contract creditor whose claim is not due? See Meriden Britannia v. Braden, 21 A. R. 352, note to sec. 7. "Creditors," "void against creditors:" see Heaton v. Flood, 29 O. R. 87; Clarkson v. McMaster, 22 A. R. 138, 25 S. C. R. 96. See *post*, sec. 7, notes.

2.—(c) When a transaction is in fact a security for an existing debt, the parties cannot evade compliance with this Act merely by adopting the form of an absolute sale: Hope v. Parrott, 7 O. L. R. 496; see also Hunter v. Corbett, 7 U. C. R. 75. Floating debenture under Company Act not a mortgage within the meaning of this Act: Johnston v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, 17 O. L. R. 372; see sec. 24, notes. A sale of growing timber is not within the Act: Steinhoff v. McRae, 13 O. R. 546; see also Short v. Ruttan, 12 U. C. R. 79; Ruttan v. Short, 12 U. C. R. 485; Cummings v. Morgan, 12 U. C. R. 565. Goods in bond or in customs warehouse, subject to duty: see May v. Security Loan, 45 U. C. R. 106;

Harris v. Commercial Bank, 16 U. C. R. 437. The Act is intended to apply to personal chattels, susceptible of specific ascertainment and of accurate description and capable of being transferred and possessed in specie: Gunn v. Burgess, 5 O. R. 585. Mortgage of a part interest in chattels: Bank of Hamilton v. Mervyn, 14 O. W. R. 132. Part interest in a mare held by joint owners: Gunn v. Burgess, 5 O. R. 585. Book debts are not within the Act and a transfer of them does not require registration: Thibaudeau v. Paul, 26 O. R. 385; Kitching v. Hicks, 6 O. R. 739; Re Perth, etc., Co., 13 O. W. R. 1140; Nat. Trusts v. Trusts and Guarantee, 26 O. L. R. 279. Chattel mortgages of crops: see Canada Permanent v. Todd, 22 A. R. 515; see also Hamilton v. Harrison, 46 U. C. R. 127; Laing v. Ontario L. & S. Co., 46 U. C. R. 114; Grass v. Austin, 7 A. R. 511; Cameron v. Gibson, 17 O. R. 233. As to fruits of the soil a distinction may be made between *fructus naturales* on the one hand, *e.g.*, growing timber (Steinoff v. McRae, 13 O. R. 546), which are really an interest in land and within the 4th section of the Statute of Frauds, and on the other hand, *fructus industriales*. These latter are a chattel interest independent of the land, see *e.g.*, Evans v. Roberts, 5 B. & C. 836. See also Steinhoff v. McRae, 3 O. R. 546; McMillan v. McSherry, 15 Gr. 133; Cummings v. Morgan, 12 U. C. R. 565; Short v. Ruttan, 12 U. C. R. 79; Clements v. Matthews, 11 Q. B. D. 808. A mortgagor after default is, as far as growing crops are concerned, a tenant at sufferance and cannot chattel mortgage crops so as to prejudice the land mortgagee, who has entered into possession before the crop is harvested: Bloomfield v. Hellyer, 22 A. R. 232. A marriage settlement of personal property is not within the Act: Connell v. Hickock, 15 A. R. 518; Patton v. Foy, 9 C. P. 512. Nor is a power of attorney to enforce mortgages: Patterson v. Kingsley, 25 Gr. 425. Where on the evidence a hire purchase agreement is shewn to be really a loan on security it may be set aside by a trustee for creditors for want of registration: Maas v. Pepper, 1903, 1 K. B. 226, 1905, A. C. 102. A deed by which a debtor covenants that if a debt is not paid by a certain day certain chattels shall be charged with it and that he will, when required, assign them

to the creditor as security, requires registration. An equitable assignment of chattels is within the Act: Edwards v. Edwards, 2 Ch. Div. 291.

The following transactions are held to be within the statute: 1. Mortgages of goods and chattels, in cases where not accompanied by an actual and continued change of possession: see sec. 5. 2. Covenants intending to operate as mortgages: see sec. 2 (c). 3. Covenants providing for execution of a mortgage in future: see sec. 16. 4. Covenants providing for a sale in future: see sec. 17. 5. Sales not accompanied by an actual and continued change of possession: see sec. 8. 6. Mortgages of rolling stock: see sec. 2 (d), and as to filing under the Companies Act: see secs. 25 and 26. 7. Future acquired or future created goods: see secs. 5, 8, and as to goods in process of manufacture: see sec. 11. 8. Mortgages by a company to a bondholder or trustee to secure bonds in specific chattels (sec. 24).

The following transactions are held to be not within the statute: 1. Debentures not covering specific goods and not secured by mortgages: Johnston v. Wade, 17 O. L. R. 372. 2. Mortgages of ships: see sec. 4. 3. Pledge of goods even with power of sale: see e.g., Ex p. Hubbard, 17 Q. B. D. 690. 4. Conditional sales which are governed by the Conditional Sales Act: see R. S. O. 1914, ch. 136. 5. Goods in hands of agent for sale, even though the latter has an option to purchase, but now see Conditional Sales Act, secs. 3 (3) and (4). 6. Things actually transferred if there is a concurrent actual and continued change of possession: see secs. 5 and 8. 7. Things incapable of physical delivery, e.g. leases of land for years: Fraser v. Lazier, 9 U. C. R. 679; book debts: Thibaudeau v. Paul, 26 O. R. 385.

3. Assignments for general benefit of creditors are not within this Act: see R. S. O. 1914, ch. 134, sec. 17. Before 48 Vic., ch. 26, they were within it: Whiting v. Hovey, 13 A. R. 7, 14 S. C. R. 515; Roberston v. Thomas, 8 O. R. 20. An assignment of personal property in trust to sell and apply the proceeds in payment of certain named creditors is a bill of sale and not covered by R. S. O. 1914, ch. 134, sec. 17:

Archibald v. Hubley, 18 S. S. R. 116; see also Kirk v. Chisholm, 26 S. C. R. 111.

4. The Act does not apply to furniture, etc., on a registered steamboat: Pallon v. Foy, 9 C. P. 512; St. John v. Bullivant, 45 U. C. R. 614.

5. Chattel mortgage defined: Conrad v. Atlantic Ins. Co., 1 Pet. (U. S. R.) 386. Distinguished from sale: Heward v. Mitchell, 11 U. C. R. at p. 628. Distintinguished from land mortgage: Franklin v. Neate, 13 M. & W. 481; Hope v. Parrott, 7 O. L. R. 496. The statute deals with all chattel mortgages and requires that when unaccompanied by immediate delivery, etc., they must be registered as directed. The penalty for not following the Act is in form declaring the instrument void against creditors and subsequent purchasers or mortgagees: Marthinson v. Patterson, 19 A. R. 188. Goods in Ontario at the time of the hypothecation of them are subject to the Act, although the parties are at the time domiciled abroad: Marthinson v. Patterson, 20 O. R. 720, 19 A. R. 188; River Stave Co. v. Sill, 12 O. R. 557. The English Act differs from the Ontario Act. The intention of the Imperial Legislature was to put a stop to the fraudulent practices of moneylenders; to protect the borrower rather than the borrower's creditors. The Imperial Act has been rigorously construed, especially on the question of whether the consideration is truly stated: see Ex Parte Carter, 12 Ch. D. 908; Hamilton v. Chaine, 7 Q. B. D. 1, 319. Under the Ontario Act a misstatement of the consideration is not *ipso facto,* in the absence of bad faith, a fatal defect. It is not, however, to be lightly regarded and casts a very heavy onus on the person supporting the security: Marthinson v. Patterson, 19 A. R. 188; Hamilton v. Harrison, 46 U. C. R. 127; Tidey v. Craib, 4 O. R. 696. A chattel mortgage need not be under seal: Paterson v. Maughan, 39 U. C. R. 371; Halfpenny v. Pennock, 33 U. C. R. 229. Where a chattel mortgage is taken to secure a present advance the time for payment may be extended beyond a year: Kerry v. James, 21 A. R. 338. Parole evidence may be given of mortgagor's change of address: Mellish v. Van Norman, 13 U. C. R. 451. Execution of chattel mortgages in blank; authority

to fill in blanks: Wade v. Bell Engine Co., 1 O. W. N. 1052, 16 O. W. R. 636.

5.—(*a*) An Affidavit of execution sworn before the Mayor of a foreign town is useless: De Forrest v. Bunnill, 15 U. C. R. 370. A person who prepared the mortgage may take the affidavit as commissioner: Noell v. Pell, 7 L. J. 322. And so may the mortgagee's solicitor: Canada Permanent v. Todd, 22 A. R. 515. The commissioner's signature is indispensable, although it is clear that the oath was properly administered: Nisbet v. Cock, 4 A. R. 200. Mistakes: De Forrest v. Bunnell, 15 U. C. R. 370; McLeod v. Fortune, 19 U. C. R. 100. Omission of date of execution is fatal defect: Cole v. Racine, 4 O. W. N. 1327, 24 O. W. R. 622.

5.—(*b*) Affidavit of *bona fides*: the language of the deponent must be equivalent to that of the Act: Osler, J.A., Boldrich v. Ryan, 17 A. R. 253 at p. 260. A mortgagee under a chattel mortgage to secure existing indebtedness, made the affidavit required under sec. 6 (d) for a mortgage to secure future advances. Held that the affidavit was defective in not stating "that the mortgagor was justly and truly indebted to the mortgagee," and that the mortgage could not be looked to to aid the affidavit in this requirement: Midland Loan v. Cowieson, 20 O. R. 583. An affidavit of *bona fides* may be sworn before a person who is a commissioner in fact, though he merely signs as "a commr., etc." and such an affidavit may be sworn before a solicitor employed in the office of the mortgagee's solicitors: Canada Permanent v. Todd, 22 A. R. 515. And even where the commissioner's addition was altogether omitted it was held no objection: Hamilton v. Harrison, 46 U. C. R. 127. Where the commissioner omitted to sign, the instrument was held invalid although the oath was in fact administered: Nisbet v. Cock, 4 A. R. 200. "From obtaining payment against ——" not saying against whom; fatal: Re Andrews, 2 A. R. 24. Affidavit that the mortgage was not made "to prevent the 'creditor' (instead of the 'creditors')" of such mortgagor obtaining payment, etc., held insufficient: Harding v. Knowlson, 17 U. C. R. 564. Affidavit that the instrument was not made to

enable the " assignor " (instead of " assignee ") to hold the goods against creditors, held bad: Olmstead v. Smith, 15 U. C. R. 421. " Estate and effects " instead of " goods " held sufficient: Mason v. Thomas. 23 U. C. R. 305. The omission of the words " against the creditors of the mortgagor," is fatal: Bolton v. Smith, 17 U. C. R. 400, 18 U. C. R. 458. Where the affidavit does not comply with the form prescribed and there would have been no difficulty in complying, though the legal effect might have been the same, the mortgage is void for want of such compliance: Reid v. Creighton, 24 S. C. R. 69. " Sworn at M——," omitting the name of the county in the jurat, although the county appeared in the heading; held invalid: Morse v. Phinney, 22 S. C. R. 563. But where the name of the county appeared in the commissioner's addition it was sufficient: De Forrest v. Bunnell, 15 U. C. R. 370. Occupation of mortgagee omitted; held that it could be supplied from the mortgage referred to in the affidavit: Smith v. McLean, 21 S. C. R. 355. " Against the creditors of the mortgagor," " against any creditors of the mortgagor "; variation held immaterial: Emerson v. Bannerman, 19 S. C. R. 1. The mortgage was for $5,066.74, and the affidavit gave the sum as $5,000: Held a valid security for the lesser sum: Thomas Limited v. Standard Bank, 15 O. W. R. 188. The omission of the words " before me " in the jurat makes the affidavit void: Archibald v. Hubley, 18 S. C. R. 116. Where the affidavit of *bona fides* was sworn before the mortgage was executed, the mortgage was invalid: Building and Loan v. Betzner, 10 C. L. T. Occ. N. 112. A mere clerical error may be corrected: Boldrick v. Ryan, 17 A. R. 253. Affidavit where mortgage given for two distinct claims—indebtedness and as guarantee for rent: Honsinger v. Kuntz, 14 O. W. R. 233. See further as to consideration and *bona fides*: Dig. Ont. Case Law, col. 796-800.

6.—(1) Time of payment for a future advance must be within a year. For a present advance, not necessarily: Kerry v. James, 21 A. R. pp. 339, 340, overruling O'Neill v. Small, 15 C. L. J. 114.

6.—(*a*) A mortgage to secure advances must be made in the *bona fide* belief that such advances would

enable the debtors to continue business and pay their debts in full: River Stave Company v. Sill, 13 O. R. 557. The " advances " need not be pecuniary: Goulding v. Deeming, 15 O. R. 201. The Act covers advances either in money or goods: Sutherland v. Nixon, 21 U. C. R. 629. An agreement enabling payment to be deferred beyond a year is probably void: McLean v. Pinkerton, 7 A. R. 490; see further Dig. Ont. Case Law, col. 819-823.

6.—(*b*) As against an assignee for benefit of creditors, an agreement of which he has notice, by the assignor to give an endorser a chattel mortgage to secure him against liability will be enforced: Kerry v. James, 21 A. R. 338. A mortgage to secure the mortgagee as endorser of notes not payable within a year is invalid: May v. Security Loan, 45 U. C. R. 106. Future advances and to secure endorsements: see Barber v. MacPherson, 13 A. R. 356; Sutherland v. Nixon, 21 U. C. R. 629; Goulding v. Deeming, 15 O. R. 201; Robinson v. Mann, 2 O. L. R. 63, 31 S. C. R. 484.

6.—(*d*) An affidavit of *bona fides* stated that the mortgagor was justly and truly indebted to the mortgagee in a certain sum. The loan was made in good faith on the chattel security, but the money was not paid over for five days after the affidavit was made. The mortgage was held valid: Martin v. Sampson, 27 O. R. 545, 24 A. R. 1. An affidavit of *bona fides* in a mortgage to secure future advances contained the words " and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage." Also the words " and for the express purpose of securing me the said mortgagee therein named against the payment of the amount of such notes indorsing liability for the said mortgagor " instead of the statutory words. Held that these variations did not avoid the mortgage: Rogers v. Carroll 30 O. R. 328. The provision requiring the consideration of a mortgage to be expressed is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect: Robinson v. Mann, 2 O. L. R. 63, 31 S. C. R. 484; see also Embury v.

West, 15 A. R. 357; Barber v. McPherson, 13 A. R. 356.

7. "Void as against .. subsequent .. mortgages in good faith." Does this import the additional words, "who have themselves complied with the requirements and formalities of the Act"? Marthinson v. Patterson, 19 A. R. 188. "In good faith" means purchasers and mortgagees who are taking their deed or security in order to carry out their purchase or secure their debt in good faith and not as a cloak to protect the property from creditors. The Act differs from the Registry Act and avoids all questions of actual notice: Marthinson v. Patterson, 19 A. R. 188 at p. 192; Moffatt v. Coulson, 19 U. C. R. 341. A mortgage so void is void as against all creditors, those becoming so after the mortgagee has taken possession as well as before, and not merely execution creditors with executions in the sheriff's hands at the time possession is taken, simple contract creditors who have taken proceedings and an assignee appointed before the mortgage was given. The words "suing on behalf of themselves, etc.," only indicate the nature of the proceedings necessary. The benefit will enure to the general body of creditors. Such a mortgage is not made valid by taking possession: Clarkson v. McMaster, 22 A. R. 138, 25 S. C. R. 96. Void as against creditors is to be read as "voidable." A sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached: Meriden Britannia v. Braden, 21 A. R. 352. Sale under invalid mortgage; mortgagor giving possession to mortgagee who then sells: Allan v. Place, 15 O. L. R. 476. "Void as against creditors"; right of creditor suing on behalf of himself and all other creditors to follow proceeds of goods taken under a conveyance not void for fraud in fact, but simply invalid for non-compliance with this Act: see Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, 10 O. W. R. 918, 11 O. W. R. 1110. A creditor cannot take the benefit of the consideration of a transfer of goods and at the same time attack the transfer as fraudulent: Wood v. Reesor, 22 A. R. 57; Rielle v. Reid, 26 A. R. 54. Mortgagees of land

are not merely by reason of their position as such, creditors of the mortgagor: Crombie v. Young, 26 A. R. 194. An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction the goods in a chattel mortgage, valid and in full force as to the parties to it, and delivers possession of the goods to a purchaser, is liable to the mortgagee for conversion, although the mortgage may be void as regards creditors of the mortgagors or subsequent purchasers for value: Johnston v. Henderson, 28 O. R. 25. A purchaser from the chattel mortgagor in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration: Williams v. Leonard, 26 S. C. R. 406. A second chattel mortgage taken in good faith and for valuable consideration takes priority over a prior unfiled chattel mortgage, even if the second mortgagee had actual notice of the prior mortgage: Raff v. Krecker, 8 Man. L. R. 230. If a mortgage is taken for a fair consideration and not for a collusive purpose, the grantee is a mortgagee in "good faith" within the meaning of the statute, and notice of a prior unfiled mortgage is not material: Raff v. Krecker, 8 Man. L. R. 230. Taking possession of mortgaged chattels will not make good a defective chattel mortgage against a subsequent validly registered *bona fide* chattel mortgage existing at the time such possession is taken and it is immaterial whether the second mortgagee had or had not notice of the prior mortgage: Marthinson v. Patterson, 19 A. R. 188; Edwards v. Edwards, 2 Ch. D. 291. An assignee for general benefit of creditors can take advantage of irregularities and defects in a chattel mortgage: Kerry v. James, 21 A. R. 338. Right of assignee to attack a chattel mortgage: Sykes v. Soper, 4 O. W. N. 1554, 29 O. L. R. 193; Pulos v. Soper, 4 O. W. N. 1559. As to liquidator: see Re Can. Shipbuilding Co., 3 O. W. N. 1476, 22 O. W. R. 585, 26 O. L. R. 564, but now see sec. 2 (*b*). "Purchaser for value" defined: Williams v. Leonard, 26 S. C. R. 406, at p. 410; see also Re Pope, 1908, 2 K. B. 169, at p. 172: "Creditors": see notes to sec. 2 (*b*) *ante*. Parties to action to set chattel mortgage aside as fraudulent: Kuntz v. Grant, 3 O. W. N. 237.

8. Bill of sale defined: Simpson v. Wood, 21 L. J., Eq. 153. "Good" consideration—probably the equivalent of "valuable:" see Doe d. Phillpott v. Blanchfield, 1 U. C. R. 350; Twyne's Case, 1 Sm. L. C. 1. A purchaser of goods who neglects to comply with the provisions of this section cannot invoke its aid against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the Act, may obtain priority: Winn v. Snider, 26 A. R. 384. When a transaction is in fact a security for an existing debt, the parties cannot evade compliance with sec. 5 merely by adopting the form of an absolute sale. If the transaction is a sale with a right of repurchase on certain terms, the vendor can only be required to observe the requirements of this section: Hope v. Parrott, 7 O. L. R. 496. On a *bona fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale: McDonald v. Gaunt, 30 O. R. 398. A *bona fide* purchaser must show either a registered title or that he has taken possession so as to render registration unnecessary. Otherwise the title of an execution creditor will prevail: Hopkins v. Gudgeon, 1906, 1 K. B. 690. A transfer of book debts is not within the act: Kitching v. Hicks, 6 O. R. 739; Tailby v. Official Receiver, 1888, 13 App. Cas. 523; Thibaudeau v. Paul, 26 O. R. 385. Affidavit that the "bill of sale was executed in good faith" (see wording of sec. 5 (b)) instead of that the "sale is *bona fide*," held insufficient: Boynton v. Boyd, 12 C. P. 334. The omission of the words "*bona fide*" is fatal: Mason v. Thomas, 23 U. C. R. 305. See also Hogaboom v. Graydon, 26 O. R. 298; Gillard v. Ballert, 24 O. R. 147, notes to sec. 2 (a).

9. The nominal date in a bill of sale is immaterial. The instrument takes effect from and after the date and time of execution: McDonald v. Gaunt, 30 O. R. 398.

10. An execution debtor can do as he pleases with his statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale given by the debtor: Field v. Hart, 22 A. R. 449. "All which said goods are now the property of the mortgagor

and are situate (describing the premises) and all machines in course of construction or which shall hereafter be in course of construction or completed in or upon the said premises or other premises in London." Held not to extend to goods wholly manufactured on premises other than those described: Williams v. Leonard, 26 S. C. R. 408. "All other ready-made clothing, tweeds, trimmings, furniture and fixtures which shall at any time during the currency of this mortgage be brought on the said premises or on any other premises when the mortgagor may be carrying on business" is sufficient and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage: Horsfall v. Boisseau, 21 A. R. 663; see also as to after-acquired goods and change of place of business: Milligan v. Sutherland, 27 O. R. 235; Mason v. Macdonald, 25 C. P. 435; Re Thirkell, Perrin v. Wood, 21 Gr. 492; Kitching v. Hicks, 6 O. R. 739; Coyne v. Lee, 14 A. R. 503. Locality: Where goods were described as in the mortgagor's dwelling house at the north-west corner of certain streets when in fact the house was at the north-east corner, the erroneous part of the description was rejected and the mortgage upheld: Accountant v. Marcon, 30 O. R. 135. Goods "in bond" is a sufficient description as to locality: May v. Security Loan, 45 U. C. R. 106. Locality: see also Mathers v. Lynch, 28 U. C. R. 354; Nattrass v. Phair, 37 U. C. R. 153; Bertram v. Pendry, 27 C. P. 371; Noell v. Pell, 7 L. J. 322; Mills v. King, 14 C. P. 223; Donelly v. Hall, 7 O. R. 581; Fraser v. Bank of Toronto, 19 U. C. R. 381. A description of property in a bill of sale or chattel mortgage as the "stock in trade" of the grantor in a specified locality such as his store or warehouse in such a street is sufficient: Hovey v. Whiting, 14 S. C. R. 515; McCaul v. Wolff, 13 S. C. R. 130. Stock in trade: see also Segsworth v. Meriden, 3 O. R. 413; Howorth v. Fletcher, 20 U. C. R. 278; Hutchison v. Roberts, 7 C. P. 470; Howell v. McFarlane, 16 U. C. R. 469; Nolan v. Donnelly, 4 O. R. 440; Wilson v. Kerr, 17 U. C. R. 168, 18 U. C. R. 470; McPherson v. Reynolds, 6 C. P. 491; Ross v. Cooper, 14 U. C. R. 525; Thompson v. Quirk, 18 S. C. R. 695; Hovey v. Whiting, 9 O. R. 314, 13 A. R. 7, 14 S. C. R. 515. What amounts to a sufficient

description of animals: see Corneill v. Abell, 31 C. P. 107; Boldrick v. Ryan, 17 A. R. 253. "Two horses, 4 cows and 1 calf" not a sufficiently specific description: Davies v. Jenkins, 1900, 1 Q. B. 133. What is sufficient description of shares in company: see Hewitt v. Corbett, 15 U. C. R. 39. Life insurance policy: Lee v. Gorrie, 1 C. L. J. 76. Crops: Grass v. Austin, 7 A. R. 511. "Crops which may be sown during the currency of this mortgage" covers crops sown after the mortgage falls due but remains unpaid: Canada Permanent v. Todd, 22 A. R. 515. As to description of chattels: "One piano, Dominion make, No. 2773," is a sufficient description: Field v. Hart, 22 A. R. 449. "14,415 feet of prepared moulding" sufficient: Noell v. Pell, 7 L. J. 322. "One kitchen table, 4 chairs, all contained in the dwelling house of the mortgagor situate at or on lot, etc." sufficient: Nattrass v. Phair, 37 U. C. R. 153: but see Howarth v. Fletcher, 20 U. C. R. 278. "One single buggy" insufficient: Holt v. Carmichael, 2 A. R. 639. "Set of blacksmithing tools complete": insufficient: Mason v. Macdonald, 25 C. P. 435. As to the inferences that may be drawn as to ownership, possession and location of the goods: see Accountant v. Marcon, 30 O. R. 135; Hovey v. Whiting, 14 S. C. R. at p. 559. And see generally as to description of goods: Dig. Ont. Case Law, col. 808-819.

11. Future acquired or future created goods; former law: see Burton v. Bellhouse, 20 U. C. R. 60; Re Thirkell, 21 Gr. 492; Coyne v. Lee, 14 A. R. 503. The intention to include future acquired goods must be clear: Mason v. Macdonald, 25 U. C. C. P. 435. For form: see Horsfall v. Boisseau, 21 A. R. 663. Agreements creating equitable interests in non-existing and future acquired property: see Banks v. Robinson, 15 O. R. 618. Goods brought into stock to replace others sold: Semmens v. Harvey, 1 O. W. N. 1099. Where possession passes without ownership: see R. S. O. 1914, ch. 136, and notes.

12.—(1) One of several mortgagees or bargainees can make the affidavit: Balkwell v. Beddoine, 16 U. C. R. 203; Heward v. Mitchell, 11 U. C. R. 625; Tidey v. Craib, 4 O. R. 696. Even where the

consideration is made up of two debts due to the bargainees separately: McLeod v. Fortune, 19 U. C. R. 100. One partner can make the affidavit: Ross v. Dunn, 16 A. R. 552. " Aware of all the circumstances and properly authorized ": see Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114.

12.—(3) In regard to companies it was formerly held that the president was the proper person to make the affidavit of *bona fides* and could do so as mortgagee and not as agent (Bank of Toronto v. McDougall, 15 C. P. 475), but a manager (Freehold Loan v. Bank of Commerce, 44 U. C. R. 284) or even a secretary-treasurer who was a shareholder and had an important share in management could only make such affidavit as agent: Greene v. Castleman, 25 O. R. 113; but now see terms of section. The affidavit of *bona fides* under this section (as enacted 1903) and the affidavit upon the renewal of a chattel mortgage where the chattel mortgagees are an incorporated company if made by the president, vice-president, manager, assistant manager, secretary or treasurer, need not state that the deponent is authorized by a resolution nor that he is aware of the circumstances and has personal knowledge of the facts deposed to. The words " officer or agent " mean an officer or agent who is not one of the principal officers of the company: Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, 10 O. W. R. 918, 11 O. W. R. 1110. And see also memo. of legislation appended to judgment of Riddell, J., in this case, 17 O. L. R. at p. 139.

16. " Goods and chattels " meaning discussed: Bullock v. Dodds, 2 B. & Ald. 276; Re McGarry, 18 O. L. R. 525. Where an agreement to give a chattel mortgage is duly made and registered the giving of such mortgage whereby the legal title becomes vested in such mortgagee does not revest in the mortgagor the equitable title which the mortgagee had by virtue of the agreement. It continues to exist as before and the mortgagee can rely on it should occasion arise: Fisher v. Bradshaw, 2 O. L. R. 128, 4 O. L. R. 162. An unregistered agreement by a debtor to give his creditor upon default in payment upon demand a chattel mortgage on his " present and

future chattels '' confers no title on the creditor as against the debtor's assignee for benefit of creditors who takes possession before a chattel mortgage is given. Nor can the creditor improve his position by subsequent registration: Hope v. May, 24 A. R. 16. See also Kerry v. James, 21 A. R. 338; Ex. p. Fisher, L. R. 7 Ch., at p. 642.

18. If the mortgage is one which the statute does not provide for, it is not avoided for any want of registration or of the recitals required by the Act, but the mortgage stands as at common law: see Burton v. Bellhouse, 20 U. C. R. 60; and cases cited Dig. Ont. Case Law, col. 824. The Act differs from the Registry Act and avoids all questions of actual notice: see Marthinson v. Patterson, 19 A. R. 188, notes to sec. 7, *ante*. An execution coming in before the filing of an assignment is entitled to prevail, though the time for filing may not have elapsed: Carscallen v. Moodie, 15 U. C. R. 92. The registration of a chattel mortgage does not cause it to relate back to its date: Freehan v. Bank of Toronto, 10 C. P. 32; Shaw v. Gault, 10 C. P. 236; Haight v. McInnes, 11 C. P. 518; but see: Feehan v. Bank of Toronto, 19 U. C. R. 474. Delay in registration: see Balkwell v. Beddorne, 16 U. C. R. 203. A memorandum of the legislation in regard to the filing of chattel mortgages is appended to the Judgment of Riddell, J., in Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, at p. 139.

19. When goods removed from the County either on alleged sale by the mortgagor or against his will or stolen from him, such removal is not within the statute requiring a copy to be filed within two months of the removal: Clarke v. Bates, 21 C. P. 348.

21.—(1) In computing time, exclude the day of original registration and include the day of filing renewal: McCann v. Martin, 15 O. L. R. 193, 10 O. W. R. 264, 681; Thompson v. Quirk, 18 S. C. R. 696. A renewal statement was not signed, but endorsed was an affidavit signed and sworn by the mortgagee referring to the statement, held sufficient: Christin

v. Christin, 1 O. L. R. 634. The statement of payments did not set them out in detail but only the total sum paid. It also stated " that no payments have been made on account of the said mortgage," but shewed that payments had been made by way of interest and no other payments, held sufficient: Christin v. Christin, 1 O. L. R. 634. Affidavit on renewal by " officer or agent " of corporated company: see Universal Skirt Mfg. Co. v. Gormley, 17 O. L. R. 114, note to sec. 12 (3) *ante*.

21.—(4) Where the statement is made in good faith, with reasonable care and is substantially correct, it is a sufficient compliance with the spirit and intent of the statute: Sloan v. Maughan, 3 A. R. 221, at p. 225.

21.—(5) During the currency of a mortgage, given to secure endorsements and before the expiration of a year, the mortgagee paid the notes and took a new mortgage upon the same goods as for an actual advance, not reciting the prior mortgage. Within 60 days the mortgagor assigned. It was held that executions prior to the second mortgage but subsequent to the first did not gain priority and that the statutory presumption of intent to prefer was rebutted by the circumstances: Rogers v. Carroll, 30 O. R. 328.

21.—(7) Successive renewal statements of a chattel mortgage need not shew all the credits on account of the mortgage. It is sufficient if each statement contains the payments made since the last renewal: Rogers v. Marshall, 7 O. L. R. 291.

21.—(8) A chattel mortgage does not cease to be valid because a renewal statement made and verified by the mortgagee before he assigns the mortgage is not filed until after such assignment: Daniel v. Daniel, 29 O. R. 493. An assignee for benefit of creditors under an assignment registered pursuant to R. S. O. 1914, ch. 134, may renew a chattel mortgage made in favour of his assignor without the registration of a particular assignment of that mortgage. A renewal statement alleging title through the general assignment is sufficient: Fleming v. Ryan, 21 A. R. 39.

23. See Clarkson v. McMaster, 22 A. R. 138, 25 S. C. R. 96; Heaton v. Flood, 29 O. R. 87; Marthenson v. Patterson, 20 O. R. 720, 19 A. R. 188; Reid v. Creighton, 24 S. C. R. 69. Damages for negligent sale of chattels by mortgage; McHugh v. Union Bank, 1913, A. C. 299. Service out of the jurisdiction in case of foreclosure of chattel mortgage: Hughes v. Oxenham, 1913, 1 Ch. 181, 254.

24. Debentures not covering specific goods and not secured by mortgage are not within the statute: Johnston v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, 17 O. L. R. 372. As to debentures: see Government Stock v. Manilla Ry., 1897, A. C. 86; Evans v. Rival Granite Quarries, 1910, 2 K. B. 979; De Beers v. Joint, &c., Co., 1912, A. C., at p. 68. A bond mortgage covering chattels requires to be registered, though (Johnson v. Wade, 17 O. L. R. 372) a debenture does not: National Trust v. Trusts and Guarantee, 3 O. W. N. 1093, 21 O. W. R. 933, 26 O. L. R. 279. A mortgage given to secure bonds, debentures, etc., must be filed in the office of the Provincial Secretary, R. S. O. 1914, ch. 178, sec. 82. As to proceedings by by-law and ratification to validate mortgages of companies: see R. S. O. 1914, ch. 178, secs. 78, 79.

CHAPTER 136.

The Conditional Sales Act.

Refer to: Barron (Can.), on Conditional Sales, Tremeear, Conditional Sales and Chattel Liens (Can.), Russell, Hire-Purchase Agreements, Bicknell and Kappele, Practical Statutes, p. 363.

In general, the effect of a conditional sale is that property does not pass. Goods are at vendor's risk and order till condition fulfilled. Possessor cannot meanwhile confer a good title: *e.g.*, Forrestal v. McDonald, 9 S. C. R. 12, (crude petroleum sent to refiner, bailor retaining property); Walker v. Hyman, 1 A. R. 345, (safemakers); Mason v. Bickle, 2 A. R. 291, (organ builders); Nordheimer v. Robinson, 2 A. R. 305, (pianos); Hales v. Hazlett, 11 A. R. 749, (machinery); Sawyer v. Pringle, 20 O. R. 111, (agricultural machinery).

Compare and distinguish English legislation: Factors Acts, 1889, 52-3 Vic. ch. 45; Sale of Goods Act, 1893, 56-7 Vic., ch. 71, secs. 47, 62.

1. In regard to the late Revised Statute, 1897, ch. 149, it was said that the extremely faulty character of the drafting of the Act rendered it well nigh impossible for any one to say with any degree of certainty what the language employed by the legislature to express its will really meant: per Meredith, C.J., Mason v. Lindsay, 4 O. L. R. 365, but the Act has been considerably amended since then.

2. See note to R. S. O. 1914, ch. 133, sec. 2 (*b*).

3.—(1) "This kind of contract is said by the Court of Appeal to mean: pay the price and get the machine (both possession and property); but till you pay, the machine is ours (the vendor's), it is our property; we can take possession, and we have the right to sell because it is our property. The permission to sell is therefore immaterial:" per Boyd, C., Arnold v. Playter, 22 O. R. 608. If the vendors wish to go further and charge the vendees with a deficiency

arising on a re-sale, they must so stipulate in their contract. If there is no term to this effect, a sale by the vendors is evidence of an abandonment of the contract by them and that the agreement has been put an end to: Sawyer v. Pringle, 18 A. R. 218; Arnold v. Playter, 22 O. R. 608. See provisions as to notice, sec. 8 (2), (3). The purchaser of property sold on condition that the title is to remain in the vendor until payment of the price, acquires complete use, enjoyment and possession of the thing sold, but he cannot sell, mortgage, or otherwise dispose of the property to a third person so as to pass a title good against the vendor: (Walker v. Hyman, 1 A. R. 345; Nordheimer v. Robinson, 2 A. R. 305; Tufts v. Mottashed, 29 C. P. 529), except in cases where the statute has not been complied with, and even then only to a purchaser or mortgagee without notice, in good faith and for valuable consideration. He has sufficient title to maintain an action for conversion, and has an interest which he can convey unless there is a term in the contract to the contrary: Black v. Drouillard, 28 C. P. 107. The conditional vendee has a possession which will ripen into title on performance of conditions, and the vendor cannot interfere with this possession until there has been a failure to perform the conditions: Hesselbacher v. Ballantyne, 28 O. R. 182. In an action between vendor and purchaser for the price of an article sold under conditional sale, the defendant may shew that the article was not as warranted: Cull v. Roberts, 28 O. R. 591. An innocent purchaser of a hay press which had been sold under a conditional sale contract duly filed, was held entitled to recovery of the press and the sum he would have received from his vendor, upon a warranty of title, the value beyond expenses upon contracts actually made, the press having been re-taken by the original vendors: Sheard v. Horan, 30 O. R. 618. By suing for and obtaining judgment for the purchase money of a chattel sold under conditional sale agreement, the vendors do not elect to treat the transaction as an absolute sale and waive their security: Utterson Lumber Co. v. Petrie, 17 O. L. R. 570, 13 O. W. R. 104. A liquidator is not a creditor nor a purchaser for value: Re Canadian Shipbuilding Co.,

3 O. W. N. 1476, 22 O. W. R. 585, 26 O. L. R. 564. See provisions as to assignees and liquidators: R. S. O. 1914, ch. 135, sec. 2 (b). Where a machine was sold conditionally and it was stipulated that the title should not pass until the moneys payable under the instalments as well as all sums for goods ordered by the condition vendors should be paid, the conditional vendees having paid one instalment and given an order for goods, assigned, and the liquidator sold the machine subject to the vendor's lien for unpaid instalments only. The vendor's rights were held unaffected and they were entitled to recover the full amount due under the terms of the order out of the estate: Re Canadian Camera Co., 2 O. L. R. 677. Right of resumption of goods "upon default of one month in any payment or extended payment:" see Bridgman v. Robinson, 7 O. L. R. 591. Risk of loss falls on person having property in goods: Chew v. Traders Bank, 19 O. L. R. 74; May v. Conn, 23 O. L. R. 102. Where goods had passed into the possession of the vendee and while in such possession had been destroyed or lost through no fault of the vendor, notwithstanding that the property in the goods had not, by the terms of the contract passed to the vendee, the vendee held liable to pay the price even though no negligence on his part was shewn: Hesselbacher v. Ballantyne, 28 O. R. 182; affirmed on other grounds, 25 A. R. 36. In an action on one of a series of notes given on a conditional sale of machinery, it was shewn that the machinery had been destroyed by fire. Held that as the defendant had had the possession and use of the machinery there was no total failure of consideration and the plaintiffs were entitled to recover: Goldie v. Harper, 31 O. R. 284; but see Corby v. Williams, 7 S. C. R. 470. Sale with right of re-purchase: see Hope v. Parrott, 1 O. L. R. 496. Construction of contract of conditional sale: see Carroll v. Beard, 27 O. R. 349; see also Dig. Ont. Case Law, cols. 6176, 6180, 6187 and 6192. Statutes: Landlord's right to distrain on vendor's interest: R. S. O. 1914, ch. 155, sec. 31. Distress for taxes: R. S. O. 1914, ch. 195, sec. 109. Execution: see R. S. O. 1914, ch. 80, sec. 19. Mechanic's lien for repairs on property under conditional sale: see Article 48 C. L. J. 252.

Contract giving jurisdiction where plaintiff's head office is: see The Noxon Co. v. Cox, 6 O. L. R. 637; and R. S. O. 1914, ch. 63, sec. 74.

3.—(1*a*) The vendor need not sign the writing evidencing the sale: Re Kurtze and McLean, 12 O. W. R. 564, 13 O. W. R. 308. An instrument in the form of a promissory note given for part of the price of an article with the added condition that "the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid" is not a promissory note or a negotiable instrument: Dominion Bank v. Wiggins, 21 A. R. 275. Jurisdiction of Division Court in regard to instrument in the form of a promissory note but with additional stipulations providing that title of chattel should not pass until payment, etc.: see Dominion Bank v. Wiggins, 21 A. R. 275; Re Thorn v. McQuitty, 8 O. L. R. 705, 4 O. W. R. 522; Re Slater v. Laberee, 9 O. L. R. 545, 5 O. W. R. 420, 539: Bisnett v. Schrader, 12 O. W. R. 656. Unlike the Chattel Mortgage Act, this Act does not stipulate for the consideration appearing on the face of the writing: Re Kurtze and McLean, 12 O. W. R. 564. Instrument evidencing sale: see Wettlaufer v. Scott, 20 A. R. 652.

3.—(1*b*) Omission to file lien: Re Kurtze and McLean, 12 O. W. R. 564, 13 O. W. R. 308. "Court:" see The Noxon Co. v. Cox, 6 O. L. R. 637.

3.—(2) For former law: see Mason v. Lindsay, 4 O. L. R. 365; Helby v. Matthews, 1895, A. C. 471.

3.—(3) For former law: see Langley v. Kahnert, 7 O. L. R. 356, 9 O. L. R. 164, 36 S. C. R. 397; Eby v. McTavish, 32 O. R. 187. The word "creditors" used in this section is not defined in this Act. The provision is in part what was formerly sec. 41 of the Chattel Mortgage Act, R. S. O. 1897, ch. 148. In the present revision of that Act "creditors" is defined: R. S. O. 1914, ch. 135, sec 2 (*b*).

3.—(5) Name plates: Dominion Carriage Co. v. Wilson, 2 O. W. N. 214, 17 O. W. R. 363. The lien of

the unpaid vendor is not rendered invalid if the purchaser obliterates, without his direction or connivance, the vendor's name and address which were properly marked on the article at the time of sale: Wettlaufer v. Scott, 20 A. R. 652. "Name and address:" statute will be construed strictly and the address will not be inferred: Toronto Furnace v. Ewing, 15 O. W. R. 381, 1 O. W. N. 467. Name of manufacturers: Goldie & McCulloch v. Uxbridge, 13 O. W. R. 696. Abbreviations in name not allowed: Ericsson v. Elk Lake, 3 O. W. N. 1309, 22 O. W. R. 161. It is not a compliance with the section if a company whose corporate name is "The M. & R. Piano Company Limited" paint on a piano sold on condition their name as "M. & R., Toronto": Mason v. Lindsay, 4 O. L. R. 365. See as to use of materials only: Wettlaufer v. Scott, 20 A. R. 652. Weight of evidence where question is whether Act complied with in regard to bailor's name and address: Greer v. Armstrong, 3 O. W. N. 956, 24 O. W. R. 960. See provisions of sub-sec. (6).

6. Errors: see Mason v. Lindsay, 4 O. L. R. 365; Toronto v. Ewing, 15 O. W. R. 381, and see secs. 3, (5) and (6) *ante*.

7. It does not appear clear how this section could be applied to the case of a vendor resident outside the province.

8. Presumed that purchaser is entitled to possession until default in absence of contract: Dedrick v. Ashdown, 4 Man. L. R. 139, 15 S. C. R. 227, at p. 239. Provisions in the agreement for re-sale by vendor on default are binding: Bridgman v. Robinson, 7 O. L. R. 591. See also *ante*, sec. 3 (1), notes. Parole variation as between contracting parties: see Long v. Smith; 23 O. L. R. 121, at p. 127; Carter v. C. N. O., 23 O. L. R. 140. Where goods are wrongfully seized and retaken from the conditional vendee, the measure of damages is the amount which he has paid the vendors on account of the price: Bridgman v. Robinson, 7 O. L. R. 591. As to using force in retaking possession by vendor: see Traders Bank v. Brown, 18 O. R. 430. Question may arise in respect to this section where the vendor retaking

goods does not resell them at all. Also where the vendor resides outside the province, takes the goods outside and resells them forthwith.

9. The Act applies to machinery bought and affixed to freehold after mortgage registered and does not refer exclusively to future mortgages: Goldie & McCulloch v. Uxbridge, 13 O. W. R. 696. Machinery leased to company and affixed to freehold: right of lessor against mortgagee of company's land: Seeley v. Caldwell, 18 O. L. R. 472. Hire purchase agreement under which machinery became fixed to freehold retains priority over subsequent equitable mortgage: Re Allen and Sons Limited, 1907, 1 Ch. 575. Landlord has no right to distrain on engine bolted to concrete bed in soil and under hire purchase agreement: Crossley v. Lee, 1908, 1 K. B. 86. Rights of mortgagee as against owners of machinery on the hire purchase system and affixed to freehold. There is no rule implying authority from the mortgagee to the mortgagor in possession to remove trade fixtures affixed to the mortgaged premises: Ellis v. Glover and Hobson, 1908, 1 K. B. 388. Machinery on hire purchase agreement and embedded in concrete floor. Position of mortgagee: Reynolds v. Ashby, 1904, A. C. 466. Apart from statute the fixtures vest in the owner of the freehold: Hobson v. Gorringe, 1897, 1 Ch. 182; Hale v. Hazlett, 11 A. R. 749; Polson v. De Geer, 12 O. R. 275. As against a mortgagee in possession not a party to a hire purchase agreement, such agreement affords no evidence to alter the *prima facie* character of the annexed property: Hobson v. Gorringe, 1897, 1 Ch. 182; Reynolds v. Ashby, 1903, 1 K. B. 87, 1904, A. C. 466; Seeley v. Caldwell, 12 O. W. R. 1245. See R. S. O. 1914, ch. 117, sec. 2 (1) notes.

CHAPTER 137.

The Factors Act.

Refer to Bicknell and Kappele, Practical Statutes, pp. 479-483; Anger, Digest of Canadian Mercantile Laws; Article, Factors and Factors Acts, 5 Canadian Law Times, 145; Chalmers, Sale of Goods Act; Story on Sale; Blackburn on Sale.

1. The English Factors Acts date from 1823, 1825, 1842 and 1877. The legislation is now 52-53 Vict ch. 45. The effect of the earliest three of these statutes is dealt with in Cole v. North Western Bank, L. R. 10 C. P. 354. The present Act follows very closely the English Act of 1889. "Factor" is not used in the Act: For definition, see Ex p. Dixon, 4 Ch. D., at p. 137.

2.—(1*a*) Documents of title: Discussed: Wiseman v. Vanderputt, 2 Vern. 203 (1690); Evans v. Martlett, I Ld. Ray. 271. First applied to ocean bills of lading. Delivery of bill of lading a delivery of goods: Lickbarrow v. Mason, 2 T. R. 63, 2 East. 21, 1 Sm. Lead. Cas. 737. In Canada, bill of lading also applies to land carrier's receipt, R. S. C. ch. 118: see Royal Bank v. G. T. R., 23 U. C. C. P., at p. 232. As to delivery orders, see Ex p. Close, 54 L. J. Q. B. 43; Re Cunningham, 54 L. T. Ch. 44; "Cash receipts": Kemp v. Falk, 7 App. Cas. 573; "mate's receipts," Cowasjèe v. Thompson, 11 Moo. P. C. 165; Hathering v. Laing, L. R. 17 Eq. 92. As to mode of transferring documents of title, see *post*, sec. 12. As to bill of lading, see notes to the Mercantile Amendment Act, R. S. O. 1914, ch. 133, esp. sec. 2 (*a*).

2.—(*b*) See note to R. S. O. 1914, ch. 133, sec. 2 (*b*).

2.—(1*c*) The word "agent" in this Act means one who is entrusted with the possession as agent in a mercantile transaction for the sale or for an object connected with the sale of the property. An agent who obtained possession of lumber from the master of the vessel without authority from the owner

was held not " entrusted " and the owner was entitled to recover the value from a *bona fide* purchaser who had paid the agent: Moshier v. Keenan, 31 O. R. 658; see also McDermott v. Ireson, 38 U C. R. 1. For enumeration of the chief classes of mercantile agents and definition of their functions, see Story on Sale, ss. 78-118. Picture dealer as mercantile agent: Turner v. Sampson, 7 T. L. R. 200. Pledge made " in the customary course of business " means the business of " a " mercantile agent, not of " the " mercantile agent which the particular agent happens to be: Oppenheimer v. Attenborough (1907), 1 K. B. 510, (1908), 1 K. B. 221; see also Waddington v. Neale, 23 T. L.R. 464.

2.—(*d*) The words " any pecuniary liability," are very wide, and are probably intended to meet cases such as the granting of a letter of credit to be operated on by bills of exchange in consideration of the pledge of goods or documents: Chalmers, p. 126. A person who has advanced money to the owner on the security of goods entrusted to him for sale, is not a pledgee but a factor, when the power to sell does not depend on the owner's default in repaying the advance: Mitchell v. Sykes, 4 O. R. 501.

2—(2) Effect of custom in rendering documents negotiable by mere delivery: Crouch v. Credit Foncier, L. R. 8 Q. B. 381; Jones v. Coventry, 1909, 2 K. B. 1029; Bechuanaland v. London, 1898, 2 Q. B. 658; Edelstein v. Schuler, 1902, 2 K. B. 144.

3. At common law one person could not, in general, dispose of another person's goods so as to give a third party any better title than he himself had. There were exceptions to the rule, e. g.: see Cole v. The North Western Bank Limited, L. R. 10 C. P. 354. It is only the owner of the goods who can give security under sec. 88 of the Bank Act, R. S. O. ch. 29. A bank which has taken such security on goods of the owner cannot under that section substitute other goods afterwards coming into the possession of the giver of the security as agent for sale: Barry v. Bank of Ottawa, 17 O. L. R. 83, 11 O. W. R. 1103, 12 O. W. R. 515. Special contract with agent: set off of debt of agent: right of

agent to make special contract sale: McGuire v. Shaw, 15 C. P. 310. Taking goods for debt of principal: Harp v. O'Connor, 21 U. C. R. 251. A partner entrusted with possession of the goods of the firm for the purpose of sale may, either as partner in the business or factor of the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only: McBean v. Dingwall, 30 S. C. R. 441. A. was in the habit of taking orders for B.'s machines but was not employed by them. A. by falsehood and forgery obtained a machine from B. which he sold to C. for cash. C. knew only A. in the transaction and B. considered they were selling to C., having received a written order and a promissory note for the price, to both of which A. had forged C.'s name. Held that A. never acquired any title and none could pass to C., and that A. was not an agent nor "entrusted with possession" within the meaning of this Act: Ontario Wind Engine v. Lockie, 7 O. L. R. 385. A person who obtains goods by false pretences is not a mercantile agent: Bush v. Fry, 15 O. R. 122. Goods entrusted on sale or return: validity of pledge: mercantile agent: Weiner v. Harris (1910), 1 K. B. 285. (This case overrules Hastings v. Pearson, 1893, 1 Q. B. 62). Agent "entrusted": see Dominion Carraige Co. v. Wilson, 2 O. W. N. 214, 17 O. W. R. 363. It may be noted that the present section does not use the word "intrusted." "How far this alteration of language extends the operation of the Act is not clear:" Chalmers, p. 127. As to former rule, that if mercantile agent was intrusted with goods in some other capacity, he could not sell or pledge them contrary to instructions: see Monk v. Whittenbury, 2 B. & Ad. 484; Cole v. North Western Bank, L. R. 10 C. P. 354; Biggs v. Evans, 1894, 1 Q. B. 88. Under the present Act, possession with the owner's consent suffices: Chalmers, p. 127. *Quære* whether when goods have been obtained by larceny, by a trick, and afterwards have been pledged by the person so obtaining them, the mode of obtaining them has any effect to take the pledging out of the Factors Act:

Oppenheimer v. Attenborough (1907), 1 K. B. 510, 1908, 1 K. B. 221. Possession of goods by mercantile agent: larceny by trick: disposition by mercantile agent to several joint purchasers, lack of good faith in one of whom caused disposition to be held invalid as regards all the joint purchasers: Oppenheimer v. Frazer, 1907, 2 K. B. 50. A custom in the diamond trade that it is not usual for agents employed to sell diamonds to pledge them cannot be set up to prevent the application of the Act: Oppenheimer v. Attenborough, 1907, 1 K. B. 510, affirmed in C. A. 24, T. L. R. 115, 1908, 1 K. B. 221, 13 Com. Cas. 125. Transfer of title: possession of document of title: resale: Cahn v. Pockett's Bristol Channel Packet Co., 1899, 1 Q. B. 643. "Notice": see Navulshaw v. Brownrigg, 21 L. T. Ch. 908. Pledge at an unusual rate of interest may be evidence that the pledgee had notice that the pledgor had no authority to make the pledge: Janesich v. Attenborough, 26 T. L. R. 278.

3.—(2) This provision overrules Fuentes v. Montis, L. R. 3 C. P. 268, L. R. 4 C. P. 93.

4. Delivery of bills of lading is a delivery of the goods to make property pass: Lickbarrow v. Mason, 2 T. R. 63, 6 East. 21, 1 Sm. Lead. Cas. 737; and in Canada, bill of lading applies to land carrier's receipt: see R. S. C. 118; Royal Bank v. G. T. R., 23 U. C. C. P. 232.

8.—(1) See Cole v. North Western Bank, L. R. 10 C. P., pp. 361-7; Johnson v. Credit Lyonnais, 3 C. P. D., at pp. 44-5.

9. The general rule at common law was that no title passed unless owner authorized sale: City Bank v. Barrow, 5 App. Cas. 677, 678; Cole v. North Western Bank, L. R. 10 C. P., at p. 373. The scope of the statutory exception is: (a) The goods must be entrusted to persons whose business is to sell such goods: (Factors): City Bank v. Barrow, 5 App. Cas. 664; Bush v. Fry, 15 O. R. 122. (b) Goods must be in bailee's possession. (c) Agent must act in ordinary course of his business: Weiner v. Harris, 1910, 1 K. B. 285. (d) Purchaser must buy in good faith: Oppenheimer v. Frazer (1907), 2 K. B. 50; Janesich

v. Attenborough, 26 T. L. R. 278. See also as to "possession": Nicholson v. Harper (1895), 2 Ch. 415. As to purchaser on a hire-purchase agreement as a person who has "agreed to buy" goods: see Helby v. Matthews (1895), A. C. 471.

13.—(3) Right to set-off in such cases: Kaltenbach v. Lewis, 10 App. Cas. 617; Cook v. Eshelby, 12 App. Cas. 271.

CHAPTER 138.

The Limited Partnership Act.

2. Parties may enter into a partnership intended to be and which is at first a limited partnership, and by their conduct either knowingly or unknowingly, change the partnership into a general partnership as regards third parties. When this occurs with the consent and concurrence of all parties, they also become general partners as between themselves. But when it occurs without the knowledge or consent or against the consent of some partners, they the partners whose acts constitute the firm a general partnership as against third parties, will not be entitled to contribution from the others but will have to indemnify them against the consequence of their acts: Patterson v. Holland, 6 Gr. 414. A company was formed to build and run steamboats consisting of one general partner and some 83 subscribers. Such a business was held to be properly the subject of a limited partnership: Bowes v. Holland, 14 U. C. R. 316. Syndicate with right to share percentage of profits: McKim v. Bixel, 19 O. L. R. 81.

3. Special partners must contribute actual cash to the firm's capital. If any false statement be made in the certificate filed, all the partners will be held liable for the debts of the firm: Whitmore v. Macdonell, 6 C. P. 547; Patterson v. Holland, 7 Gr. 1. Special partners cannot make their payment by promissory notes: Patterson v. Holland, 7 Gr. 1; Watts v. Taft, 16 U. C. R. 256. Nor by bills of exchange:

Whittemore v. Macdonnell, 6 C. P. 547. Nor by the special partner endorsing to the general partner notes made by the general partner and held by the special partner: Benedict v. Van Allen, 17 U. C. R. 234.

6. Where a defendant pleads a limited partnership, the plaintiff may object to the description of the business as well as plead that the limited partner has not paid his share: Benedict v. Van Allen, 17 U. C. R. 234.

10. See Whittemore v. Macdonell, 6 C. P. 547, noted *ante*.

16. Where a special partner has once rendered himself liable as a general partner, he continues liable and is not relieved after he has ceased to intermeddle: Hutchison v. Bowes, 15 U. C. R. 156. A special partner who has become a general partner by interference has become so for all purposes not only as regards creditors but as regards the partners *inter se*: Bowes v. Holland, 14 U. C. R. 316. Special partners elected a board of directors to advise the general partner. The board interfered with business, especially during the absence of the general partner. The members of the board were held liable as general partners: Whittemore v. Macdonell, 6 C. P. 547. Special partner becoming general partner by interference or intermeddling: see also Davis v. Bowes, 15 U. C. R. 280.

CHAPTER 139.

The Partnership Registration Act.

2. The business of printing and publishing a newspaper constitutes the partners employed in it a partnership "for trading purposes" and liable to the penalty for not registering: Pinkerton q. t. v. Ross, 33 U. C. R. 508. The statute does not require the registration of a partnership of real estate agents or insurance agents: Stitt v. Arts and Crafts, 13 O. W. R. 730. Mining syndicate with right to share percentage of profits: McKim v. Bixel, 19 O. L. R. 81. Where a firm sues or is sued: see Con. Rule 144, H. & L. notes p. 279, 1913, Rule 14, Con. Rules 222-231, H. & L. notes pp. 412-428, 1913 Rules 100-108.

6. A registered declaration under this Act signed by a husband and his wife, by which they declared themselves partners, is incontrovertible as against a creditor suing and it is not open to the wife to contend that she is incapable of becoming a partner of her husband. In any event such a contention would be met by the provision of the Married Women's Property Act. A registered declaration signed by the husband only that the partnership had been dissolved was no evidence in his favour: Gibson v. Le Temps, 8 O. L. R. 707. "Not be controvertible" means not controvertible in a civil action in which a claim is made against the firm. It does not apply to a case of a penal action brought against a member of the firm for neglecting to file such declaration: Cassidy q. t. v. Henry, 31 U. C. R. 345.

8. This provision does not apply to a case where it was unnecessary to have filed the original declaration, as in the case of a firm of real estate brokers: Stitt v. Arts and Crafts, 13 O. W. R. 730. Failure to file a declaration of change of membership and omission of usual common law methods of giving notice: see Oakville v. Andrew, 10 O. L. R. 709; see also as to change in firm: Bank of Toronto v. Nixon, 4 A. R. 346. A declaration under this Act may be filed by a limited liability company doing business as an ordin-

ary company. The question whether a limited liability company may lawfully do business under another name does not arise on a question of registration merely: Guthrie, 1911, p. 10.

10. Remission of penalty: Dixon v. Georgas Bros., 4 O. W. N. 462, 23 O. W. R. 524. Penalty: see Chaput v. Robert, 14 A. R. 354; Pinkerton v. Ross, 33 U. C. R. 508; Cassidy v. Henry, 31 U. C. R. 345. Fines, penalties and forfeitures: see R. S. O. 1914, ch. 99.

11. Where the applicant for a certificate furnishes the name of the firm it is unnecessary to search the individual index, and the Registrar is entitled to 25c for certificate and 10 cents only for the search, no matter how many individuals constitute the firm: Guthrie's Decisions, 1897, p. 5.

CHAPTER 140.

The Mechanics' and Wage-earners' Lien Act.

Refer to: Wallace, Mechanics' Lien Laws in Canada, Holmested's Mechanics' Lien Act (Ont.), Bloom's Mechanics' Lien Laws and Building Contracts (U. S.); Hudson on Building Contracts.

1. Legislation in Ontario dates from 1873, 36 Vic. ch. 27. Amended 38 Vic. ch. 20. Consolidated 1877 as ch. 120. Amended 45 Vic. ch. 15, 47 Vic. ch. 18, 50 Vic. ch. 20. Consolidated 1887, ch. 126. Amended 53 Vic. ch. 38, 53 Vic. ch. 37, 56 Vic. ch. 24. Consolidated 59 Vic. ch. 35. Amended 60 Vic. ch. 24. Consolidated 1897, ch. 153. Amended 63 Vic. ch. 2, 1 Edw. VII. ch. 12, 2 Edw. VII. ch. 21, 4 Edw. VII. ch. 11. Consolidated 10 Edw. VII. ch. 69. The lien is purely statutory and is not analogous to a vendor's lien: King v. Alford, 9 P. R. 643.

2.—(*a*) "Contractor:" The distinction between different classes of lien-holders has now been almost dropped, but: see Bunting v. Bell, 23 Gr. 584; and McPherson v. Gedge, 4 O. R. 246, where the expression "lien-holders of the same class" is said to mean

"those who have contracted with the same person whether their liens are registered or not."

2.—(*c*) A person is not an "owner" within the meaning of this sub-section unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge or consent to the work being done or the materials being supplied is not enough; there must be a request either express, or by implication from circumstances, to give rise to the lien: Gearing v. Robinson, 27 A. R. 364. In order to create a lien on the property of the owner in favour of the material man there must in all cases be a request of the owner and a furnishing of the materials either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit: Slattery v. Lillis, 10 O. L. R. 697; see Fortin v. Pound (B.C.), 1 W. L. R. 333. This sub-section must be read with sec. 6, which creates the lien. The effect of these two sections was considered in Graham v. Williams, 8 O. R. 478, 9 O. R. 458. There the claim was made by a material man who had supplied bricks to a person who had leased lands from an owner with an option to purchase. Under the circumstances of that case the interest of the owner was not charged, the Court holding that it requires something more than mere knowledge of the work being done to bind the owner and that the privity and consent mentioned in the Act must be in pursuance of an agreement. In Blight v. Ray, 23 O. R. 415, there was a verbal agreement for the purchase of land sufficient to give ownership in equity to the buyer. The seller was aware that the work was being done and the materials furnished. Ferguson, J., held that the circumstances of this case entitled the material man to a lien upon the interest of the owner and criticized the expression in Graham v. Williams (*supra*) that the privity and consent must be in pursuance of an agreement. "Owner:" see also Scratch v. Limoges, 44 S. C. R. 86. See also Tennant v. Powell, Sept. 21st, 1893, Court of Appeal, unreported, following Graham v. Williams, noted 10 O. L. R. 703. An agreement to purchase property under which buildings are to be erected by the seller and which has been acted

on by the parties, although not binding under the Statute of Frauds if pleaded, constitutes the buyer an "owner." *Semble*, if not an "owner" then by the Registry Act, no unregistered lien of which he had not notice prior to the registry of the deed to him, could prevail against him: Reggin v. Manes, 22 O. R. 443. The lessor in a lease which provides for certain repairs to be done by the lessee and the cost deducted from the rent, is not an "owner:" Garing v. Hunt, 27 O. R. 149. Where married woman is owner difficulties formerly occurred: *c.f.* Wagner v. Jefferson, 37 U. C. R. 551; but now see sec. 7. Where the contract is made with an owner who is a minor or a lunatic no lien attaches: Holmested p. 9. As to guardian: Collins v. Martin, 41 U. C. R. 602. "Work or service;" for distinction: see secs. 22 (3) and 22 (4); see also Arnoldi v. Gouin, 22 Gr. 314; Garing v. Hunt, 27 O. R. 149; Davis v. Crown Point, 3 O. L. R. 69, noted *post*, sec. 6.

2.—(*f*) "Sub-contractor" now includes all sub-contractors, however remote: but see sec. 15, where wage-earners are specially considered.

3. A mechanic's lien, "registered in the Registry Office of the registry division in which the land is situated" (see sec. 17) is unenforceable against a Dominion railway extending beyond the county limits: Crawford v. Tilden, 8 O. W. R. 548, 9 O. W. R. 781, 13 O. L. R. 169, 14 O. L. R. 572; see R. S. C. 1906, ch. 37, sec. 299. Powers of Provincial Legislatures as to railways within the legislative authority of the Dominion: see C. P. R. v. Notre Dame de Bonsecours, 1899, A. C. 367; Madden v. Nelson and Fort Sheppard Ry., 1899, A. C. 626. See also as to railways: King v. Alford, 9 O. R. 643; Breeze v. Midland, 26 Gr. 225; and see provisions of sec. 17 (3) and notes. Lands of a municipality actually required for the public uses of the municipality, *e.g.*, public buildings, firehalls, etc., are exempt from the operation of this Act: General Contracting Co. v. Ottawa, 14 O. W. R. 749, 1 O. W. N. 911. Applies to mines: see R. S. O. 1914, ch. 32, sec. 182. Public schools: see Robb v. Woodstock School Board; see Armour, Titles, p. 242. Where a house is being rebuilt by an insurance company under the terms of a policy: see sec. 9, note.

4. See Workmen's Compensation for Injuries Act, R. S. O. 1914, ch. 146, sec. 10.

6. Liens are divided into two classes: (1) Liens for which a claim is not registered; and (2) liens for which a claim is registered. The lien is given by this section, and exists independently of the registration of a claim. Before registration there are two courses open to a lienor: (*a*) he may omit to register a claim, in which case his lien will either lapse or be enforced by action at his own instance, or that of others; or (*b*) he may register a claim, in which case his lien will lapse on the expiration of 90 days, or he must bring an action within a certain time, or some one else must. (See sec. 24, notes): Eadie Douglas v. Hitch, 27 O. L. R. 257. "Performs any work" relates back to commencement of work: Ottawa Steel v. Dom. Supply, 25 Occ. N. 58, 5 O. W. R. 161; see note sec. 14. "Performs any work or service upon or in respect of any building . . . mine . . ." Under this, a blacksmith employed for sharpening and keepings tools in order for the work of mining is entitled to a lien for his wages, but a cook who does the cooking for the men employed, is not: Davis v. Crown Point, etc., 3 O. L. R. 69. An architect is entitled to register a lien for money due him for plans and specifications and also superintending the erection of buildings for the owner: Arnoldi v. Gouin, 22 Gr. 314. But as to a scene painter: see Garing v. Hunt, 27 O. R. 149, note to sec. 7 (1). Query, if scenery is part of freehold. "Places or furnishes materials:" see Larkin v. Larkin, 32 O. R. 80, note to sec. 8 (3), *post*. The phrase "furnishes any materials to be used" means that unless the materials are furnished for the purpose of being used no lien attaches even though they are used. Experimental purposes are insufficient: Brooks Sanford v. Telier, 20 O. L. R. 303, 22 O. L. R. 176. When furnishing materials gives a direct lien on the land as against the owner, and when a sub-lien on the moneys owing by the owner to the contractor or upon the statutory drawback: see Slattery v. Lillis, 10 O. L. R. 697. "The commencement of the lien is coincident with the commencement of the work" and therefore liens registered within the proper time limit for materials supplied prior to the service of petition to wind up

company are entitled to be paid in priority to ordinary creditors: Re Clinton Thresher Co., 15 O. W. R. 318, 1 O. W. N. 445. The lien given by this section exists independently of registration: Eadie Douglas v. Hitch, 27 O. L. R. 257. When lien attaches (under Nova Scotia Act): S. Morgan Smith v. Sissibo Pulp Co., 35 S. C. R. 93. "Lands occupied or enjoyed therewith" includes waterlots adjoining: Davis v. Crown Point, 3 O. L. R. 69. "Sum justly due:" see notes to sec. 22 as to when amount is due. "The amount due to the contractor could not be ascertained without the persons liable on the contract being before the Court: Woods v. Stringer, 20 O. R. 148. The occupying of church pews objected to was not an acceptance of the work. A reduction of the price by the difference in value between the bad material and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled: Wood v. Stringer, 20 O. R. 148. Work improperly done, not authorized in writing as required by written contract, nor within time specified: see Hutchison v. Rogers, 14 O. W. R. 768, 1 O. W. N. 89. Conditions of written contract cannot be disregarded and the lien paid on *quantum meruit*: Kelly Bros. v. Tourist Hotel Co., 15 O. W. R. 29, 1 O. W. N. 337, 20 O. L. R. 267. "Amount justly due": see also Farrell v. Gallagher, 2 O. W. N. 635, 815, 18 O. W. R. 446. A contractor formerly could contract subcontractors out of their liens without their knowledge or consent: Forhan v. Lalonde, 27 Gr. 300. The lien of a subcontractor is limited to what is due by the owner to the contractor: Briggs v. Lee, 27 Gr. 464. "Except as otherwise provided:" Section considered: Rice Lewis v. Rathbone, 27 O. L. R. 630. What persons have a right to file liens: see Annotation, 9 D. L. R. 105. Armour, Titles, p. 236, *et seq.*, and see esp. p. 238.

8.—(1) A building committee of a church have no "interest" in the lands upon which a lien may attach and the individual members are not liable except on a distinct cause of action that they misrepresented their authority: Litton v. Gunther, 12 O. W. R. 1122. "Interest of the owner": see Booth v. Booth, 3 O. L. R. 294; B. C. Lumber Co. v. Leberry, 22 Occ. N. 273.

8.—(2) Where a leasehold interest is sought to be charged: Gearing v. Robinson, 27 A. R. 364.

8.—(3) The plaintiffs claimed priority as lienholders over a mortgagee whose mortgage was prior to the date of the contract for the amount by which the selling value had been increased. The Court held under the then wording of the Act, that the mortgagee was not an owner, not being a person at whose "request, etc., the work had been done." Proceedings had not been taken against the mortgagee within the time required in secs. 23 and 24: Bank of Montreal v. Haffner, 29 Gr. 319, 3 O. R. 183, 10 A. R. 592, Cas. Dig. 526. Proceedings taken to enforce claim for priority on the increased selling value must state the dates of creation of the incumbrances: Douglas v. Chamberlain, 25 Gr. 288. The contractor is restricted to his proportionate share of increased selling value in case of deficiency: Broughton v. Smallpiece, 25 Gr. 290. Each lienholder is entitled to security on the enhanced value: Bank of Montreal v. Haffner, 3 O. R. 183. It must clearly appear that the selling value has been enhanced: Kennedy v. Haddon, 19 O. R. 240. A prior mortgage is one existing in fact before the lien arises, though not necessarily prior in point of registration: Cook v. Belshaw, 23 O. R. 545; see Gaulthier v. Larose, 38 C. L. J. 156. Materials were placed on the land by the owner and paid for by the mortgagee to be used in the construction, but were not actually incorporated. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there some time and storage charges incurred, the mortgagee sold them to the mill-owner. Under these circumstances, Meredith, C.J., was of opinion that no lien attached, incorporation in the building being an essential element. Rose and MacMahon, JJ., considered that a lien would attach, notwithstanding the absence of incorporation, but, there having been a conversion, no relief could be granted for there is nothing in the Act enabling a Court to assess damages which could be applicable to lienholders: Larkin v. Larkin, 32 O. R. 80. The lienholder's remedy is confined to the increased value. He cannot question the priority of the mortgage: Dufton v. Horning, 26 O. R. 252. As between

a lienholder and a prior mortgagee increased value was found. The premises were then destroyed by fire. The claim of the lienholder was at an end so far as the mortgagee was concerned: Patrick v. Walbourne, 27 O. R. 221. It seems increased value can only be ascertained by sale: Patrick v. Walbourne, 27 O. R. 221. A mechanic was held not entitled to any lien in respect of a registered mortgage under which progressive advances were made, although a part of the money was advanced after the execution of the work, but without notice of it: Richards v. Chamberlain, 25 Gr. 402. Progressive advances under a mortgage as the building goes on have priority over concurrent unregistered liens, the increased value in such a case not being a benefit to the pre-existing mortgage, but calling forth periodical payments: Cook v. Belshaw, 23 O. R. 545. Mortgagees not parties to a pending action to enforce lien took sale proceedings, notified the registered lienholders and sold. On motion of the mortgagees, the registry of the liens and certificates was annulled and the balance of money in the mortgagees' hands ordered paid into Court: Finn v. Miller, Rathbone v. Miller 26 C. L. J. 55. Judgment where mortgagees are directed to pay increased selling value into Court and directing proceedings in default: see Ludlam Ainslie Lumber Co. v. Fallis, 12 O. W. R. 1270, and see this case, 14 O. W. R. 273, 19 O. L. R. 419. See Armour, Titles, p. 236, *et seq.*, 248.

9. Where in fulfilment of a policy a house is rebuilt by an insurance company upon the land of the insured, no lien for work or materials attaches: Holmested, p. 9. Premises destroyed by fire: Patrick v. Walbourne, 27 O. R. 221.

10. Extinguishment of balance due contractor as liquidated damages; liability of owner to material man: McManus v. Rothschild, 25 O. L. R. 138, 3 O. W. N. 291, 20 O. W. R. 469. "The basis of the price to be paid for the whole contract": see Cole v. Pearson, 17 O. L. R. 46, 12 O. W. R. 111; note to sec. 12. Where plaintiff has not completed building contract in accordance with its terms he is not entitled to a lien: Simpson v. Rubeck, 21 O. W. R. 260, 3 O. W. N. 577. Plaintiffs claiming lien

may be allowed to complete work *pendente lite*: Crown Art Stained Glass v. Cooper, 1 O. W. N. 1047. See Russell v. French, 28 O. R. 215; Truax v. Dixon, 17 O. R. 366; Farrell v. Gallagher, 23 O. L. R. 130; Rice Lewis v. Rathbone, 4 O. W. N. 602, 27 O. L. R. 630; note to sec. 12, *post*. Failure of contractor to complete work on building contract: see Annotation, 1 D. L. R. 9.

11. Amount owing to contractor: In King v. Low, 3 O. L. R. 234, there was an agreement to do work for a specified sum and the building was destroyed. The plaintiffs admitted non-completion by suing on a *quantum meruit*. Following the rule in English cases (Appleby v. Myers, L. R., 2 C. P. 651, etc.), there being no default on the part of the defendants, the plaintiffs could not recover: see Sherlock v. Powell, 27 A. R. 407; see Wood v. Stringer, 20 O. R. 148. A sub-contractor, though not a wage-earner, is entitled to a lien on the percentage in priority to any right of set-off the owner may have against the contractor by reason of any default in the performance of his contract where progress certificates have issued: Rice Lewis v. Rathbone, 4 O. W. N. 602, 27 O. L. R. 630, and see notes to sec. 12.

12.—(1) The owner of a building is not prohibited from making payments before the expiry of the 30 days from completion out of the 20 per cent. reserve to persons entitled to liens, but he makes such payments at his own risk as against anyone ultimately prejudiced by such payment: Torrance v. Cratchley, 31 O. R. 546. Where an owner took possession of the works, the percentage which he was required to deduct from any payments and retain was to be computed on the value of the work and materials, but not upon the value of the plant as well: Birkett v. Brewder, 22 Occ. N. 93, 1 O. W. R. 62. In a case under the Nova Scotia Act it was held that the provision requiring a percentage to be retained did not apply where the contract price was associated with other considerations from which it could not be separated: S. Morgan Smith v. Sissibo, etc., 35 S. C. R. 93. Word "payment" includes an arrangement by which an order is given by the contractor on the owner for the payment of the material man

out of the fund which when accepted fixes the owner with direct liability to pay for the materials: Jennings v. Willis, 22 O. R. 439. Where a contract provided that upon non-completion by a fixed day the contractor was to pay or allow $10.00 a day until completion, this authorized a deduction as liquidated damages even against lienholders claiming adversely to the contractor other than those having liens for wages: McBean v. Kinnear, 23 O. R. 313. A payment in excess of the contract price made to complete a building owing to the failure of the contractor should be deducted from the contract price and the 20 per cent. calculated on the balance of such contract price after such deduction: Reggin v. Manes, 22 O. R. 443. See also Sherlock v. Powell, 27 A. R. 407; Goddard v. Coulson, 10 A. R. 1. (Re Cornish, 6. O. R. 259, and In re Sear v. Woods, 23 O. R. 474, are not now applicable: Russell v. French, 28 O. R. 215). Under the earlier Acts the 20 per cent. was to be deducted from the "price to be paid" and a lienholder must prove money owing by the owner to the contractor or no lien attached. The present section provides for 20 per cent. drawback on the "value of the work:" Russell v. French, 28 O. R. 215. It is the duty of the owner to retain out of the payments to be made to the contractor as the work progresses 20 per cent. of the value of the work and materials to form a fund for the payment of lienholders, not subject to be affected by the failure of the contractor to perform his contract: Russell v. French, 28 O. R. 215. Under the authority of Russell v. French, 28 O. R. 215, lienholders are entitled to 20 per cent drawback, whether owing or not, and the owner is required to pay that portion even if it never becomes due to the contractor. This case has been adopted as a rough-and-ready rule, but its authority has not been passed on by the Court of Appeal: see articles on the authority of this case, 41 C. L. J., p. 733, 49 C. L. J. 260. When rightly understood the case of Russell v. French, 28 O. R. 215, was well decided: Rice Lewis v. Rathbone, 27 O. L. R. 630. Computation of the 20 per cent. where the contract a losing one and work not completed: Farrell v. Gallagher, 2 O. W. N. 635, 815, 18 O. W. R. 446, 23 O. L. R. 130. In ascertaining the amount upon which is to be computed, the 20 per cent. provided in the Act, the

value of the work done and materials furnished is to be calculated on "the basis of the price to be paid for the whole contract:" Cole v. Pearson, 17 O. L. R. 46, 12 O. W. R. 111. Note the wording of the present section: "calculated on the basis of the contract-price, or if there is no specific contract-price, then on the basis of the actual value of the work, service or materials." If an owner contemplating building chooses to say "I will not pay until completion," the statute has not advanced the rights of general lienholders not being wage-earners beyond the position of the plaintiff in Goddard v. Coulson, 10 A. R. 1, and they are still limited to the amount owing from the owner. On the other hand if the owner chooses to agree to make payments to the contractor before completion, he cannot complain that a portion of what he is willing to part with should be put aside, not for his security, but for the security of others whose labor or materials have gone to benefit the property: Rice Lewis v. Rathbone, 27 O. L. R. 630. The true meaning of the statute is that if the owner has agreed to pay moneys before completion of the contract, whether fixed amounts or sums arrived at by an architect's progress certificate or otherwise, and they actually become payable, he must retain the same to the extent of twenty per cent. of the value of the work and materials to the date for payment calculated as prescribed in the Act and upon this percentage the liens will become a charge, but except in so far as moneys become actually payable, there is no percentage upon which liens, other than wage-earners' liens, can become a charge: Rice Lewis v. Rathbone, 27 O. L. R. 630. Rice Lewis v. Rathbone follows Russell v. French 28 O. R. 215, and virtually overrules Farrell v. Gallagher, 23 O. L. R. 130: see also note to sec. 15, *post*. Payments to be made: see Simpson v. Rubeck, 21 O. W. R. 260, 3 O. W. N. 577, note to sec. 10.

12.—(4) What is a sufficient "notice in writing": Craig v. Cromwell, 32 O. R. 27, 27 A. R. 585; see article 7 C. L. T. 69. "Technicalities should not obtain in construing this Act and what would be deemed sufficient notice as a matter of business should suffice": per Boyd, C.: Craig v. Cromwell, 32 O. R. 27. A material man giving notice to the owner of an

unpaid account against the contractor is not thereby entitled to dispute the validity of payments afterwards made by the owner to persons having claims for wages or to persons furnishing materials on the owner's personal liability: McBean v. Kinnear, 23 O. R. 313.

13. This section appears "merely to give authority to the owner without the consent of the contractor, but upon mere notice to him, to make payments out of the contract price direct to persons who would be entitled to liens, limiting, however, the right to make such payments to the moneys which the owner is not directed to retain under the 12th section. It does not apply at all to the moneys which the owner is directed to retain": per Street, J.: Torrance v. Cratchley, 31 O. R. 550.

14.—(1) A lien of a sub-contractor relates back to the commencement of his work, and where a contractor assigned a large sum due to him from the employer, the sub-contractor's lien had priority for the full amount of his lien and not merely for the portion earned up to the date of the assignment: Ottawa Steel v. Dom. Supply, 25 Occ. N. 58, 5 O. W. R. 161. A notice of indebtedness for which a lien can be claimed is *prima facie* notice of the lien itself: Robock v. Peters, 36 C. L. J. 354. A lienholder who registers his lien in time has priority from the date of commencement of his work or from the placing of materials: Robock v. Peters (Man.), 36 C. L. J. 354. Application of *pro rata* payments: Hood v. Coleman, 36 C. L. J. 308. Whether a mechanic's lien of a sub-contractor takes priority over a garnishee summons against the fund in the hands of the owner for a debt by the contractor: see Bicknell and Seager, D. C. Act, p. 359. See also provisions of R. S. O. 1914, ch. 134, sec. 14.

14.—(2) See Hoffstrom v. Stanley, 14 Man. L. R. 227, 22 Occ. N. 337.

15.—(1-4) See Torrance v. Cratchley, 31 O. R. 546; Black v. Wiebe, 15 Man. L. R. 260. Where a contract provided for $10.00 a day deduction for non-completion, this authorized a deduction as liquidated damages

against lienholders other than liens for wages. The amount required to satisfy the wages' lien should be deducted from the contract price after allowing for the reduction by reason of non-completion and cannot be marshalled in favour of a material man by being thrown upon the part of the contract price representing such reduction: McBean v. Kinnear, 23 O. R. 313; see Reggin v. Manes, 22 O. R. 443, Russell v. French, 28 O. R. 215, *ante*. The Act in giving wage earners an exceptional and special benefit of liens in the case of uncompleted and abandoned contracts, enlarges the claims of the wage earners beyond the written contract price agreed on by compelling the owner or contractor to pay, in cases of uncompleted and abandoned contracts, certain liabilities and the extra cost of the defaults. But such increase of contract price ought not to be extended beyond what the plain reading of the Act will warrant: Brienzi v. Samuel, 12 O. W. R. 1233. Where moneys fall due on a contract under progress certificate, the owner is liable to lienholders to the extent of 20 per cent. upon these payments, and if over and above the amount of the progress certificate, any sum ever became payable by the owner to the contractors, 20 per cent. of that also is available to lienholders. There is nothing inconsistent in this view with the provision of this section, and there is nothing in this section to affect the other provisions of the Act respecting liens for other things than wages. This section covers cases in which there are no progress certificates in which there may be nothing ever payable by the owner to the contractor except the ultimate balance, if any, and so it goes far beyond other provisions of the Act in favour of other lienholders. This is in accordance with the decision of Russell v. French, 28 O. R. 215, and if there is anything decided or stated to the contrary in Farrell v. Gallagher, 23 O. L. R. 130; McManus v. Rothschild, 25 O. L. R. 138, it should be overruled: Rice Lewis v. Rathbone, 27 O. L. R. 630.

15.—(5) A mortgagee paying off the original vendor and taking a conveyance is not, having notice of a lien, entitled to be subrogated to the vendor's

priority: Robock v. Peters, 36 C. L. J. 354; see also McBean v. Kinnear, 23 O. R. 313; Jennings v. Willis, 22 O. R. 439, noted *ante*.

16. The lien having attached to the land because of the material furnished, and being on the land, the creditors of the person who furnishes the same have no right to pursue the property there to satisfy their claim: Ludlam-Ainslie v. Fallis, 14 O. W. R. 273, 19 O. L. R. 419. Materials removed and converted: see Larkin v. Larkin, 32 O. R. 80, noted, *ante*, sec. 8 (3).

17.—(1) Residence of Claimant: "Toronto" is sufficient address—the house number and street are not required: Barrington v. Martin, 16 O. L. R. 635, 12 O. W. R. 324. See also as to sufficiency of claimant's address: Dufton v. Horning, 26 O. R. 252, Crerar v. C. P. R., 5 O. L. R. 383. "Believes to be the owner." A mistake as to the true owner is not material: Barrington v. Martin, 16 O. L. R. 635. Name of owner: Omission of owner's name held not to invalidate lien: Makins v. Robinson, 6 O. R. 1. When a mortgage is a prior incumbrance and when a subsequent incumbrance: see Reinhart v. Shutt, 15 O. R. 325. Naming mortgagees in lien: parties: see McVein v. Tiffin, 13 A. R. 1; Re Wallis and Vokes, 18 O. R. 8. Where priority over incumbrance or increased selling value is claimed: see Douglas v. Chamberlain, 25 Gr. 288. The name and residence of the person for whom or on whose credit the work was done must appear. This objection can be taken by a contractor against a sub-contractor: Wallis v. Skain, 21 O. R. 532. "Time within which materials were furnished." The end of the period is the important date: see sec. 17 (2) and form appended to Act: Barrington v. Martin, 12 O. W. R. 324. See also as to time: Roberts v. Macdonald, 15 O. R. 80; Truax v. Dixon, 17 O. R. 366. "Lumber supplied" is a sufficient description. "Materials supplied" is not sufficient but such a defect may be cured by sec. 19 (1): Barrington v. Martin, 16 O. L. R. 635, 12 O. W. R. 324. The application of the Registry Act to liens: see Armour, Titles, p. 244, *et seq*. As to registration of liens against mining claims: see R. S. O. 1914, ch. 32, sec. 182.

17.—(2) Imperative requirement of affidavit: Bruce v. National Trust, 4 O. W. N. 1372, 24 O. W. R. 688. The land was in Wellington County and the affidavit was sworn in Bruce County: satisfied the provisions of the Act: Truax v. Dixon, 17 O. R. 366. Affidavit referred to claim marked A., and no such mark appeared. This did not invalidate the lien: Currier v. Friedrick, 22 Gr. 243. Assignment of lien: see Currier v. Friedrick, 22 Gr. 243. Affidavit of assignee of lienor: Grant v. Dunn, 3 O. R. 376. Substantial compliance with this section: see Ludlam Ainslie Lumber Co. v. Fallis, 12 O. W. R. 1270, 14 O. W. R. 273, 19 O. L. R. 419. As to registration of lien signed by the lienholder's agent, see Guthrie's decisions, 1897, p. 43.

17.—(3) The Court will not direct a sale of railway lands but only order payment of amount due: Breeze v. Midland R. Co., 26 Gr. 225. This applies also to engine house, turntable and land on which they are: King v. Alford, 9 O. R. 643; see sec. 3 notes.

18. This section and sec. 19 were passed in 1896 after the decisions in Currier v. Friedrick, 22 Gr. 243; Oldfield v. Barbour, 12 P. R. 554. Where a contract was made with the respective owners of adjoining lands for the repair of two separate buildings included under one roof at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches against the lands of each owner for the price of work and materials on the buildings respectively: Booth v. Booth, 3 O. L. R. 294; see Fairclough v. Smith, 13 Man. L. R. 509. A material man is not entitled to register, as one individual claim, a lien for the amount of materials supplied by him to a contractor against all the lands jointly of the owners of different parcels of land who have separate contracts with the contractor for the erection of houses on their respective parcels: Dunn v. McCallum, 14 O. L. R. 249, 9 O. W. R. 756, and see sec. 32 notes. Secs. 17 and 18 must be construed as meaning that each particular piece of land shall be deemed as incumbered only in respect of the lien with which it is properly chargeable. This sec. does not contemplate the consolidation of liens or extending the

lien so as to becloud the title of additional lands: Dunn v. McCallum, 14 O. L. R. 249, 9 O. W. R. 756. There can be a valid lien against several buildings having different owners where a material man supplies material under an entire contract: Ontario Lime Association v. Grimwood, 22 O. L. R. 17, 2 O. W. N. 25, 16 O. W. R. 929. Claiming a lien on too much property will not invalidate it altogether: Ontario Lime Association v. Grimwood, 22 O. L. R. 17.

19. The provisions of this section are confined to matters in secs. 17 and 18: Bruce v. National Trust, 4 O. W. N. 1372. Substantial compliance: Crera v. C. P. R., 5 O. L. R. 383; Grant v. Dunn, 3 O. R. 376; Makers v. Robinson, 6 O. R. 1; Robock v. Peters, 36 C. L. J. 354. "Or other person" means (probably) *ejusdem generis*, and does not include persons other than the claimants who are themselves, and in competition with him, claiming a lien against the property: Barrington v. Martin, 16 O. L. R. 635, 12 O. W. R. 324.

20. Fee for registration. There is no provision for increased fee in case of a number of lots being included in one lien: Guthrie, 1897, p. 8. Proper fees where claimant claims for himself and as assignee of a number of others: 25c. for the first name, and 10c. for each alleged assignor: Guthrie, 1911, p. 22.

21. What is a valid registration: see Re Wallis and Vokes, 18 O. R. 8. Priorities as between lienholder and innocent purchaser for value without notice of unregistered lien: Wanty v. Robins, 15 O. R. 474. Lienholder and mortgagee: Robock v. Peters, 36 C. L. J. 354; Gauthier v. Larose, 38 C. L. J. 156; Cook v. Belshaw, 23 O. R. 545; Patrick v. Walborne, 27 O. R. 221; Reinhart v. Shutt, 15 O. R. 325; Wanty v. Robins, 15 O. R. 474; Graham v. Williams, 9 O. R. 458; Richards v. Chamberlain, 25 Gr. 402; McVein v. Tiffin, 13 A. R. 1; and see notes to sec. 8 (3) *ante*. Lienholder and purchaser under contract of purchase: Reggin v. Manes, 22 O. R. 443. Lienholder and purchaser from mortgagee (not a party and selling under power of sale):

Finn v. Miller, Rathbone v. Miller, 22 C. L. J. 55. The application of the Registry Act to liens: see Armour, Titles, p. 244, *et seq.*

22.—(1) A claim for lien against the lands of a company which is being wound up under R. S. C. 1906, ch. 144, cannot be made without the consent of the Official Referee: See R. S. C. 1906, ch. 144, sec. 22. Where such proceeding is taken without leave the lien will be vacated with costs as irregular and unnecessary: Re Haleybury Rink Co., 12 O. W. R. 197. Where contract to do work for a fixed sum and completion a condition precedent to final payment: see as to right of contractor to lien: Sherlock v. Powell, 27 A. R. 407; King v. Low, 3 O. L. R. 234. The time limited for the registration of liens does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder. Day v. Crown Grain Co., 39 S. C. R. 258. Where under the contract the architects are the persons to determine when the work is completed, it is not so completed until they signify their approval: Vokes Hardware Co. v. G. T. R., 12 O. L. R. 344, 7 O. W. R. 537, 8 O. W. R. 24.

22.—(2) Furnishing or placing the last material, time for filing lien for materials: Barrington v. Martin, 12 O. W. R. 324, 16 O. L. R. 637. History of this legislation: see Barrington v. Martin, 16 O. L. R. 637, 12 O. W. R. 324. Such cases as Hall v. Hogg, 20 O. R. 13; Morris v. Thrale, 24 O. R. 159, are said to be no longer applicable since the amendment of 1896. "Furnishing or placing the last material," means the last material furnished by the material man under his contract where there is a distinct contract: Rathbone v. Michael, 14 O. W. R. 389, 19 O. L. R. 428, and see 1 O. W. N. 573, 15 O. W. R. 639. Although an account of materials supplied may consist of items for different lots supplied at different dates on separate and distinct orders, the lien filed within the time required after delivery of the last lot will cover all orders if given in pursuance of a previous general arrangement: Robock v. Peters, 36 C. L. J. 354. It is essential, before the lien can arise, that the material should be furnished and

placed upon the land upon which the lien is claimed: Ludlam Ainslie v. Fallis, 12 O. W. R. 1270, 14 O. W. R. 273, 19 O. L. R. 419. Materials furnished after work is completed will not keep a lien alive: Renney v. Dempster, 2 O. W. N. 1303, 19 O. W. R. 644. Remedying defects and doing immaterial work as extending time for registration: see Neill v. Carroll, 28 Gr. 30, 339; Summers v. Beard, 24 O. R. 641. (Where the report of Neill v. Carroll is corrected); Booth v. Booth, 3 O. L. R. 294. Furnishing materials of trifling value: Brooks Sanford v. Telier, 20 O. L. R. 303, 22 O. L. R. 176. Effect of non-registration of lien: see Wanty v. Robins, 15 O. R. 474.

22.—(5) Where the engineer who is made arbiter of disputes under a contract is, unknown to the contractor, really the engineer of the employer, the contractor is not bound: Good v. T. H. & B., 26 A. R. 133. The relationships, family and financial, of the superintendent (on whose certificate work was paid for), should have been disclosed: per Armour, C.J.O., Ludlam v. Wilson, 2 O. L. R. 549. Architects' certificate, completion of work and time of registering: Vokes v. G. T. R., 12 O. L. R. 344; noted ante, sec. 22 (1).

23. Action to realize claim: McPherson v. Gedge, 4 O. R. 246; Hovenden v. Elison, 24 Gr. 448. Parties: Hall v. Hogg, 14 P. R. 45; Wood v. Stringer, 20 O. R. 148. Proceedings by other persons: Bunting v. Bell, 23 Gr. 584; Re Sear v. Woods, 23 O. R. 474

24. The Master in Chambers has jurisdiction to entertain a motion to annul registration of a lien: Re Moorehouse v. Leake, 13 O. R. 290. Premature proceedings: Burritt v. Renihan, 25 Gr. 183. Ninety days: Briggs v. Lee, 27 Gr. 464. Applies to a mortgagee and that whether proceedings have or have not been previously taken against the owner: Bank of Montreal v. Haffner, 10 A. R. 592: see S. C., 29 Gr. 319. The action which is necessary to be begun to save the lien from absolutely ceasing to exist must have as parties to it all persons whose rights or interests are sought to be affected, unless according to the ordinary practice of the Court such persons may be added as defendants after judgment.

That, I understand, is the effect of the judgments of the Court of Appeal in Bank of Montreal v. Haffner (1884), 10 A. R. 592, affirmed by the Supreme Court (Cas. Dig. 526), and Cole v. Hall; per Meredith, C.J., Larkin v. Larkin, 32 O. R. 80. A prior mortgagee against whom relief is sought must be made a party within the time limited by the section: Larkin v. Larkin, 32 O. R. 80. An incumbrancer was improperly added a party in the Master's office after the expiration of the 90 days: Cole v. Hall, 13 P. R. 100. Filing a defence not a proceeding to realize: a counterclaim if properly framed and a certificate registered might be: Macnamara v. Kirkland, 18 A. R. 271. The 90 days allowed by this section are not to be computed exclusively of long vacation: Canada Sand Lime v. Ottaway, 15 O. L. R. 128, 10 O. W. R. 686, 788. A lienor who registers a claim must be taken to have abandoned all relief, but what he can obtain under this section: Eadie Douglas v. Hitch, 4 O. W. N. 147, 27 O. L. R. 257. The words "unless in the meantime," in subsec. 2, do not mean "between the time of registering the claim and the expiry of the time limited; but any proceeding taken during the existence of the lien (at all events), is taken "in the meantime," within the meaning of the section if taken before the expiration of the periods mentioned in the section: Eadie-Douglas v. Hitch, 27 O. L. R. 257.

26. Assignment of claim must be for the whole claim, not a part of it: Seaman v. Canadian Stewart Co., 18 O. W. R. 56, 2 O. W. N. 576. Assignment of claim and re-assignment: Currier v. Friedrick, 22 Gr. 243.

27. Fees for registering lien or discharge affecting many lots: see Guthrie, 1897, p. 8. Two or more liens cannot be discharged in one discharge: Guthrie, 1897, p. 8.

28. This section of the Act makes a change in the law: for former law see Edmunds v. Tiernan, 1892, 21 S. C. R. 406; National Supply Company v. Horobin, 1906, 4 W. L. R. 570. The new statute will prevent similar questions arising as to the effect of the negotiation of a note given for part of the debt: Brooks-Sandford v. Telier, 22 O. L. R. 176. A plaintiff cannot move before trial in a proceeding under

this Act for a personal judgment: Robertson v. Bullen, 13 O. W. R. 56; but he can bring a personal action as well if he so desires, the Court seeing that the defendants are not unduly burdened with costs: Hamilton Bridge Works v. General Contracting Co., 14 O. W. R. 646, 1 O. W. N. 34.

31.—(1) Style of cause of proceedings under this Act: see Con. Rule 1235; 1913, Rule 190 (3). Procedure is the ordinary procedure of the Supreme Court: see Larkin v. Larkin, 32 O. R. 80; Hall v. Pilz, 11 P. R. 449; Truax v. Dixon, 13 P. R. 279. Nature of procedure: see Canada Sand Lime v. Ottaway, 10 O. W. R. 686, 788; Canada Sand Lime v. Poole, 10 O. W. R. 1041; Bruce v. National Trust, 24 O. W. R. 688, 4 O. W. N. 1372. Long vacation is not to be excluded in computing the 90 days allowed by sec. 24: Canada Sand Lime v. Ottaway, 10 O. W. R. 686, 788, 15 O. L. R. 128. The limitations of secs. 42, 43 and 44 shew that interlocutory motions are not contemplated by the procedure under this Act: Rowlin v. Rowlin, 9 O. W. R. 297. Motion to dismiss in default of discovery: Ramsay v. Graham, 3 O. W. N. 972. Production and discovery: Wade v. Tellier, 13 O. W. R. 1132. The "ordinary procedure" includes the right of appeal from a Master's report: Wesner v. Tremblay, 13 O. W. R. 544, 18 O. L. R. 439. The Act does not contemplate a trial by jury: see the original Act, 36 Vict. ch. 27, sec. 6. While a jury notice does not violate any rule, the practice is against it, and such a notice was struck out as a matter of discretion in Trussed Steel Concrete Co. v. Wilson, 9 O. W. R. 238. Where a claim was registered and proceedings taken to enforce it in the name of a firm which had been dissolved and one member had died previous to registration, the lien attached and was validly continued, the word claimant covering the difficulty arising out of the word "person:" Bickerton v. Dakin, 20 O. R. 192, 695. Statement of claim in M. L. proceedings in long vacation: (1913) Rule 178.

31.—(2) Affidavits verifying statement of claim may be made by solicitor or agent: Crerar v. C. P. R., 5 O. L. R. 383. Statement of claim filed without affidavit: Bruce v. Nat. Trust, 4 O. W. N. 1372. The provisions of Con. Rule 522; 1913 Rule 297, apply: The

affidavit cannot be sworn before the lienor's solicitor: Canada and Lime v. Poole, 10 O. W. R. 1041.

31.—(3) Since 1893 the word "writ" in Con. Rule 162; 1913 Rule 25, includes any document by which a matter or proceeding is commenced. Service out of the jurisdiction can therefore be made of a statement of claim filed under this section. Prior to this: see Pennington v. Morley, 3 O. L. R. 517: see also McIver v. Crown Point, 19 P. R. 335. Substituted service of statement of claim: Restall v. Allen, 3 O. W. N. 63. When an action is begun by filing a statement of claim, the plaintiff cannot include other causes of action and other matters: Bagshaw v. Johnston et al., 3 O. L. R. 58. The Master or Official Referee should be judicially satisfied that the facts manifest a valid claim; but if any one claimant is omitted, he has a general power of amendment if the facts and circumstances warrant it: Orr v. Davie, 22 O. R. 430. Amendment of statement of claim: Bickerton v. Dakin, 20 O. R. 192. Circumstances under which Con. Rule 353 (1913, Rule 176), may be invoked to enlarge time for serving claim: Pease Heating Co. v. Bulmer, 12 O. W. R. 258.

32. "Groups:" see Crerar v. C. P. R., 5 O. L. R. 383. Class of lienholders: see McPherson v. Gedge, 4 O. R. 246. A suit brought by a lienholder operates for the benefit of all of the same class, so that a suit instituted by one within 30 days keeps alive all similar liens then existing: Hovenden v. Ellison, 24 Gr. 448. Whatever rights may be given by section 18 for joining claims for liens, the right, if any, to bring one action in respect of separate properties and owners, depends on the general practice of the High Court: Dunn v. McCallum, 14 O. L. R. 249, 9 O. W. R. 756. In an action begun by statement of claim to enforce a lien, it is improper to join a claim against the architect for fraudulently refusing his final certificate: Bagshaw v. Johnston, 3 O. L. R. 58.

33. Right of summary disposition of mechanics' lien by County Court Judge, assuming jurisdiction exists, should be sparingly exercised: General Contracting Co. v. Ottawa, 1 O. W. N. 911.

34. When the Official Referee is once seized of the case and the trial begun, all applications should be made

to him directly as controlling the entire procedure: Wade v. Tellier, 13 O. W. R. 1132. The officer trying the action has jurisdiction to deal with questions of priority: Gauthier v. Larose, 38 C. L. J. 156. The amount due from the owner to the contractor should be paid into Court by the owner less his costs which should be taxed as a stakeholder watching the case. The costs of lienholders should be paid as a first charge on the fund. Costs of lienholders subsequent to judgment should be taxed on a scale appropriate to the amount found due to each: Hall v. Hogg, 14 P. R. 45. An owner paid into Court a sum due a contractor which was insufficient to pay lienholders. An appeal was taken by the contractor unsuccessfully, and he was ordered to pay the owner's costs. The owner wished to claim on the fund in Court, but was held not entitled to do so: Patten v. Laidlaw, 26 O. R. 189. The assignee of an unregistered lienholder relying on an action brought by a number of unregistered lienholders, took no steps to enforce his lien or apply for a certificate. The action was dismissed and the assignee was allowed to intervene and prosecute the action: McPherson v. Gedge, 4 O. R. 246. Relief where defendant did not appear: Guest v. Linden, 3 O. W. N. 750, 21 O. W. R. 303.

36. See McPherson v. Gedge, 4 O. R. 246, noted ante, sec. 34.

37.—(1) The Judge or officer fixing a day for the trial of an action under this Act is to do so on application to him, and a notice of trial given by a party who has not obtained an appointment from the Judge or officer is not effective. Notice of trial must be served at least 8 clear days before the day fixed: McIver v. Crown Point, &c., 19 P. R. 335. An action was brought to enforce a lien, and a counterclaim was made for damages for breach of contract for the supply of the materials in respect of which the lien was registered. The action was discontinued and the defendant obtained *ex parte* from an Official Referee an order appointing a time for special trial of the counterclaim before the Master in Ordinary. It was held that there should have been notice to fix a day for trial, that a judicial officer cannot give an appointment for trial before another officer, and the notice of trial and appointment were set aside.

The counterclaim was proper: Pilkington v. Browne, 19 P. R. 337. Contractor's action for amount greater than value of land; power to stay: Dick v. Standard Underground Cable Co., 23 O. W. R. 19; 4 O. W. N. 57, 111. Proceedings in action to enforce lien where building left unfinished: Saltsman v. Berlin Robe Co., 4 O. W. N. 88. Action to enforce lien brought before work completed; costs: Crown Art. Stained Glass v. Cooper, 16 O. W. R. 634.

37.—(2) It is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served; service of notice of trial on them being the mode by which incumbrancers, not already parties to the proceedings, are brought in: Haycock v. Sapphire, &c., 7 O. L. R. 21.

37.—(3) Interest on principal sum found due where there was unreasonable delay in payment is properly allowed and secured by the lien and should be computed from commencement of the action: Metallic Roofing Co. v. Jameson, 2 O. W. R. 316. Adjudication of the claims of subsequent incumbrancers and other lienholders where notice of trial has been served after the time limited for bringing the action: Robock v. Peters, 36 C. L. J. 354.

38. Costs of sale proceedings: Wesner v. Tremblay, 13 O. W. R. 544, 18 O. L. R. 439. Position of purchaser under sale proceedings under this Act as regards undisclosed tax incumbrance: Wesner v. Tremblay, 13 O. W. R. 544, 1017, 18 O. L. R. 439.

39. Kelly Brothers v. Tourist Hotel Co., 15 O. W. R. 29, 1 O. W. N. 337, 20 O. L. R. 267.

40. The provisions of this section do not seem to cover appeals from interlocutory orders or reports: see also secs. 41-43, which go to shew that interlocutory motions are not contemplated by the procedure under this Act: Rowlin v. Rowlin, 9 O. W. R. 297, H. & L. notes, p. 1005. Appeals: see R. S. O. 1914, ch. 56, sec. 26 (2) (j).

42. The limitation on the amount of costs in this section does not apply to the costs of an appeal from the

decision of a Judge or officer trying the action. The costs of such an appeal are, it seems, within the scope of section 45: Gearing v. Robinson, 19 P. R. 192. Costs of appeal and of sale proceedings: Wesner v. Tremblay, 13 O. W. R. 544, 18 O. L. R. 439. See Rowlin v. Rowlin, 9 O. W. R. 297, noted ante.

43. "Actual disbursements" which may be allowed in addition to an amount equal to 25 per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings and *a fortiori*, not counsel fees charged by the solicitor himself when acting as counsel: Cobban v. Lake Simcoe Hotel Co., 5 O. L. R. 447.

44. Interlocutory motions in chambers are to be discouraged: Robertson v. Bullen, 13 O. W. R. 56.

46. Costs of an appeal are it seems within the scope of this section: Gearing v. Robinson, 19 P. R. 192.

48. Judgment with reference to ascertain rights of incumbrancers and mortgagees and directing payment into Court by mortgagees of increased selling value and proceedings in default and distribution of proceeds: see Ludlam Ainslie Lumber Co. v. Fallis, 12 O. W. R. 1270. (S. C. 14 O. W. R. 273, 19 O. L. R. 419).

49. Application of section: see Simpson v. Rubeck, 3 O. W. N. 577. When proceedings are taken under the Act, there can be no personal judgment (*e.g.*, under Con. Rule 603; 1913 Rule 57), until the percentage required to be retained by the owner and the other remedies prescribed by the Act are exhausted: Robertson v. Bullen, 13 O. W. R. 56: see also Hamilton Bridge Works v. General Contracting Co., 14 O. W. R. 646.

50. For a lien to arise the creditor must have taken possession of the debtor's property lawfully. A lien cannot be acquired by a wrongful act: Madden v. Kemster, 1807, 1 Camp. 12. Possession must be of a continuous and uninterrupted nature: Kruger v. Wilcox, 1753, Amb. 252; Tudor's Leading Cases in Mercantile Law, 353. See, however, Millburn v. Millburn, 4 U. C. R. 179, where sending a wagon to

a blacksmith's shop for ironwork did not invalidate the wagonmaker's lien for repairs which revived when he regained possession. The lien referred to in the action is a particular lien. No power of sale is given for a general lien. When an artificer's lien arises, his remedy under the general law is to retain possession of the chattel. This section enables him to sell. The lien cannot arise from voluntary work. The work must be completed unless completion is prevented by the owner of the property. For form of notice of sale, see Holmested, p. 309. A steam shovel was borrowed and needing repairs, the lender instructed the bailee to repair it, charge to him and deduct from the rent of the shovel. The bailee had no lien for repairs as the chattel had not come into his possession for the purpose of repair, and the agreement for payment excluded the lien: Barbeau v. Piggott, 9 O. W. R. 234. Lien for repairs on launch: Canadian Gas Power v. Schofield, 15 O. W. R. 847. A person who has a dog-cart under a hire purchase agreement has implied authority from the owner to employ a coach builder to do necessary repairs, and if he does so will create a lien in favour of the coach builder, not only against himself, but as against the owner of the dog-cart: Keene v. Thomas, 1905, 1 K. B. 136. Mechanics' liens for repairing property under conditional sale: see Article 48, C. L. J. 252. As to improvements to chattels under mistake of title: see 42 Can. L. J., p. 329. See R. S. O. 207, sec. 27, for specific statutory lien on impounded motor cars.

CHAPTER 141.

The Woodmen's Lien for Wages Act.

2. At present the Act applies to Haliburton (provisional county), and to Algoma, Manitoulin, Thunder Bay, Muskoka, Parry Sound, Rainy River, Nipissing, Sudbury, Temiskaming and Kenora. Territorial Districts each forming a Provisional Judicial District, R. S. O. 1914, ch. 3.

6. See Mechefeske v. Robert Stewart Limited, 9 O. W. R. 182.

CHAPTER 142.

THE PUBLIC AND OTHER WORKS WAGES ACT.

CHAPTER 143.

THE WAGES ACT.

Refer to Bicknell and Kappele, Practical Statutes, p. 501.

2. Where a commercial traveller was employed at £2 per week and a commission of 4 per cent. on all goods sold, the commission earned was held part of his "salary" in bankruptcy proceedings: In re Klein, 22 T. L. R. 664. See also where priority allowed: Re Morlock and Cline, 23 O. L. R. 165; Re S. E. Walker, Ltd., 25 W. L. R. 164 (Secretary and Salesman); Re Western Coal Co., 25 W. L. R. 26. (Teamster employed to deliver coal at a rate per ton, and using his own horses and wagons). Priority not allowed, see Cairney v. Beck (1906), 2 K. B. 746 (note to sec. 3); In re Beeton (1913), 2 Ch. 279 (artist on fixed annual salary to supply drawings as required); Re Ritchie Hearn Co., 6 O. W. R. 474; Re Newspaper, etc., Syndicate (1900), 2 Ch. 349, (managing director). See sec. 3, notes.

3. A secretary of a company who was also secretary of another company devoting the greater part of his time to the second company, was held not entitled to priority in respect of his salary on bankruptcy of the first company: Cairnely v. Beck, 75 L. J., K. B. 1014, (1906) 2 K. B. 746, 22 T. L. R. 776. Claims for arrears of salary made by persons occupying the position of president and vice-president of a company under resolutions duly passed are valid in liquidation in priority to the claims of the general body of creditors: Fayne v. Langley, 31 O. R. 254. If employment has been duly authorized, a director may have a preferential claim as clerk or servant: Re Beeton, Ltd. (1913) 2 Ch. 279; Re Morlock and Cline, 23 O. L. R. 165. The provisions of this Act are wider than those of the Winding-up Act:

Welch v. Ellis, 22 A. R. 255; Herman v. Wilson, 32 O. R. 60. Preference extends to any balance due so long as the same does not exceed 3 months' wages: McLarty v. Todd, 4 O. W. N. 172, 23 O. W. R. 166. The assignee of a claim for wages has the same right as the assignor: Re Morlock and Cline, 23 O. L. R. 165; Lee v. Friedman, 20 O. L. R. 49. This rule prevails, even if assignments of wages were made before the assignment for benefit of creditors, and the assignee of the wages has got in a large number of claims: Porterfield v. Hodgins, 5 O. W. N. 162, 29 O. L. R. 409, 6 O. W. N. 2. But if no assignments are taken, the agent of the debtor paying wage claims can assert no priority: Eastern Trust v. Boston Richardson, etc., Co., 5 E. L. R. 558. Where an employer arranged that as part of his employees' wages, he would pay their board, the boarding-house keeper could not assert a priority claim for wages: Olson v. Machin, 4 O. W. N. 287, 23 O. W. R. 531. Wages in case of winding-up: see Ontario Companies Act, R. S. O. 1914, ch. 178, secs. 174, 193.

4. Executions against goods subsequent to the making of a chattel mortgage, attach only on the equity of redemption and are not entitled under the Creditors Relief Act to share with executions prior to the giving of the mortgage, and the fact that they are on judgments for wages, gives such subsequent executions no priority. They can take nothing until the chattel mortgage and prior executions are satisfied in full: Roach v. McLachlin, 19 A. R. 496.

5. This section applies where an attachment is made by the Sheriff under the Absconding Debtors Act, R. S. O. 1914, ch. 82. But when the attachment is made under the provisions of the Division Courts Act, R. S. O. 1914, ch. 63, sec. 199, *et seq.*, the creditors share alike: see sec. 207, B. & S. notes, p. 450.

6. As to proving claims in administration: see Con. Rules 703-715, H. & L. notes, pp. 919-924, 1913 Rules 435, *et seq.*

7. See R. S. O. 1897, ch. 60, sec. 180, Bicknell and Seager, notes, pp. 330, 331, R. S. O. 1914, ch. 63, secs. 146, 147, and notes. See Con. Rule 911, H. & L. notes, "Moneys not attachable," pp. 1154-5, 1913 Rule 590.

CHAPTER 144.

The Master and Servant Act.

Refer to Addison on Contracts; Bullen and Leake's Pleadings; Macdonell, Master and Servant; Smith, Master and Servant; Labatt, Master and Servant; Bicknell and Kappele, Practical Statutes, p. 311.

2. See as to "contracts of continuous service," Cutter v. Powell, 2 Smith's Leading Cases, p. 1 and notes.

3.—(1) Allegation of partnership. Defence of special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary. Held on appeal that it was not necessary to plead the statute more specifically: Neil v. Park, 10 P. R. 476. Agreement for share of profits: Bartlett v. Bartlett Mines, 3 O. W. N. 958. See Con. Rule 271, (1913) Rule 143.

3.—(2) A statement of profits furnished by a master to his servant where there is an agreement within the statute to share profits, is impeachable for fraud. Fraud being alleged, production of the document in the possession of the master shewing the basis of the statement of net profits will be ordered: Cutten v. Mitchell, 10 O. L. R. 734; see Formularo v. Forest City Laundry (not reported), referred to 13 O. L. R. 187; Rogers v. Ullman, 27 Gr. 137. The drastic provision that the servant is bound to accept the master's statement as to profits is to be construed strictly. It is for the benefit of the employer and the employer must bring himself strictly within its provisions. Even under the Statute of 1897, the statement was impeachable for fraud: Cutten v. Mitchell, 10 O. L. R. 734. The employer's statement is now by the express words of the statute impeachable. As to what is meant by fraud in the statute: see Washburn v. Wright, 5 O. W. N. 515. The consideration of the matter of the production should be postponed till it has been properly determined whether the agreement set up is within the statute, and, if it is, whether the statement of profits can be impeached for fraud, error,

mistake, or other like cause: Engeland v. Mitchell, 9 O. W. R. 31, 13 O. L. R. 184.

4.—(1) The Act does not apply to the case of school trustees and school teachers: Re Joice, 19 U. C. R. 197. Associate justices: The justice issuing a summons returnable before himself "or such other justices as might then be present," has no exclusive right to deal with the case: R. v. Milne, 25 C. P. 94. *Certiorari*: Re Sullivan, 8 L. J. 276. The proceedings must disclose the relation of master and servant or an offence punishable under the Act in order to shew jurisdiction in the convicting justice: McDonald v. Strickey, 31 U. C. R. 577. The conviction must shew that the person against whom the complaint is lodged was a servant, that the complaint was "upon oath," and in what manner the wages are due: Helps v. Eno, 9 L. J. 302. What amounts to a sufficient hiring to give a magistrate jurisdiction: R. v. Walker, 21 U. C. R. 34. An order for payment of money under this Act is not a conviction of which it is necessary to make a return: Ranney, q. t. v. Jones, 21 U. C. R. 370. Quashing conviction: Delay of more than six months before conviction quashed. Protection of convicting justice: Re Joice, 19 U. C. R. 197. A magistrate has no jurisdiction to order payment of wages for any period after the discharge of the servant: Swannick v. Katinsky, 14 O. W. R. 537, 19 O. L. R. 407. Applies to Police Magistrates: Re O'Neill and Duncan, 13 O. W. R. 511, 648. Justifiable dismissal: Right to wages: (1) Earned and overdue. (2) Earned and not payable: see Annotations, 8 D. L. R. 382. See note on rights and liabilities of master and servant: Bicknell & Seager D. C. Act, pp. 117-120. Right of minor to sue for wages: see R. S. O. 1897, ch. 60, sec. 78, see B. & S. note, p. 117, R. S. O. 1914, ch. 63, sec. 66.

4.—(3) When a justice was shewn that the hiring had been terminated more than a month and was given warning that he had no jurisdiction, but nevertheless made a conviction, the jury rightly found that he did not act *bona fide* in the execution of his duty: Cummins v. Moore, 37 U. C. R. 130.

9. Applies to decisions of Police Magistrates: Re O'Neill and Duncan, 13 O. W. R. 511, 648. An abortive attempt to enter appeal to a Division Court is no bar to right to move for prohibition to Magistrate: Swanick v. Katinsky, 14 O. W. R. 537, 19 O. L. R. 407. Power to amend notice of appeal: see Re Coe v. Coe, 21 O. R. 409.

CHAPTER 145.

THE TRADES DISPUTES ACT.

CHAPTER 146.

THE WORKMEN'S COMPENSATION FOR INJURIES ACT.

Refer to Holmested (Ont.); Ruegg, The Employers' Liability and Workmen's Compensation Acts (Can. Ed.)

2.—(*f*) A. hired by the day the general servant and horse and wagon of B. for use in A.'s business, and while so hired and while delivering A.'s goods the servant knocked a man down and injured him. It was held that A. was not liable in damages for the injury and that the driver remained the general servant of B. from whom he was hired and not that of A.: Caston v. Consolidated Plate Glass, 26 A. R. 63, 29 S. C. R. 624. Where a shipping company employ a contractor to unload their ship and appoint certain of the crew to assist in the unloading, it is a question of fact whether the members of the crew were under the orders and control of the contractor's foreman or not: Union S. S. Co. v. Claridge, 1894, A. C. 185. Owners of a colliery held not liable for injury to workman of independent contractor: Fitzpatrick v. Evans (1902), 2 K. B. 505; Marrow v. Flimby & Co. (1898), 2 Q. B. 88.

2.—(*i*) This sub-section is given a wide interpretation: Cox v. Great Western Ry., 9 Q. B. D. 106; Gibbs v. Great Western Ry., 11 Q. B. D. 22; McCord v.

Cammill, 1896, A. C. 57; Warren v. Macdonnell, 10 O. W. R. 614.

2.—(*j*) No implied right of superintendence arises from length of service or skill, and the employer is not liable if one workman, presuming on length of service or skill, directs a fellow workman to do certain work in an unsafe manner and injury results: Garland v. Toronto, 27 O. R. 154, 23 A. R. 238. Where three workmen were employed to rivet boilers, the first to heat the rivets, the second to place them in position and the third to operate a hydraulic hammer to fasten them, the man who used the hydraulic hammer was held in effect necessarily entrusted with the superintendence of the whole operation: Shea v. Inglis Co., 12 O. L. R. 80. A mason and the man who brings him mortar are fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the mason is not a person to whose orders the other is bound to conform: Ferguson v. Galt School Board, 27 A. R. 480. What amounts to superintendence: Magnussen v. L'Abbe, 20 O. W. R. 502, 3 O. W. N. 301, 21 O. W. R. 376, 3 O. W. N. 864. Foreman or partner: see Kitts v. Phillips, 10 O. W. R. 986. "Master Mechanic" does not import superintendence: Cameron v. Royal Paper Mills, 39 S. C. R. 365. "Superintendence:" see Darke v. C. G. Electric, 20 O. W. R. 587, 3 O. W. N. 368, 21 O. W. R. 583, 3 O. W. N. 817; Negro v. Donati, 4 O. W. N. 453, 23 O. W. R. 438; Brulott v. G. T. P. 19 O. W. R. 514, 24 O. L. R. 154, 21 O. W. R. 206; Eagle v. Meade, 4 O. W. N. 948; Demers v. Nova Scotia Silver, 3 O. W. N. 1206, 22 O. W. R. 97, and see notes to sec. 3 (*b*) *post*.

2.—(*k*) A bookkeeper in a factory is not a "workman:" Miller v. Monarch Mfg. Co., 12 O. W. R. 14. A practical chemist whose work involved manual labour and scientific knowledge, held not a "workman:" Bagnall v. Levinstein, 1907, 1 K. B. 531. "Workman," Bargeman, Seaman: see Corbett v. Pearce, 1904, 2 K. B. 422. The Act applies to sailors on lake steamers: Frawley v. Hamilton Steamboat Co., 10 O. W. R. 308; see Hedley v. Pinkney, 1892, 1 Q. B. 58, 1894, A. C. 222. Manager who is paid

a yearly salary but does not do any manual labour is not a "workman:" Simpson v. Ebbw Vale Steel Co., 1905, 1 K. B. 453. Working partner not a "workman:" Ellis v. Ellis & Co., 1905, 1 K. B. 324. Independent contractor not a "workman:" Vamplew v. Parkgate Iron Co., 1903, 1 K. B. 851. The driver of a motor omnibus is an artificer or handicraftsman and therefore a "workman:" Smith v. Associated Omnibus Co., 1907, 1 K. B. 916. "Servant in husbandry." Engagement to dig a drain on a farm. How far a question of fact rather than of law: Reid v. Barnes, 25 O. R. 223. In English cases under the Employers Liability Act (1880), the following persons were held not within the scope of that Act: *e.g.*, a grocer's assistant (Bound v. Lawrence, (1892) 1 Q. B. 226); Omnibus conductor (Morgan v. London General Omnibus Co., 13 Q. B. 832); Tram car driver (Cook v. North Metropolitan Tramways, 18 Q. B. D. 683), Underhill: Art. 94.

3.—(*a*) *Common law and statutory liability.* The contract between the employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition. If the master knowingly does not perform this duty, he is guilty of negligence. Where a master has provided proper appliances and done his best to maintain them in a state of efficiency, if the appliances become unsafe and the man was injured, no action lies unless he avers and proves that the master knew of their having become unsafe and the man was ignorant of it: Williams v. Birmingham Battery Co., 1899, 2 Q. B. 338; Matthews v. Hamilton Powder Co., 14 A. R. 261. "What the master is bound to the servant to do in the event of his not personally superintending and directing the work is to select proper, competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has done all he is bound to do:" per Lord Cairns, Wilson v. Merry, L. R. 1 H. L. Sc. 326. These words are clearly not intended to cover cases arising out of the master's liability for injuries caused by defects in the system or in the condition of his

premises or machinery, which he either knew or ought to have known about, and of which the injured servant was ignorant: Johnson v. Lindsay & Co., 1891, A. C. 371, pp. 379, 385-7; Traplin v. Canada Woolen Mills, 35 S. C. R. 424, at p. 432: see Rajotte v. C. P. R., 5 Man. L. R. 297, 365; Matthews v. Hamilton Powder Co., 14 A. R. 261; Wood v. C. P. R., 6 B. C. R. 561, 30 S. C. R. 110; Sim v. Dominion Fish Co., 2 O. L. R. 69. A broad distinction lies between the liability of the master for his personal negligence or for the condition of his premises and machinery, and that arising out of the negligence in the management or operation of that machinery by the servants to whom he has entrusted it: per Davies, J., Traplin v. Canada Woolen Mills, 35 S. C. R. 424, at p. 431. Where a master employs his servant in a work of danger he is bound to exercise due care to have his tackle and machinery in a safe and proper condition so as to protect the servant against any unnecessary risks: Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266; Smith v. Baker, 1891, A. C. 325. A master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than by a defect in the machinery itself: Smith v. Baker, 1891, A. C. 325. Liability under the statute and not at common law where unusual work is being done when accident occurs: Hicks v. Smith Falls E. P. Co., 5 O. W. N. 301, 25 O. W. R. 294. Employers' common law obligation to provide safe and proper places where employees may work: see McDougall v. Ainslie Mining Co., 42 S. C. R. 420.

Defective system: The fact that for many years an operation has been carried on in the same way and with the same appliances, while strong evidence in the master's favour, is not conclusive, and if there is evidence that the system is defective the case must go to the jury: Commeford v. Empire Limestone Co., 11 O. L. R. 119. The fact that the same work with the same appliances had been carried on for 15 years without an accident is strong but not conclusive evidence. Notwithstanding this long immunity, the danger may have always been obvious and the defect one which should have been guarded against: Bisnaw v. Shields, 7 O. L. R.

210. The test as to what safeguards are proper is not what has previously happened, or what the defendant or even the plaintiff expect, but what would a reasonable man making a reasonably careful examination of the plant and considering reasonably all possible chances, consider might be expected to happen: Fisher v. International Harvester Co., 12 O. W. R. 1126. Evidence of no former accident is competent for the purpose of shewing reasonable care but not as conclusively rebutting negligence: Fletcher v. Baltimore & Potomac, 168 U. S. 135; Lane v. Hancock, 74 N. Y. Sup. Ct., (67 Hun.) 623; Jarvis v. Brooklyn Electric, 16 N. Y. Supp. 96; Coupland v. Hardingham, 3 Camp., 398. It is strong evidence against a plaintiff who alleges that a machine was defective in a certain particular, that no machine is on the market or known to the trade having any such contrivance as the plaintiff alleges should have been supplied. Absence of evidence of complaints of the machine acting in an unexpected or irregular manner, and of accidents happening to persons using it, are also to be noted: McCarthy v. Kilgour, 7 O. W. R. 44, 8 O. W. R. 515. A negligent system or a negligent mode of using perfectly sound machines may make the employer liable quite apart from any provisions of the Employers Liability Act: Smith v. Baker, 1891, A. C. 325, at p. 339. The contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk: Smith v. Baker, 1891, A. C. 325, at p. 362; Williams v. Birmingham, 1899, 2 Q. B. 338. Where the accident was due to the "general dilapidation of the plant," (an elevator in this case), the company was held liable at common law: Traplin v. Canada Woollen Mills, 35 S. C. R. 424. Admissibility of evidence of working of machine subsequent to accident to shew its defective structural condition or disrepair at the time of the accident: Green v. Kilgour Bros., 11 O. W. R. 752. Where the accident is caused by the plaintiff, a skilled workman using the ordinary appliances he was used to, misplacing a jack, he

could not recover, although better appliances conceivably might have been supplied: Bainard v. M. C. R. R., 13 O. W. R. 112. Defective system; exposing workmen to unnecessary danger: Giovinazzo v. C. P. R., 13 O. W. R. 24, 1200, 19 O. L. R. 325. Defect in machinery or system: Maitland v. Mills, 4 O. W. N. 557, 23 O. W. R. 688. Defect in plant: Walberg v. A. C. Stewart & Co., 3 O. W. N. 402. Defective system: Plocks v. Can. Northern, 3 O. W. N 381; Portilance v. Milne, 4 O. W. N. 589.

Defects in the ways, works, machinery, etc.: Where a man was sent to shingle a roof and, relying on some cleats that were there and defectively fastened, was injured, it was held that this was a defect in the ways, works, etc. In this case the cleats were put on as a separate piece of work. If the plaintiff had been the workman entrusted with the duty or even one of a number of workmen, different considerations would apply: Markle v. Donaldson, 7 O. L. R. 376, 8 O. L. R. 682. An employee was dragging a heavy box of fish according to the usual practice, when the handle, which was constructed of poor material, broke and the man fell overboard and was drowned. It was held that even at common law the defendants were bound to furnish their men with material and plant in a sound and proper condition and were liable: Sim v. Dominion Fish Co., 2 O. L. R. 69. A brakeman was killed by being thrown from a train owing to the loosening of a defective brake wheel. It was part of the brakeman's duty to examine the brakes and see that they were in good order before starting the train. The defendants were not liable: Fawcett v. C. P. R., 8 B. C. R 393, 32 S. C. R. 721. For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment: Wood v. C. P. R. 6 B. C. R. 561, 30 S. C. R. 110. A plank laid down across a temporary opening in the floor is a "way," and if the plank is cross grained and knotty so as to break and injure a workman carrying a load across it, that is a "defect" for which the employer is liable: Caldwell v. Mills,

24 O. R. 462. A public street in a defective condition used by an employer in connection with his business is not a "way used in the business of the employer:" Stride v. Diamond Glass, 26 O. R. 270. A contractor who, pursuant to the terms of a sub-contract, supplies a sub-contractor with a machine to use in his work, is not liable to one of the sub-contractor's workmen for a patent defect in the machine which has been accepted and used by the sub-contractor without objection: Smith v. Onderdonk, 25 O. R. 171. A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the Act: Wilson v. Owen Sound Portland Cement, 27 A. R. 328. Where the accident happened through the plaintiff's attempt to pull a sliver of wood out of a revolving roller not in itself defective, the defendants are not liable: Allard v. Cleveland Saw Mills Co., 12 O. W. R. 729. An unpacked frog in the defendant's private railway is a defect in the condition of works within the Act: Cooper v. Hamilton Steel, 8 O. L. R. 353. The omission to have a lock at a railway switch, not otherwise securely guarded, situate near a much travelled highway is such negligence as to make those having control of the railway liable in damages for the death of their servants, resulting from the switch becoming misplaced: Rombough v. Balch, 27 A. R. 32. Failure to repair a defective petcock, which was the real cause of the disaster, was held negligence under the Act, from the consequences of which "common employment" is no defence: Woods v. Toronto Bolt and Forging Co., 11 O. L. R. 216. Negligence of a street railway company may consist in the absence of buffers to protect employees from injury in coupling cars: Bond v. Toronto Railway, 22 A. A. 78, 24 S. C. R. 715. Injury to carpenter through giving way of a stay in a scaffolding, the defect not being discovered through the negligence of a foreman: Kelly v. Davidson, 31 O. R. 521, 32 O. R. 8, 27 A. R. 659. Negligence of sawmill owner in not protecting opening in floor: Talon v. Price, 32 S. C. R. 123. (See Ferguson v. Galt Public School Board, 23 A. R. 480.) A workman in the employ of the B. railway was killed in consequence of the defective condition of a truck of the C. railway which had been lent in the

ordinary course of railway exchange to the B. railway. Held that C. railway not liable to workman's representative: Caledonian Railway v. Mulholland, 1898, A. C. 216. Absence of side-guard from sawbench held a defect: Tate v. Latham, 1897, 1 Q. B. 502. The open joists of a floor of a house in course of construction across which a labourer has to pass in carrying out an order of his foreman do not constitute a "way": McGowan v. Smith, 1907, S. C. 548 (Ct. of Sess.). Duty of master to provide safe gangway: Christie v. Richardson, 15 O. W. R. 802, 1 O. W. N. 689, 16 O. W. R. 961, 2 O. W. N. 42. Defect in platform: McKeand v. C. P. R., 16 O. W. R. 664, 18 O. W. R. 309, 1 O. W. N. 1059, 2 O. W. N. 812. Defective gangway: Christie v. Richardson, 15 O. W. R. 802, 1 O. W. N. 689. Defect in condition of ways: Leitch v. Pere Marquette, 18 O. W. R. 433, 2 O. W. N. 617. Liability for breach of statutory duty of guarding pit mouth of mine: Pressick v. Cordova Mines, 24 O. W. R. 631, 25 O. W. R. 228, 4 O. W. N. 1334, 5 O. W. N. 263, and see Groves v. Wimborne, 1898, 2 Q. B. 402. The liability for defect in the ways, etc., extends to cases where the plant used is the property of a third person for whom the employer is working and who supplies it for the purpose: Biddle v. Hart, 1907, 1 K. B. 649. A defective machine which a foreman has ordered not to be used again, may be "used in the business" in the meaning of this section: Thompson v. City Glass Bottle Co., 1902, 1 K. B. 233. Defective condition of machinery installed in premises of purchaser and not accepted—liability: Nokes v. Kent Co., 4 O. W. N. 665. Machine becoming defective in operation: Lougheed v. Collingwood Shipbuilding Co., 12 O. W. R. 871. Defective boiler: Waddell v. Pere Marquette, 13 O. W. R. 817. Absence of guard: Linden v. Trussed Concrete, 18 O. L. R. 540. Unguarded receptacle: Davidson v. Peters, 3 O. W. N. 1160. Use of implements insufficient for purpose of work: Smith v. Hamilton Bridge Co., 3 O. W. N. 177, 4 O. W. N. 36. Liability for injuries caused by defects in premises: article, see 47 C. L. J. 41.

Dangerous machines. Where a machine is defective with reference to danger and such defect is

within the knowledge of the employer he is then liable: Morgan v. Hutchins, 59 L. J. Q. B. 197; Tate v. Latham, 1897, 1 Q. B. 502; McCloherty v. Gale Mfg. Co., 19 A. R. 117; O'Connor v. Hamilton Bridge Co., 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598; see Walsh v. Whiteley, 21 Q. B. D. 371; Kervin v. Canadian Coloured Cotton, 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478. Where an injury is alleged to have been caused by the negligence of the defendants in not furnishing proper safeguards at the place of danger, evidence that the safeguards were placed there after the injury is not admissible to show prior negligence: Cole v. C. P. R., 19 P. R. 104. Where dangerous work was done under a defective system, the plaintiff's voluntary exposure of himself to danger is natural. He has a right to expect that the dangerous contingency will not occur: Dagg v. McLaughlin, 11 O. W. R. 1080, 12 O. W. R. 407, 13 O. W. R. 150. Safeguards to which a workman is entitled in situations of grave danger: see Jamieson v. Harris, 35 S. C. R. 625; Brannigan v. Brannigan, 1892, 1 Q. B. 402; Linden v. Trussed Concrete Steel, 11 O. W. R. 1003, 18 O. L. R. 540. Failure to obey directions of the Factories Act, as to guarding dangerous machinery which results in injury being caused an employee, gives a right of action: Billing v. Semmens, 7 O. L. R. 340, 8 O. L. R. 540; Groves v. Wimborne, 1898, 2 Q. B. 402; Meyers v. Sault Ste. Marie Pulp, 33 S. C. R. 23; and see sec. 34, *post*. Employing a girl under 18 to work between the fixed and traversing parts of a self-acting machine contrary to the Factory, etc., Act, is in itself sufficient to render the master *prima facie* liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducing to the accident need not be shown: Fahey v. Jephcott, 1 O. L. R. 18, 2 O. L. R. 449 (overruling Roberts v. Taylor, 31 O. R. 10). Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages unless it is shew that the accident by which the injuries were caused was directly due to his neglect. In this case the employer had not complied with the Quebec Factories Act, but the immediate cause of the accident was the imprudence of a young girl employee,

who, contrary to rules, and while seated at work, was arranging her hair, which caught in the machine and injured her: Bergeron v. Tooke, 27 S. C. R. 567. There is an element of danger arising from the position of machinery in itself perfectly sound and well fitted for its purpose: McCloherty v. Gale Mfg. Co., 19 O. L. R. 117. A steel cutting machine perfect of its kind, was dangerous in its operation owing to the liability of pieces of steel to fly. It was in this way the accident happened. It was not shown that a guard could be used. It was held that there should have been some system of giving warning and so reducing the danger, and the defendants were liable at common law: Choate v. Ontario Rolling Mills, 27 A. R. 155. Where a workman was injured by a machine which was in itself dangerous and which could have been furnished with a guard and was not, the foreman's knowledge of this defect and failure to remedy it constituted negligence for which the plaintiffs were liable: Godwin v. Newcombe, 1 O. L. R. 525. Where the defendants employed a dangerous system and means were not adopted for the protection of the men, who were ignorant of the danger, the defendants were held liable at common law and if there was liability at common law, *a fortiori* there was liability under the Act: Dodds v. Consumers' Gas, 9 O. W. R. 905. While a workman was engaged in the dangerous work of chipping a cast-iron cylinder, another workman was struck with a flying chip. Had a pivot been utilized the work could have been turned and the danger avoided. This omission was evidence of negligence: Allen v. Sawyer Massey, 12 O. L. R. 282. The employee was injured by passing over a dangerous set of cogs. The jury found there were other ways of passing, but that none of them were sufficient or as expeditious. The trial Judge held that the plaintiff had voluntarily taken the risk. The Supreme Court ordered a new trial, it not being sufficiently established that the plaintiff had "of reasonable and practical necessity" to pass over the cogs: British Columbia Mills v. Scott, 24 S. C. R. 702. Non-guarding a dangerous machine and not fastening a ladder, the removal of which led to the accident, constituted negligence and the defendants were liable: Myers v. Sault Ste. Marie Pulp, 3 O. L. R. 600, 33 S. C. R. 23. Negligence in not guarding a rapidly revolving shaft or stopping the machinery

while the workman was set to work there: Doyle v. Diamond Glass, 8 O. L. R. 499. Negligence by leaving machine unguarded: Smith v. Hayes, 29 O. R. 283. Non-guarding dangerous machinery constitutes a defect in the condition of the machinery: Rodgers v. Hamilton Cotton Co., 23 O. R. 425. Negligence of defendants in not having dangerous and deceptive machine guarded and inattention of operator were sufficient to negative contributory negligence of plaintiff: Moore v. J. D. Moore Co., 4 O. L. R. 167. There was a dangerous machine and unguarded, which the plaintiff in spite of warnings went near, where he had no right to be, and was injured. The plaintiff had no cause of action: Mammelito v. Page Hersey Co., 13 O. W. R. 109; Lowe v. Pearson, 1899, 1 Q. B. 261. Negligence, absence of warning, dangerous machine: Stokes v. Curled Hair Co., 22 O. W. R. 474, 3 O. W. N. 1414. Common law liability: defective dangerous machine: Cotie v. Canada Turpentine Co., 12 O. W. R. 422. Defective dangerous works: Regan v. Montreal Light, Heat & Power Co., 40 S. C. R. 580. Negligent management of dangerous work: Dagg v. McLaughlin, 11 O. W. R. 1080, 12 O. W. R. 407. Water power is a dangerous element and proper safeguards are to be provided. Liability where absence of these results in death of employee:: McKea v. C. P. R., 1 O. W. N. 1059, 2 O. W. N. 812; Fairweather v. Canadian Gen. Electric, 28 O. L. R. 300. Use of implements insufficient for dangerous work: Smith v. Hamilton Bridge Co., 3 O. W. N. 1524. To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company in a stituation where opportunity for damage might occur is negligence which will render the company liable although the direct cause of the explosion is unknown: Durand v. Asbestos and Asbestic, 30 O. R. 285. Explosive in unguarded receptacle: Davidson v. Peters Coal Co., 23 O. W. R. 25, 4 O. W. N. 36. Omission to guard dangerous machines: see R. S. O. 1914, ch. 229, and ch. 238, and notes.

Electricity and electric wires. Whoever uses or employs dangerous agencies is held to a correspondingly high degree of care, including circumspection and foresight: Gloucester v. Toronto

Electric Light Co., 38 S. C. R.; Citizens' Electric Light Co. v. Lepitre, 29 S. C. R. 1; Royal Electric Co. v. Hévé, 32 S. C. R. 462; Sutton v. Dundas, 11 O. W. R. 501. An electric light company may through hanging wires in proximity to guy wires, which afterwards become charged with current and do injury, be liable for actionable negligence in failing to exercise the high degree of skill, care and foresight required of persons engaging in operations of a dangerous nature: Hévé v. Royal Electric Company, 32 S. C. R. 462. In the absence of evidence that the precaution would have been efficient there is no negligence in not insulating or guarding wires: Dumphy v. Montreal L., H. & P. Co., 1907, A. C. 454. Imperfect insulation of electric wires as negligence: Fortin v. Quebec Railway, Light & Power Co., 40 S. C. R. 181. Defective insulation: Wright v. Port Hope Electric Co., 11 O. W. R. 318, 688, 13 O. W. R. 210. Negligence: electric wires: Russell v. Bell Telephone Co., 11 O. W. R. 808. Dumphy v. Martineau, 42 S. C. R. 224; Davidson v. Stuart, 14 Man. L. R. 74, 34 S. C. R. 215; Labombarde v. Chatham Gas, 10 O. L. R. 446; Young v. Gravenhurst, 24 O. L. R. 467; Paquette v. Rideau Skating Club, 14 O. W. R. 845. Electric wires: see R. S. O. 1914, ch. 185, sec. 239, and notes; also ch. 151, sec. 3, notes.

Evidence of cause of death. In a case of accidental injury resulting in death it is necessary to prove by direct evidence or weighty, precise and consistent presumptions arising from the facts proved, that the accident was caused by the positive fault, imprudence or neglect of the person sought to be charged with the responsibility: Corcoran v. Montreal Rolling Mills, 26 S. C. R. 595. Evidence which merely suports a theory propounded as to the probable cause of the injuries received through an unexplained accident is insufficient to support a verdict of damages, where there is no direct fault or negligence proved against the employer and the actual cause of the accident is a matter of conjecture: Trainor v. Canada Paint Co., 27 S. C. R. 352. Where the accident was due to the fault of the defendant either in neglecting to cover a dangerous part of a revolving shaft temporarily or stop the machinery while the plaintiff was required to work over it, the

defendant was held liable. And although there was room for the inference that the accident might have been due to the plaintiff's imprudence, the Supreme Court refused to interfere: Bouchard v. Matthews, 28 S. C. R. 580; see also Rainville v. G. T. R., 29 S. C. R. 201. Where there was no direct evidence as to the cause of the accident, but it was shown that the machine which exploded and caused the injury was not fitted with any safety valve, but only with an escape valve adjusted by hand, the Court inferred that the accident was due to the absence of the safety valve or negligent adjustment of the escape valve and that the defendants were liable: Wilson v. Boulter, 26 A. R. 184. The deceased was killed by being run over while shunting cars. There was a dangerous accumulation of snow and ice between the tracks, but there was no evidence that the tracks were not in good condition and it was a matter of conjecture whether the deceased was on the tracks at the time of the accident or on the space between them. The accident was held not to have been proved to be due to the defendants' negligence: Armstrong v. C. A. R., 2 O. L. R. 219, 4 O. L. R. 560. A workman was killed by being caught in a revolving shaft. No one saw the accident and it could not be ascertained how it occurred. The negligence charged was the want of a guard. It was held that the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the action: Kervin v. Canadian Coloured Cotton, 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478. Where the employee was killed under circumstances which warranted the inference that he came to his death owing to the knives of the dangerous machine which he was working on being unguarded, the employer was liable: Billing v. Semmens, 7 O. L. R. 340, 8 O. L. R. 540. Onus of proof to connect death with negligence of the defendants: Wakelin v. L. & S. W. Ry., 12 App. Cas. 41. It is not necessary to prove to a demonstration how a death by actionable negligence occurred: Lefebvre v. Tretheway, 22 O. W. R. 694, 3 O. W. N. 1535. Death from unexplained accident: Falconer v. Jones, 4 O. W. N. 709, 1373, 24 O. W. R. 18, 672. Defect in way; absence of direct evidence; causal connection: McKeand v. C. P. R. 1 O. W. N. 1059. Unprotected hatchway, absence of direct

proof: King v. Northern Nav. Co., 20 O. W. R. 220, 3 O. W. N. 172, 24 O. L. R. 643, 3 O. W. N. 1538, 22 O. W. R. 697. Evidence of proximate cause of death; conjecture: Burley v. G. T. R., 10 O. W. R. 857; Moxley v. Canada Atlantic Ry., 14 A. R. 309, 15 S. C. R. 146. See R. S. O. 1914, ch. 151, sec. 3, notes.

Negligence generally. Negligence is defined as "the neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property: Per Brett, M.R.: Heaven v. Pender, 11 Q. B. D. 507. See also Underhill on Torts, Art. 78, where the definition is based on Blyth v. Birmingham Water Works, 11 Ex. 781, 784; Caledonian Ry. Co. v. Mulholland (1898) A. C. 216, at p. 225, per Lord Herschell, and it is shown that three points require to be established to found the action, viz.: (1) A duty to take care, (2) A breach of that duty (negligence), (3) Damage as the natural and probable consequence. In an action to recover damages for death caused by alleged negligence the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence but that such negligence was the cause of the death: Young v. Owen Sound Dredge Co., 27 A. R. 649. In the absence of a finding that the negligence imputed was the proximate cause of the injury and of evidence to justify such a finding, the action must fail: Thompson v. Ontario Sewer Pipe Co., 40 S. C. R. 396. Where a workman was killed by an explosion of a soap boiling tank, evidence of experts that the explosion was probably due to defective screws fastening the tank cover was sufficient to go to the jury: Badcock v. Freeman, 31 A. R. 633. The question whether under the special circumstances it was necessary for the defendants to take greater precautions than they did take or to be much more careful than in ordinary circumstances when these conditions did not exist, is properly left to the jury: Barclay v. Lake Erie and Detroit Ry., 30 S. C. R. 360. When ringing bell or keeping an outlook have been abandoned in the running of a shunting engine, the employee who has abandoned such safeguards

without adopting an efficient equivalent has been guilty of negligence: McMullen v. Nova Scotia Steel, 39 S. C. R. 593. The proposition that in an action for damages for negligence resulting in injury to the plaintiff there must be proof of a fault which certainly caused the injury is not one of universal application: McArthur v. Dom. Cartridge Co., 31 S. C. R. 392, 1905, A. C. 72. Employing a young girl contrary to the provisions of the Factories Act, is sufficient to render the employer *prima facie* liable, and negligence on his part directly conducing to the accident need not be shewn: Fahey v. Jephcott, 1 O. L. R. 18, 2 O. L. R. 449; Groves v. Lord Wimborne, 1898, 2 Q. B. 402. Employment in violation of the provisions of an Act like the Factory Act, is *prima facie* actionable negligence: Sharp v. Pathead Spinning Co., 12 Rettie 574; Blamires v. Lancashire and Yorkshire Ry., 1873, L. R. 8 Ex. 283; Braddeley v. Earl Granville, 1887, 13 Q. B. D. 423; Willy v. Mulledy, 78 N. Y. 310; Finlay v. Miscampbell, 20 O. R. 29. As to findings of negligence and questions to be asked jury: see Harris v. Jamieson, 35 S. C. R. 625. As to common law liability of a corporation for negligence, see judgment of Nesbitt, J.: Traplin v. Canada Woolen Mills, 35 S. C. R., at p. 438 *et seq.* See also as to proof of negligence against a company: Wilson v. Botsford Jenks Co., 22 Occ. N. 95.

The rule as to contributory negligence is stated by Underhill as follows, Art. 84: Though negligence, whereby actual damage is caused is actionable, yet if the damage would not have happened had the plaintiff himself used ordinary care, the plaintiff cannot recover from the defendant. But where the plaintiff's own negligence is only remotely connected with the accident, and the defendant might by the exercise of ordinary care have avoided the accident the plaintiff will be entitled to recover: Radley v. London North Western Ry., 1 App. Cas. 754; Tuff v. Warman, 2 C. B. N. S. 740, 5 C. B. N. S. 573. In an action to recover damages for negligence tried by a jury, where the defence of contributory negligence is set up, the onus of proof of the two issues is respectively on the plaintiff and the defendant, and though the Judge may rule negatively that there no evidence

to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury: Morrow v. C. P. R., 21 A. R. 149. See also Jones v. T. & Y. Radial Ry., 23 O. L. R. 331, 336; Brown v. London Ry., 2 O. L. R. 53, 31 S. C. R. 642. What would amount to contributory negligence in an adult may not be so in a child of tender years: Lynch v. Murdin, 1 Q. B. 29; Lay v. Midland Ry., 34 L. T. 30; Underhill, p. 183. The fact that a child of tender years in a shop with its mother by the invitation and for the benefit of the proprietors, is injured by an unfastened mirror standing against a wall, is sufficient evidence of negligence to go to a jury: Sangster v. Eaton, 21 A. R. 624, 24 S. C. R. 708. See also Merritt v. Hepenstal, 25 S. C. R. 150; McIntyre v. Buchanan, 14 U. C. R. 581; Vars v. G. T. R., 23 C. P. 143; Garner v. Grace, 1 F. & F. 359; Smith v. Hayes, 29 O. R. 283. See R. S. O. 1914, ch. 151, sec. 3, note.

Res ipsa loquitur: Meenie v. Tilsonburg, etc., Ry., 5 O. W. R. 69, 6 O. W. R. 286, 955, and cases cited. Defective appliances; *res ipsa loquitur*: Doucet v. Shawinigan Carbide, 42 S. C. R. 281. Where the Act resulting in injury is also a crime: see Villeneuve v. C. P. R., 10 O. W. R. 287; R. v. M. C. R. R., 10 O. W. R. 660; and see also notes to R. S. O. 1914, ch. 151.

Common employment. "Before the Act was passed a workman could only recover, if injured in his employment, when he could prove that the employer had personally been guilty of the negligence which led to the injury, which in the case of large employers was almost, and in the case of corporations quite, impossible. Now a workman is *prima facie* entitled to recover whenever the employer, be he private employer or corporation, has delegated his duties or powers of superintendence to other persons and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, save in so far as it is thus abrogated, remains:" Ruegg, 6th Edn. p. 27; Thomas v. Quartermaine, 18 Q. B. D. 685; Priestly v. Fowler, 3 M. & W. 1; Bartonshill Coal Co. v. Reid,

3 Macq. H. L. 266; Smith v. Baker, 1891, A. C. 325. Morgan v. Vale of Neath Ry. Co., L. R. 1 Q. B. 149; Tarrant v. Webb, 18 C. B. 797; Williams v. Birmingham Battery (1899), 2 Q. B. 338; Groves v. Lord Wimborne (1898), 2 Q. B. 402; Underhill on Torts, Art. 92. The statute does not give a workman remedy against his employer for the negligence of a fellow-servant, except in the cases specified: Wakeley v. Holloway, 62 L. T. N. S. 639; Wild v. Waygood, 1892. 1 Q. B. 783; McEvoy v. Waterford Steamboat Co., 18 Ir. L. R. 159. The doctrine of common employment so far as it is not abrogated by the provisions for delegating the duty or power of superintendence, etc., remains: Finch v. Northern Navigation Co., 8 O. W. R. 412; Hastings v. Le Roi No. 2, 34 S. C. R. 177. The doctrine of common employment affords no defence where injury has been caused to a servant by a breach of a statutory duty imposed on the master: David v. Britannic Merthyr Coal Co., 1909, 2 K. B. 146, and see 26 T. L. R. 164. Where a statutory duty imposed on an employer has not been observed it is no defence that its non-observance is due to the negligence of a fellow-servant of the person injured: Curran v. G. T. R., 25 A. R. 407; and see Pressick v. Cordova Mines, 4 O. W. N. 1334, 24 O. W. R. 631. Liability of railway where employee engages in operation of trains without passing tests required by Railway Commission. The doctrine of common employment is not available as a defence in such case: Jones v. C. P. R., 3 O. W. N. 1404, 13 D. L. R. 900 (P. C.). The maxim *volenti non fit injuria* does not apply where there has been a breach of statutory duty: Rodgers v. Hamilton Cotton Co., 23 O. R. 425. Negligence in not taking reasonable precautions for servant's safety: Thompson v. Ontario Sewer Pipe, 9 O. W. R. 132. Negligence in defective construction and not providing elevator with safety clutches was sufficient to create liability though the direct cause of the accident was carelessness of a fellow-servant: McKelvey v. Le Roi, 32 S. C. R. 664; see also Hastings v. Le Roi, No. 2, 10 B. C. R. 9, 34 S. C. R. 177. Where it was found that the company had failed to maintain their mine in a condition suitable for carrying on their works with reasonable safety, they were

liable for injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by a fellow-workman: Grant v. Acadia Coal, 32 S. C. R. 427. Defendants not responsible for accident due to the negligence of a fellow-servant in the same grade of employment: Matthews v. Hamilton Powder, 14 A. R. 260; Simpson v. Webb, 11 O. W. R. 732, 12 O. W. R. 1189. Negligence of fellow-servant not in superintendence: Davies v. Badger Mines, 2 O. W. N. 559, 18 O. W. R. 348; Dunlop v. Canada Foundry, 4 O. W. N. 791. Fellow-servant in common employment: Woods v. Toronto Bolt & Forge Co., 6 O. W. R. 637; The Petrel, (1893) P. 320; Morgan v. Vale of Neath Ry., 5 B. & S. 570, 580, 1866, L. R. 1 Q. B. 149; Howells v. Lodore Siemens Steel Co., 1874, L. R. 10 Q. B. 62; Waller v. South-Eastern Ry., 1863, 2 H. & C. 102, 112; O'Connor v. Hamilton Bridge Co., 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598; Kelly v. Davidson, 31 O. R. 521, 32 O. R. 8, 27 A. R. 659; Ferguson v. Galt School Board, 27 A. R. 480. Common employment as regards the Crown: see R. v. Armstrong, 40 S. C. R. 229; Filion v. R., 4 Ex. C. R. 134, 24 S. C. R. 482. The doctrine of common employment does not prevail in the province of Quebec: Duran v. Asbestos and Asbestic, 30 S. C. R. 285; Grenier v. the Queen, 30 S. C. R. 42; Filion v. the Queen, 24 S. C. R. 482; see also Belanger v. Riopel, M. L. R. 3 S. C. 198, 258; Dupont v. Quebec S. S. Co., Q. R. 11 S. C. 188. See R. S. O. 1914, ch. 151, sec. 3, notes.

3.—(*b*) The common law rule is that the master is liable only for his own negligence and where he acts by deputy; "if the persons so selected are guilty of negligence, this is not the negligence of the master:" Wilson v. Merry, 1868, L. R. 1 Sc. App. 326; Allen v. New Gas Co., 1 Ex. D. 251; Lovegrove v. London Brighton Ry., 16 C. B. N. S. 669; Brown v. Accrington Cotton Co., 3 H. & C. 511; Hall v. Johnson, 3 H. & C. 589; Wilson v. Hume, 30 C. P. 542. Efforts have been made to break through this rule but without success: Howells v. Lodore Siemens Steel Co., L. R. 10, Q. B. 62; Hedley v. Pinkney, 1894, A. C. 222. But in the United States with greater success.

There the rule is that where the master only acts in the management of his business through vice principals, he will be liable for their negligence just as if it had been his own: Chicago Milwaukee Ry. v. Ross, 112 U. S. R. 377; Baltimore & Ohio Ry. v. Baugh, 149 U. S. R. 368; Laning v. New York Central, 49 N. Y. 521; Malone v. Hathaway, 64 N. Y. 5. There is a duty on an employer to give instruction to young and inexperienced employees employed in dangerous work. That duty can be delegated to a foreman and the negligence of that foreman is, at common law, a risk which the fellow servant, though an infant, takes on himself: Cribbs v. Kynoch Ltd., 1907, 2 K. B. 548. When a workman, engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily assumed the risk: Smith v. Baker (1891), A. C. 325. If the accident happens through the negligence of any person within this sub-section, the principle of Smith v. Baker, 1891, A. C. 354, as to placing of responsibility, should be followed rather than Cribbs v. Kynoch, 1907, 2 K. B. 548: Lawson v. Packard Electric, 10 O. W. R. 525, 11 O. W. R. 72, 16 O. L. R. 1. Where there is a breach of statutory duty, the maxim *volenti non fit injuria* has no application: Buddeley v. Earl Granville, 19 Q. B. D. 423; Rodgers v. Hamilton Cotton Co., 23 O. R. 425. At common law a duty is imposed to supply proper machinery and to have it properly inspected. This must be done personally or by the employment of competent persons. Where however machinery had been properly inspected, but the accident had been caused by escaping steam from a locomotive water tube which had been insufficiently "belled" by J., a workman entrusted with such work, it was held that there was no liability at common law, but under the Act, J. was a person entrusted and liability existed: Schwoob v. Michigan Central, 9 O. L. R. 86, 10 O. L. R. 647, 13 O. L. R. 548, 8 O. W. R. 710. Owing to horses attached to a heavy dray becoming frightened and

oversetting an engine which was standing on a track in the defendant's engine works, the engine fell on a workman and killed him, the defendant was held liable because he did not have the engine properly braced. The finding was justified under the Act. The accident did not occur through any defect in the ways, works, machinery, etc., but through the negligence of the superintendent under whose orders the engine was braced and supported: King v. Miller, 34 S. C. R. 710. Where a mason and his helper fixed a scaffolding in passing over which the helper was subsequently injured, it was held that they were fellow workmen, that the mason had no "superintendence" of the other and that the gangplank or scaffold was not a "way" within this Act: Ferguson v. Galt School Board, 27 A. R. 480. Employer liable for negligence of foreman in not making suitable foundation for trestle, although supplied with proper materials: Lappage v. C. P. R., 13 O. W. R. 118. Where a machine, perfect of its kind, had a dangerous tendency to let pieces of steel fly and the defendants' foreman had been in the habit of giving warning and had neglected to do so on this occasion, the defendants were held liable: Choate v. Ontario Rolling Mills, 27 A. R. 155. Negligence of foreman in not pointing out which machines were dangerous, and in not warning and instructing inexperienced operatives: Lawson v. Packard Electric, 10 O. W. R. 525, 11 O. W. R. 72, 16 O. L. R. 1. Setting employee to oil machine in motion: Scott v. Governors of University of Toronto, 4 O. W. N. 994, 24 O. W. R. 325. Use of dangerous machinery: injury to inexperienced workman acting with reasonable care under orders of superior: O'Connor v. Hamilton Bridge Co., 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598. Where the employer provides for the instruction of infant workman in use of machine by competent foreman, there is no liability at common law and no difference between an infant and an adult workman, but the extent and method of instruction may vary with the age and disability of the workman: Young v. Hoffman, 1907, 2 K. B. 646. There is no rule to the effect that the master has a personal duty to perform which he cannot delegate to others: Cribbs v. Kynoch, 1907, 2 K. B. 548. It is not

necessary that the superintendence should include or involve superintendence over the plaintiff: Kearney v. Nicholls, 76 L. T. 63; Webb v. Canadian General Electric, 2 O. W. R. 322; Darke v. Canadian General Electric, 28 O. L. R. 240. An elevator man in a department store is not an employee having superintendence entrusted to him: Carnahan v. Simpson, 32 O. R. 328. What amounts to superintendence: Darke v. Canadian General Electric, 28 O. L. R. 240; Gower v. Glen Woollen Mills, 28 O. L. R. 194. Negligence of foreman: Nigro v. Donati, 4 O. W. N. 2, 22 O. W. R. 974. Negligence of foreman of works: Liability of contractor and of contractor's principal: Dallantonio v. McCormick, 29 O. L. R. 319. Person not intrusted with superintendence: Demers v. Nova Scotia Silver, 3 O. W. N. 1206. Negligence of a superior in exercise of superintendence: Brulott v. G. T. P., 2 O. W. N. 1277, 19 O. W. R. 514, 24 O. L. R. 154; Quinto v. Bishop, 2 O. W. N. 1152, 19 O. W. R. 313; Hicks v. Smiths Falls El. Co., 4 O. W. N. 1215. See also Markle v. Donaldson, 7 O. L. R. 376, 8 O. L. R. 682; Commarford v. Empire Limestone Co., 11 O. L. R. 119; McNaughton v. Caledonian Ry., 28 L. T. N. S. 376; Spaight v. Tedcastle, 1881, 6 App. Cas. 217; Northern Pacific v. Hambly, 154 U. S. R. 349; Shea v. Inglis Co., 12 O. L. R. 80; Fairweather v. Owen Sound Quarry, 20 O. R. 604. The Supreme Court has applied the principle of employer's responsibility for the acts of his overseers to His Majesty in relation with government employees, as well as the maxim "*respondeat superior*:" Queen v. Martin, 20 S. C. R. 240, at p. 250; Filion v. The Queen, 24 S. C. R. 482; Quebec v. The Queen, 24 S. C. R. 420. Superintendence: Assumption of risk: see Annotation, 11 D. L. R. 106, and see notes to sec. 2 (*j*), *ante*.

3.—(*c*) It must be established that the injury was caused by the negligence of the plaintiff's superior to whose orders he conformed and that the injury resulted from his so conforming: McLeod v. Canadian Stewart, 1 O. W. N. 951. Negligence consisting in mate of lake vessel not instructing deckhand to coil a rope properly, the deckhand being bound to conform to the mate's orders: Frawley

v. Hamilton Steamboat Co., 10 O. W. R. 309. Conforming to orders of foreman: Negligence of foreman in not attending to warnings: Condon v. Hamilton Steel and Iron, 11 O. W. R. 49. Foreman's orders: Darke v. C. G. Electric, 3 O. W. N. 368, 20 O. W. R. 587, 28 O. L. R. 240. Conforming to orders: Morton Co. v. Ontario Accident, 11 O. W. R. 828, 12 O. W. R. 269, 14 O. W. R. 1010, 1 O. W. N. 199, and see *ante*, notes to sec. 3 (*b*).

3.—(*d*) As to misconduct of servant through disobedience to rules precluding a recovery for his death: see Bist v. London South Western, 1907, A. C. 209. A master is entitled to make and insist on the observation of reasonable rules for the conduct of his business, and if in consequence of the non-observance of these rules by a servant he is injured, the master is not liable: Anderson v. Mikado, 3 O. L. R. 581. Disregard of rules in using code of signals in a mine. No contributory negligence by non-use of the signals, the rules having with the consent of the employees and of the persons in charge of the men, been disregarded so as to indicate that they were abrogated: Warmington v. Palmer, 7 B. C. R. 414, 8 B. C. R. 344, 32 S. C. R. 126. The employer is not responsible for an accident resulting from an act of a workman opposed to the usual course and system. Neither the employer nor his foreman could be blamed for not assuming that a workman would resort to unlikely and extraordinary methods of accomplishing his work: Alexander v. Miles, 7 O. L. R. 103. The deceased was in charge of a gang of men working on a railway cutting, and in a zealous attempt to save his employer's time, persuaded the engine driver of a construction train to break rules as to flagging, etc., which resulted in the fatal accident in question. The defence of contributory negligence was not set up. The deceased could not have compelled the engine driver to move the train as he did nor have authorized him to disregard rules. The engine driver's negligence was held to make the company liable under this Act: Muma v. C. P. R., 14 O. L. R. 147, 9 O. W. R. 475. Disobedience of rules, dangerous machine: D'Aoust v. Bissett,

13 O. W. R. 1117. Although there may be a plain defect in the condition of the way, resulting in the accident and injury, yet an engineer who proceeded with his engine in spite of the condition of the signals, thereby negligently disobeying his orders as contained in the company's rules, has no action, and where the accident results in his death, his widow has no action either: Holden v. G. T. R. 5 O. L. R. 301. A conductor was engaged in his duties. By omitting to have a light on the rear end of the train which backed and killed him, the railway company were guilty of negligence: Boisseau v. C. P. R., 32 S. C. R. 424. Where a brakeman was injured by a low bridge when standing on the top of cars contrary to rules of which he was aware, the company were not liable although there was not a clear headway space as required by the Railway Act: Deyo v. Kingston & Pembroke Ry., 8 O. L. R. 588. Disobedience of Ry. Co. Rules: see also Walker v. Wabash Ry., 13 O. W. R. 250; Fawcett v. C. P. R., 8 B. C. R. 393, 32 S. C. R. 721; Fralick v. G. T. R. 13 O. W. R. 462, 15 O. W. R. 55, 1 O. W. N. 309; Maycock v. Wabash, 9 O. W. R. 546, 10 O. W. R. 127; Birkett v. G. T. R., 35 S. C. R. 296. Habitual violation of rules as an excuse: see Senior v. Ward, 1 E. & E. 285. Knowledge of and acquiescence in breach of rules: Northern Pacific v. Nickels, 4 U. S. App. 369; Atchison Ry. v. Reesman, 19 U. S. App. 596; Railroad Co., v. Jones, 95 U. S. 439; Kansas and Arkansas Ry. v. Dye, 70 Fed. Rep. 24. Where disobedience of a railway company's rules is alleged, the construction of the rules is a matter for the trial Judge: Walker v. Wabash Ry., 13 O. W. R. 250. Disobedience of railway company's rules: see R. S. O. 1914, ch. 185, sec. 163 *et seq.*, and notes.

3.—(*e*) The words "person in charge or control" do not necessarily point to a person in charge of the whole train: McCord v. Cammell & Co., 1896, A. C. 57. The charge or control of a switch need not be exclusively in the defendants in order to make them liable: Warren v. Macdonnell, 12 O. W. R. 493. A motorman of an electric car may be a person "who has charge or control" within the meaning of the Act, and if he negligently allows his car to collide

with a vehicle, whereby the conductor, attending to his duty, is injured, the company is liable: Snell v. Toronto Railway, 27 A. R. 161, 31 S. C. R. 241. Negligence of engine driver: Person in charge: Smith v. G. T. R., 3 O. W. N. 379. Negligence of engineer: Durant v. C. P. R. 12 O. W. R. 294, 13 O. W. R. 316. Negligence of signalman and engineer: Curtis v. M. C. R. R., 12 O. W. R. 445. Rules of railway company: Person in charge: Smith v. G. T. R. 4 O. W. N. 42. Brakeman standing on ground and giving signals to locomotive engineer is a person in charge or control of the engine: Summerson v. G. T. R., 11 D. L. R. 104; 4 O. W. N. 1082, 1529, 24 O. W. R. 403, 816 (and see Annotation, 49 C. L. J. 458). "Person in charge or control of engine:" Martin v. G. T. R., 3 O. W. N. 350, 20 O. W. R. 600, 4 O. W. N. 51; Allan v. G. T. R., 40 O. W. N. 325, 23 O. W. R. 453; McLaughlin v. Ontario Iron and Steel Co., 15 O. W. R. 284, 1 O. W. N. 408, 20 O. L. R. 335; Jones v. C. P. R., 3 O. W. N. 1404. Superintendence over engineer: Martin v. G. T. R., 20 O. W. R. 600, 3 O. W. N. 350. Defective system of control of yard engine: Fralick v. G. T. R., 13 O. W. R. 462, 15 O. W. R. 55, 1 O. W. N. 309. Signal on a railway, etc.: Davies v. Badger Mines, 2 O. W. N. 559, 18 O. W. R. 348. Signalman employed by two companies: Pattison v. C. P. R. and C. N. R., 20 O. W. R. 18, 22 O. W. R. 131, 3 O. W. N. 45, 1245, 24 O. L. R. 482, 26 O. L. R. 410. Person in control of machine on tramway: Dunlop v. Canada Foundry, 3 O. W. N. 932. Negligent order to servant to get on moving train: Taylor v. G. T. R. 2 O. W. N. 282, 17 O. W. R. 512. Servant walking on railway track. Ultimate negligence: McEachen v. G. T. R., 21 O. W. R. 187, 3 O. W. N. 628. Fall of coal from locomotive tender: O'Brien v. Michigan Central, 19 O. L. R. 345, 14 O. W. R. 581, 1 O. W. N. 7. Workman run over by train in railway yard: Giovinazzo v. C. P. R., 13 O. W. R. 24, 1200, 19 O. L. R. 325. See further as to this sub-sec: Brunnel v. C. P. R., 15 O. R. 375; Jackson v. Canada Southern, 17 S. C. R. 316; Farmer v. G. T. R., 21 O. R. 299; Weegar v. G. T. R., 23 S. C. R. 422; Curran v. G. T. R., 25 A.

R. 407; Miller v. G. T. R., 23 S. C. R. 454; Rombough v. Balch, 27 A. R. 32; Collier v. Michigan Central, 27 A. R. 630; Wood v. C. P. R., 30 S. C. R. 110; Bond v. Toronto Ry., 22 A. R. 78, 34 S. C. R. 715; Schwoob v. Michigan Central, 9 O. L. R. 86, 10 O. L. R. 647, 13 O. L. R. 548.

Steam shovel moving from place to place upon a temporary track is within this section: Dicarllo v. McLean, 4 O. W. N. 1444, 24 O. W. R. 749. Hoist, an engine or machine upon a tramway: Dunlop v. Canada Foundry, 28 O. L. R. 140. What is a machine or engine within this section: Darke v. Can. Gen. El., 4 O. W. N. 851, 28 O. L. R. 240. What is a train? Cox v. Great Western Ry., 9 Q. B. D. 106; McCord v. Cammell, 1895, A. C. 57; Hollinger v. C. P. R., 21 O. R. 705, 20 A. R. 244; Vaccaro v. Kingston and Pembroke Ry., 11 O. W. R. 836; R. S. C. 1906, ch. 37, sec. 2 (32); R. S. O. 1914, ch. 185, sec. 2 (*r*) (*x*), 155, and notes.

"Railway" is not confined to railways operated by incorporated railway companies, but is used in its natural sense: Cooper v. Hamilton Steel Co., 8 O. L. R. 353; Doughty v. Firbank, 10 Q. B. D. 358. This Act is binding on Dominion railways: Canadian Southern v. Jackson, 17 S. C. R. 316, and is to be construed liberally in the interests of the workman: Martin v. G. T. R., 27 O. L. R. 165. While there may be a right of action under this section, there may also exist along with it a right of action based on breach of the statutory duty imposed by the Railway Act to provide modern and efficient apparatus: R. S. C. 1906, ch. 37, sec. 264; R. S. O. 1914, ch. 85, sec. 99; Durant v. C. P. R., 12 O. W. R. 294, 13 O. W. R. 316. Where a car of a foreign railway company forms part of a train and is so high that a brakeman is injured by a bridge usually sufficiently high, it is being "used" within the meaning of the Railway Act, and the company is liable: Atcheson v. G. T. R., 1 O. L. R. 168. A workman in the employ of the B. railway was killed in consequence of the defective condition of a truck of the C. railway which had been let in the ordinary course of railway exchange to the B. railway. Held that the C.

railway not liable at suit of workman's widow: Caledonian Ry. v. Mulholland, 1898, A. C. 216. Disregard of the provisions of the Railway Act, R. S. C. 1906, ch. 37, secs. 277, 278, by defendants' servants in charge of train, resulting in death of engine driver: see McKay v. Wabash Ry., 10 O. W. R. 416. Defective railway system and responsibility of company; Ainslie Mining Co. v. McDougall, 42 S. C. R. 420; Fralick v. G. T. R. 495 (see Smith v. Baker, (1891) A. C. 325). Signalman hired by one company and paid by another: liability of company using service at time of injury: Pattison v. C. P. R., 24 O. L. R. 482, 26 O. L. R. 410. Where a railway company permit an employee to engage in operation of trains without passing test required by Railway Commission, they are liable for damages resulting, and the defence of common employment is not available: Jones v. C. P. R., 3 O. W. N. 1404; 13 D. L. R. 900 (P.C.). On application to examine an engine driver for discovery under (1913) Rule 327, as an officer of the defendants, held he had no control of the train and was not examinable: Morrison v. G. T. R., 4 O. L. R. 43, 5 O. L. R. 38. See also notes to sec. 5 *post*.

The rights under this statute are not more restricted than under the Fatal Accidents Act. "The same right of compensation" means that which the Fatal Accidents Act confers: Brown v. G. T. R., 28 O. L. R. 354: Damages for injury to servant in Province of Quebec: Story v. Stratford Mill Building Co., 4 O. W. N. 1212. Workmen's compensation law in Quebec: see Annotation, 7 D. L. R. 5.

4. See Smith v. Onderdonk, 25 O. R. 171; Dallontania v. McCormick, 4 O. W. N. 547, 29 O. L. R. 319, and other cases noted *ante*. Plaintiff suing railway for damages for death of husband from defects in track, who claimed over against person constructing siding in question: Trial of third party issue: Pettigrew v. G. T. R., 2 O. W. N. 57, 16 O. W. R. 989, 22 O. L. R. 57.

5. Where a statutory direction imposed upon an employer is not observed, it is no defence that its

non-observance was due to the negligence of a fellow servant of the person injured: Curran v. G. T. R., 25 A. R. 407. What amounts to compliance with statutory duty to supply proper apparatus: Watkins v. Naval Colliery Co., 1911, 2 K. B. 162, 1912, A. C. 693. See R. S. O. 1914, ch. 185, sec. 99, and notes. Dispensing power of Railway Committee to permit precautions to be omitted. Construction: Washington v. G. T. R. 1899, A. C. 275. "Railway" includes a private railway and is not confined to railways operated by incorporated railway companies: Cooper v. Hamilton Steel, 8 O. L. R. 353; Doughty v. Firbank, 10 Q. B. D. 358. Unpacked frog: Macdonald v. Walkerton and Lucknow Ry., 1 O. W. N. 395. Employee in disobedience of orders of which he was aware stood on top of car and was injured; the company were not liable although there was not the clear headway required by the Railway Act: Deyo v. Kingston and Pembroke Ry., 8 O. L. R. 588; and see *ante*, sec. 3 (*d*) notes. See Ont. Ry. Act, R. S. O. 1914, ch. 185, sec. 116, notes, as to headway under bridges, and also ch. 185, sec. 108, and notes, as to frogs, packing, etc. This Act is binding on Dominion railways: Canada Southern v. Jackson, 17 S. C. R. 316; C. P. R. v. The King, 39 S. C. R. 476, at p. 497. See R. S. C. 1906, ch. 37, secs. 288 and 427; R. S. O. 1914, ch. 185, secs. 3, 99, 108, 116 and 288, and notes. Employer's liability for breach of statutory duty: 5 D. L. R. 328, and see *ante*, sec. 3, notes.

6. The right of action for compensation for injury or death by negligence of Government employees does not abate on the demise of the Crown: The King v. Desrosiers, 41 S. C. R. 71. An action for injury to the person now survives to the executor of the plaintiff, who can, in case of death *pendente lite*, obtain an order of revivor and continue the action: Mason v. Peterborough, 20 A. R. 683: see R. S. O. 1914, ch. 121, sec. 41, and notes. When actions survive: see H. & L. notes, p. 609.

6.—(*a*) There is a difference between the Ontario Act and the corresponding provision of the English Act: The English Act requires that the person entrusted shall be some one "in the service of the employer,"

and, therefore, when a competent independent contractor is employed the common law rule applies, and the employer is not answerable for injuries sustained by the workman, owing to the contractor having negligently performed the work entrusted to him: (Kiddle v. Lovett, 1885, 16 Q. B. D. 605); Markle v. Donaldson, 7 O. L. R. 376, 8 O. L. R. 682. At common law a master is bound to provide proper appliances for carrying on his work, and to take reasonable care that appliances which, if out of order, will cause danger to his servant, are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge personally or by employing a competent man in his stead, and the purpose of sec. 3 (*a*) as modified by this section is to take from the master his common law immunity for the neglect of such a person: Schwoob v. Michigan Central, 9 O. L. R. 86, 10 O. L. R. 647, 13 O. L. R. 548. Under this section the employer is answerable so far as the condition and arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he entrusts the duty mentioned in the sub-section, and in the performance of that duty in the same way and to the same extent as he would have been liable at common law had he taken on himself personally the performance of that duty; and where an appliance necessary for the safety of workmen is required in the course of the work, and the employer directs anyone to provide it, that person is one entrusted with the duty of seeing that the appliance is proper: Markle v. Donaldson, 7 O. L. R. 376, 8 O. L. R. 682. Knowledge by employer of dangerous conditions: Kirby v. Briggs, 2 O. W. N. 1511, 19 O. W. R. 917. Negligence of foreman in not discovering defect: Kelly v. Davidson, 31 O. R. 521, 32 O. R. 8. Negligence of foreman in failure to remedy defect of which he was aware—namely, absence of guard to a dangerous machine: Godwin v. Newcombe, 1 O. L. R. 525. Negligence of foreman in failure to give the usual warning before operating a dangerous machine: Choate v. Ontario Rolling Mill, 27 A. R. 155. Negligence is not having proper guard and inattention of operator in charge of dangerous machine: Moore v. J. D. Moore Co., 4 O. L. R. 167. See Giles v. Thames Ironworks, 1

Times L. R. 469; Ferguson v. Galt School Board, 27 A. R. 480. Negligence of foreman: McClement v. Kilgour, 20 O. W. R. 770, 21 O. W. R. 856, 3 O. W. N. 399, 446. New machine by reputable manufacturer: Bennie v. Verrall, 14 O. W. R. 1095, 1 O. W. N. 222. 'Discovered or remedied:' Linden v. Trussed Concrete Steel Co., 18 O. L. R. 540. If an employer takes a plant supplied to him by a third person for whom he is working, and uses it without enquiry or inspection, there is *prima facie* evidence of negligence to go to a jury where a workman has been injured by a defect in the plant: Biddle v. Hart, 1907, 1 K. B. 649.

6.—(*c*) Where the plaintiff before the accident knew of the defect and the defendants were not aware of it and the plaintiff with such knowledge failed to notify the defendants of its existence, the plaintiff cannot take advantage of the Act: Clegg v. Great Western Ry., 10 O. R. 708: Campbell v. Ontario Lumber Co., 3 O. W. R. 235; Truman v. Rudolph, 22 A. R. 250; Dominion Coal v. Day, 24 C. L. T. 167; Davidson v. Stuart, 34 S. C. R. 215. At common law the statement of claim must allege that the master knew, but that the servant was ignorant of the danger: Griffiths v. London and St. Katharines Dock Co., 13 Q. B. D. 259. The fact that the defect is known to the servant does not necessarily involve his consent to undertake the risk: Williams v. Birmingham Battery, etc., Co., 1899, 2 Q. B. 338. Finding by jury that "the deceased voluntarily accepted the risks of shunting," was held to mean the ordinary risks, not risks arising from negligence: Hurdman v. Canada Atlantic Ry., 25 O. R. 209, 22 A. R. 292, 25 S. C. R. 205. The plaintiff was injured by the breaking of a bolt in a loom. The evidence shewed that there was a special employee whose occupation and duty was that of loom-fixer, and that this employee was notified that there was something wrong with this loom, but did not examine it. Held evidence of negligence, and the defendant liable: Talbot v. Canadian Coloured Cotton, 27 S. C. R. 198. To disentitle a workman to damages under this Act, for injury from a defect in a machine, he must not only have a knowledge of the danger he incurs, but also a thorough appreciation

of the risk he runs: Haight v. Wortman and Ward Company, 24 O. R. 618. It is not voluntarily incurring the risk to remain without making complaint, when, if you do complain, the company will discharge you: Fulton v. M. C. R. R., 11 O. W. R. 52. When the workman is aware that the employer knows of the defect that causes the injury, he is not bound under this section to give information to the employer. His failure to give information in other cases will not bar his right of action if a reasonable excuse is shewn for the omission. Where both employer and workman knew of the defect and it was the workman's duty to see that the defect was remedied, he cannot recover: Truman v. Rudolph, 22 A. R. 250. Where the danger is visible, and the risk is appreciated, and where the injured person knowing and appreciating both risk and danger, voluntarily encounters them there is, in the absence of evidence of further acts of omission or commission, no evidence of negligence on the part of the employer at all. Knowledge is not conclusive in itself. But where it is a knowledge under circumstances that leave no inference open, but one, namely, that the risk has been voluntarily encountered, the defence seems complete, per Bowen, L.J.: Thomas v. Quartermaine, 18 Q. B. D. 685; see also Smith v. Baker, 1891, A. C. 325; Yarmouth v. France, 19 Q. B. D. 647; see Ruegg, 5th ed., p. 170. In an action claiming compensation for personal injuries, the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by the plaintiff's evidence that the trial Judge is justified in withdrawing the case from the jury and dismissing the action: Mitchell v. Canada Foundry, 35 S. C. R. 452. To enable an employer to successfully invoke the doctrine of *volenti non fit injuria* he must obtain a finding of the jury in it in his favour: Williams v. Birmingham Battery & Metal Co., 1899, 2 Q. B. 338. If the contention that the servant voluntarily undertook the risk, is to be relied on, a question on that point should be put to the jury: Star Kidney Pad Co. v. Greenwood, 5 O. R. 28. An accident occurred by the giving way of a string, which worked a brake automatically. The plaintiff knew of the defect and of

the likelihood of an accident, having frequently replaced the string when worn, and having continued to work without assistance and without complaint. Held he was "*volens*" and could not recover at common law: Poll v. Hewitt, 23 O. R. 619. What is meant by voluntarily incurring risk of injury: see McCloherty v. Gale Mfg. Co., 19 O. R. 117. The maxim "*volenti non fit injuria,*" does not apply where the accident is caused by a breach of a statutory duty: Rodgers v. Hamilton Cotton Co., 23 O. R. 425; Baddeley v. Earl Granville, 19 Q. B. D. 423. Merely continuing in the employment of the defendants and using utensils with knowledge that they were unfit for the purpose and of the risk, would not prove that the servant had voluntarily undertaken the risk: Sim v. Dominion Fish Co., 2 O. L. R. 69; Smith v. Baker, 1891, A. C. 325; Greenhalgh v. Cwmaman Coal Co., 1891, 8 Times L. R. 31. *Volenti non fit injuria.* Application of the rule and cases reviewed: see Fairweather v. Can. Gen. Electric, 4 O. W. N. 592, 24 O. W. R. 164. Servant's knowledge of danger: see also Miller v. Reid, 10 O. R. 419; Rudd v. Bell, 13 O. R. 47; Ross v. Cross, 17 A. R. 29; Choate v. Ont. Rolling Mill, 27 A. R. 155; Cooper v. Hamilton Steel, 8 O. L. R. 353, and cases collected Ont. Dig. Case Law, cols. 4180, 4181. *Volenti non fit injuria*: see article 41 Can. Law Journal, p. 387. See R. S. O. 1914, ch. 151, sec. 3, notes.

7. "Earnings" includes money and things capable of being turned into money by accurate estimation, such as rent, food and clothes; but it does not include so vague a thing as the tuition an apprentice receives from his master: Noel v. Redruth Foundry, 1896, 1 Q. B. 453. The plaintiff's evidence of his own earnings is evidence of the fact to be proved: Bortick v. Head, 53 L. T. 909; Noel v. Redruth (1896), 1 Q. B. 453; Williams v. Piggott, 11 O. W. R. 28. Where a workman is given under the Dominion Railway Act a right of action "for the full amount of damages sustained," such a provision is *intra vires* and the limitation mentioned in this Act does not apply: Curran v. G. T. R., 25 A. R. 407. By amendment of 1903 (3 Edw. VII. ch. 7, sec. 46), a plaintiff who has established a good cause of action under the Ontario Factories Act is entitled to the

same amount of damages as under this Act: see Jones v. Morton Co., 9 O. W. R. 500. See R. S. O. 1914, ch. 229, sec. 83. Power of Judge to enter judgment for sum over $1,500, where jury were not asked to assess damages under this Act, but only at common law: Linden v. Trussed Concrete, 18 O. L. R. 540. Where the plaintiff's claim was consistent either with proceedings under this Act or at common law, but the true conclusion from the evidence and the jury's findings was liability under the Act, the verdict was reduced to $1,500: Bagnall v. Durham Rubber Co., 13 O. W. R. 164. Application of this section to suit under Fatal Accidents Act: Dawson v. Niagara, etc., Ry., 2 O. W. N. 1080, 19 O. W. R. 242, 22 O. L. R. 69, 23 O. L. R. 670. The limit of damages is not three years' wages according to the rate which the workman himself was receiving, but the estimated earnings of a person in the same grade in the like employment: Lappage v. C. P. R., 13 O. W. R. 118. Estimation of amount of compensation: Lougheed v. Collingwood Shipbuilding Co., 12 O. W. R. 871. As to elements to be considered in assessing damages for injuries in cases of accident: see Fraser v. London St. Ry., 29 O. R. 411, 26 A. R. 383. Estimation of damages:: Parker v. Michigan Central Ry., 11 O. W. R. 860. Permanent disability: mentioning sum claimed: Bradenburg v. Ottawa Electric, 19 O. L. R. 34. A new trial will not be granted on the ground of excessive damages unless, having regard to all the circumstances of the case, the Court is of opinion that 12 men could not reasonably have given it, or unless the Court without imputing perversity to the jury comes to the conclusion from the amount of damages and the other circumstances that the jury must have taken into consideration matters which they ought not to have considered or applied a wrong measure of damages: Praed v. Graham, 1889, 24 Q. B. D. 53; Johnston v. Great Western Rw. Co., 1904, 2 K. B. 250. See also McDonald v. Cameron, 4 U. C. R. 1; Dobbyn v. Dicow, 25 U. C. C. P. 18; Ford v. Gourlay, 42 U. C. R. 552. A workman is not acting unreasonably in refusing to undergo operation where such refusal is based on the doctor's honest opinion that in the state of the workman's health, the anæsthetic was

dangerous: Tutton v. S. S. "Majestic," 1909, 2 K. B. 54; see also as to reasonableness: Marshall v. Orient S. S. Nav. Co., 101 L. T. 584; Bateman v. County of Middlesex, 24 O. L. R. 84.

8. Apportionment of damages: Hicks v. Smith's Falls El. Co., 4 O. W. N. 1215. "Child," means "child" as defined in Fatal Accidents Act, and includes step-child: Brown v. G. T. R., 4 O. W. N. 942, 24 O. W. R. 255, 28 O. L. R. 354. The claim for damages under this Act must be confined to the plaintiff alone. An action "*per quod servitium amisit*," does not lie except in the case of the workman's death when it is awarded to his representatives: Wilson v. Boulter, 26 O. R. 184. And at common law the mother of an infant plaintiff cannot recover for her services in attending on him when he was injured, nor for money expended, nor for medical attendance and nursing, or supplies, she not being in the legal relation of master to him, or under legal liability to maintain him: Wilson v. Boulter, 26 O. R. 184; see Schouler, Domestic Relations, 4th ed., sec. 255. The father's right is grounded on the theory of his right as master to the child's services: Cuming v. Brooklyn City Ry., 109 N. Y. 95. How far this theory extends to cases where the child is emancipated and earning his own wages under his own contracts may be doubtful: see Delesdernier v. Burton, 12 Gr. 569; Perlet v. Perlet, 15 U. C. R. 165; Ferris v. Fox, 11 U. C. R. 614; Rex v. Chillesford, 4 B. & C. 94; Dierker v. Hess, 54 Mo. 246. Claim of mother without sufficient interest in or expectation from her son's earnings: see Doyle v. Diamond Glass, 8 O. L. R. 499. Claim of widow whose status as widow and administratrix is attacked: Doyle v. Diamond Glass Co., 8 O. L. R. 499; see R. S. O. 1914, ch. 151, and notes.

9 The language of the section is imperative, but it is open to the defendants to waive the limitation in their favour: Thompson v. Ontario Sewer Pipe Co., 9 O. W. R. 132, 11 O. W. R. 32. Where a plaintiff commences his action and subsequently, after the expiration of the six months, shifts his ground: right of plaintiff to amend: Paschal v. Nicholson, 11 O. W. R. 394. Terms on which limitation allowed

to be pleaded after defence delivered: Siven v. Temiscaming Mining Co., 2 O. W. N. 129, 17 O. W. R. 81. Limitation: see R. S. C. 1906, ch. 37, sec. 306 (4), R. S. O. 1914, ch. 185, sec. 265. Territorial limitations of Act: see Tomalin v. Pearson, 1909, 2 K. B. 61. As to notice of injury and reasonable excuse for not giving it: see notes to sec. 13, *post*.

10. A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act: Grenier v. the Queen, 30 S. C. R. 42; Griffiths v. Earl Dudley, 9 Q. B. D. 357. Payment to a person injured by an accident on a railway of " the sum of $10, such sum being in lieu of all claims which I may have against said company on account of an injury received on 16th May, 1893," may constitute accord and satisfaction. An issue as to the effect of the payment and its receipt and its procurement by fraud may be tried by the presiding Judge at the trial and need not necessarily be left to the jury: Haist v. G. T. R., 26 O. R. 19, 22 A. R. 504. A contract of hiring, waiving right to sue, set out at length with consideration of this section and collection of cases where such contracts were passed upon: see Fisher v. International Harvester Co., 12 O. W. R. 1126; reversed, 13 O. W. R. 381; and see 13 O. W. R. 654. This Act is binding on Dominion railways: Canada Southern v. Jackson, 17 S. C. R. 316; C. P. R. v. the King, 39 S. C. R. 476 at p. 497. See Holden v. G. T. R., 5 O. L. R. 301; Curtis v. M. C. R. R., 12 O. W. R. 445. Employers' liability insurance; condition as to employment: Morton Co. v. Ontario Accident, 11 O. W. R. 828, 12 O. W. R. 269. An infant's contract to accept benefits of a railway servants' society in lieu of claims under Employers' Liability Act may be for his benefit and be binding on him: Clements v. L. & N. W. Ry., 1894, 2 Q. B. 482. But if detrimental will not be binding: Flower v. L. & N. W. Ry., 1894, 2 Q. B. 65; and see Alexander v. Toronto and Nipissing Railway, 33 U. C. R. 474, 35 U. C. R. 453. Contrast this section with the English Act, 1906, 6 Edw. VII., ch. 58, sec. 3 (3). See R. S. C. 1906, ch. 37, sec. 306, R. S. O. 1914, ch. 185, sec. 3, 99 (12), 266, and notes.

12. Where the plaintiff received accident insurance, it would probably be held in view of the cases, such as Bradburn v. Great Western Ry., L. R. 10 Ex. 1, and The Mariposa, 1891, P. 403 at p. 407, notwithstanding cases like Farmer v. G. T. R., 21 O. R. 299, at p. 306, and Hicks v. Newport, 4 B. & S. 403a, that the fact of such insurance could not be taken into consideration by the jury: Loughead v. Collingwood Shipbuilding Co., 11 O. W. R. 329. In regard to taking into consideration sums received for benefit and accident insurance, the (former) rule in cases under the Fatal Accidents Act has no application to cases where the action is brought by the injured person himself. In the former case the cause of action is the pecuniary loss caused by death, in the latter it is the wrong itself and the liability of the wrongdoer to pay for it: Misner v. Toronto and York Radial, 11 O. W. R. 1064. Deduction of insurance moneys from amount of verdict made, in cases under the Fatal Accidents Act: Dawson v. Niagara, etc., Ry., 22 O. L. R. 69; 23 O. L. R. 670. See now R. S. O. 1914, ch. 151, sec. 4 (2). Insurance received by plaintiff: see G. T. R. v. Jennings, 13 App. Cas. 800, at p. 803; Miller v. G. T. R., 1906, A. C. 187; R. v. Armstrong, 40 S. C. R. 229; Harris v. G. T. R., 3 O. W. N. 211, 550, 567. In Quebec the payment of insurance benefit is an effectual bar to the recovery of damages: Queen v. Grenier, 30 S. C. R. 42; Miller v. G. T. R., 34 S. C. R. 45, 1906, A. C. 187; see also Griffiths v. Earl Dudley, 9 Q. B. D. 357. If in an action for damages it comes to the knowledge of the jury that the defence is really on behalf of an insurance company paid to protect the defendants against such risks, there must be a new trial: Loughead v. Collingwood Shipbuilding Co., 11 O. W. R. 329; Flynn v. Industrial Exhibition, 6 O. L. R. 653, 2 O. W. R. 1047, 1075. It is not an ordinary case of improper admission of evidence under Con. Rule 785: see R. S. O. 1914, ch. 56, sec. 28. A question as to whether the defendants carry employers' liability insurance is improper. Such evidence should not be considered by a jury: Bradburn v. Great Western Ry., L. R. 10 Ex. 1. The Mariposa, 1891, P. 403 at p. 407, but see Farmer v. G. T. R., 21 O. R. 299; Hicks v. Newport, 4 B. & S. 403a. Whether under Con. Rule 785, a new trial need be granted in such a case

where no substantial wrong or miscarriage has resulted: see Loughead v. Collingwood, 11 O. W. R. 329. A condition in an employers' liability policy that the insurers should have conduct and control of defending any claim made, employing their own solicitors, is not complied with by offering to turn the action over to the insurers' solicitors when it is at issue. An employer who takes such a course with respect to the insurers cannot claim against them the amount of a judgment obtained against him, leaving the insurers to set up by counterclaim that they could have done better: Wythe v. Manufacturers' Accident, 26 O. R. 153.

13. Notice of action: see Eke v. Hart Dyke, 1910, 2 K. B. 677. While notice of injury required by sec. 9 is for the employer's protection against stale or imaginary claims and to entitle him while the facts are recent to make enquiry, the injured workman is the primary object of legislative consideration. Under secs. 9, 13 and 14, notice may be dispensed with where there is reasonable excuse for the want of it, the employer not being prejudiced: Armstrong v. Canada Atlantic, 2 O. L. R. 219, 4 O. L. R. 560. What constitutes reasonable excuse depends on the particular case and regard should be paid to (a) the notoriety of the accident, (b) the knowledge of the employers of the injury and its cause, and (c) claims made upon them: Armstrong v. Canada Atlantic, 2 O. L. R. 219, 4 O. L. R. 560. The notice of accident should be in writing: Hughes v. Coed Talon Colliery, 1909, 1 K. B. 957. Where there is actual knowledge or verbal notice, it may be regarded as an element of reasonable excuse but something more is required. The fact of the accident by itself is not a reasonable excuse if it is not accompanied by some disabling circumstance. The plaintiff being misled by someone into not giving notice may be such a circumstance: O'Connor v. Hamilton, 6 O. W. R. 227, 8 O. L. R. 391, 10 O. L. R. 529; and see Biggart v. Clinton, 2 O. W. R. 1092, 3 O. W. R. 625; McCrae v. Brussels, 7 O. L. R. 146, 8 O. L. R. 156. Where the conduct of the defendants is such as to throw the plaintiff off his guard as to seeking legal advice, it amounts to reasonable excuse for not giving notice: Smith v. McIntosh, 8 O. W. R. 472, 13 O. L. R. 118. Protracted

negotiations for settlement as excuse for want of notice: Gower v. Glen Woollen Mills, 4 O. W. N. 796, 28 O. L. R. 193. Reasonable excuse for not giving notice; no one in the country pecuniarily interested or clothed with administration: Giovinazzo v. C. P. R., 13 O. W. R. 24, 1200, 19 O. L. R. 325. Ignorance of Act not an excuse for not giving notice: Roles v. Pascall, 1911, 1 K. B. 982. Circumstances shewing reasonable excuse for insufficient notice: Leitch v. Pere Marquette, 2 O. W. N. 617, 18 O. W. R. 433. Reasonable excuse for want of notice: Quist v. Serpent River L. Co., 4 O. W. N. 159, 23 O. W. R. 151; Egerton v. Moore (1912), 2 K. B. 308. As to what constitutes reasonable excuse for omission to give the statutory notice: see R. S. O. 1914, ch. 192, sec. 460, and cases there noted.

14. To state in the defence that notice of the accident has not been given and that the defendants intend to rely on that defence is not sufficient. Formal notice of objection must be given in accordance with the provisions of this section: Wilson v. Owen Sound, etc., Co., 27 A. R. 328; Cavanagh v. Park, 23 A. R. 715. Setting up defence of want of notice: see Lever v. McArthur, 9 B. C. R. 417. "Seven days before the hearing" means before the day originally fixed for the trial and not any adjourned day or the day of actual hearing: Potter v. McCann, 16 O. L. R. 535, 11 O. W. R. 417. The defence of want of notice under this Act is a statutory defence: Conroy v. Peacock, 1897, 2 Q. B. 6; see Con. Rule 271, 1913 Rule 143.

15. If the plaintiff cannot give the particulars directed to be given until after discovery, he can have an order for that purpose: Vannort v. Canada Foundry, 11 O. W. R. 343. Particulars: see Scriver v. Wabash Ry., 11 O. W. R. 832. Particulars as to medical and nursing expenses should be given: Odgers, 5th Edn. p. 116. Contributory negligence must be specially pleaded: Odgers' Pleading, 5th Edn. p. 162; Con. Rule 268, 1913 Rule 141; Kelly v. Martin, 6 O. W. R. 141; McGinnis v. Hyslop Bros., 12 O. W. R. 81, 140.

16. Where no defence entered, but damages assessed by the Court: see as to counsel fees: Hamilton v.

Hamilton, Grimsby & Beamsville Ry., 15 O. L. R. 50; see also H. & L. notes, p. 778.

33. A plaintiff in a High Court action may at any stage abandon a part of his claim and thereafter only the remainder may be said to be in controversy: Preston v. Toronto Ry., 13 O. L. R. 79, 8 O. W. R. 753; McKay v. Toronto Ry., 9 O. W. R. 832, 893. Where an action under this Act is at issue, the plaintiff will be permitted in proper terms to amend and add claim at common law: Stuart v. Bank of Montreal, 14 O. L. R. 487, 9 O. W. R. 822; Guthro v. Foster Cobalt, 11 O. W. R. 882; and *vice versa*: Casselman v. Barry, 8 O. W. R. 198. A plaintiff whose statement of claim alleged generally a cause of action both at common law and under this Act, but gave no facts to support the latter, was allowed to amend, after a trial, by setting out facts which would shew a cause of action under this Act: McKay v. Toronto Ry., 9 O. W. R. 832, 893. Right to amend after six months limited in sec. 9: Pascal v. Nicholson, 11 O. W. R. 394. The function of a Court of Appeal is not to retry the question or to set aside the verdict if it is one which might reasonably be found by the jury even though a different result might be more satisfactory to the Judge at trial or the Court of Appeal: McArthur v. Dom. Cartridge Co., 1905, A. C. 72.

34. This provision throws on the defendants the onus of shewing that the accident was not caused by the want of a guard, etc.: Godwin v. Newcombe, 1 O. L. R. 525. See cases noted, sec. 3 (a), and 6, *ante*.

CHAPTER 147.

The Apprentices and Minors Act.

Refer to: Smith on Master and Servant, Macdonell on Master and Servant, Austin on Apprentices.

6. It would seem at common law that the age at which apprentices could be bound or could bind themselves was 7 years: R. v. Saltern, 1 Bott. P. L. Cas. 613. Where a statute prohibits the taking of an apprentice under a certain age and a child under that age is taken notwithstanding, the binding will be void: R. v. Hipswell, 8 Barn. & Cress. 466. A master has no common law right to dismiss his apprentice for ordinary misconduct: Winstone v. Linn, 1 B. & C. 460; Phillips v. Cliff, 4 H. & N. 168. He can only do so where the contract in express terms gives him the power to dismiss him: Westwick v. Theodor, L. R. 10 Q. B. 224, 44 L. J. Q. B. 110. But a master can dismiss an apprentice who is an habitual thief: Learoyd v. Brooks, 1891, 1 Q. B. 431.

9. Where a minor enters into a contract of hiring, the wages he earns belong to him and not to his parent: Delesdernier v. Burton, 12 Gr. 569. *Quaere* whether if an infant hire himself for wages to his parent, the contract is binding on the latter: Perlet v. Perlet, 15 U. C. R. 165; and see Smith v. Smith, 29 O. R. 309, 26 A. R. 397. R. S. O. 1914, ch. 63, sec. 66, was intended to enable infants to recover for their own labour (contrary to the common law rule), and is not to be construed as restricting them from suing for anything but wages: Ferris v. Fox, 11 U. C. R. 612; see notes to sec. 12 *infra*.

10. At common law an apprentice cannot be compelled to serve the executors, etc., of his master unless the indenture binds him to the master, "his executors and administrators:" Cooper v. Simmonds, 7 H. & N. 707.

12. If the master carries on several trades, the apprentice is entitled to instruction in all the trades, and if the master gives up any one of them the apprentice may cease to serve the master, who will be liable on his covenant to teach: Ellen v. Topp, 6 Ex. Rep. 424, 20 L. J. Ex. 241. By the general law a master is not bound to provide medical advice for a servant, but the case is different in regard to an apprentice and the master is bound during the illness of his apprentice to provide him with proper medicine: per Patteson, J., Reg. v. W. Smith, 8 C. & P. 153. Where infant apprentice is injured through master's negligence, see as to parents' right to engage medical help and make it an item of claim against the master: Shea v. Inglis, 12 O. L. R. 80, 8 O. W. R. 208. In an action under the Workmen's Compensation for Injuries Act, the mother of an infant cannot recover for her services in attending on him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, as she has not the legal relationship of master nor legal liability to maintain him: Wilson v. Boulter, 26 A. R. 184; Wright v. McCabe, 30 O. R. 390. The action for injury to an apprentice is fundamentally the master's action *per quod servitium amisit*: Robert Mary's Case, 9 Rep. 113a. The father's right to bring such an action is really an infringement of the master's right, and is based on the same reasoning: Grinnell v. Wells, 7 M. & G. 1033; Cuming v. Brooklyn City Ry., 109 N. Y. 95. The mother would appear to have no such right by common law or statute: Wilson v. Boulter, 26 A. R. 180. And how far the right of the father would extend when the child is, as it were, emancipated and earning wages for himself under his own contracts, may be doubtful: Delesdernier v. Burton, 12 Gr. 569; Perlet v. Perlet, 15 U. C. R. 165; Smith v. Smith, 29 O. R. 309. 26 A. R. 397; Ferris v. Fox, 11 U. C. R. 612. See sec. 5 *supra* and R. S. O. 1897, ch. 60, sec. 78, and notes thereto; also Bicknell & Seager, D. C. Act, p. 117; R. S. O. 1914, ch. 63, sec. 66; see also R. S. O. 1914, ch. 229, sec. 2 (*l*), (*q*), (*r*); R. S. O. 1914, ch. 151, sec. 8.

CHAPTER 148.

THE MARRIAGE ACT.

Refer to Holmested (Can.); Gemmell on Divorce; Eversley, Domestic Relations.

1. Powers of Dominion and Provinces: see Re Marriage Laws, 46 S. C. R. 132; Re Questions Concerning Marriage, 1912, A. C. 880. The only marriage known to the law of England is Christian marriage, which has been judicially defined as "the voluntary union for life of one man and one woman to the exclusion of all others": Hyde v. Hyde, L. R. 1 P. & D. 130. A monogamous union between persons marriageable by the law of their domicile and validly celebrated according to the *lex loci contractus* will be recognized as marriage in the English Courts: Brinkley v. A. G., 1890, 15 P. D. 76. A union either actually or potentially polygamous will not be so recognized: in Re Bethell, L. R. 38 Ch. D. 220. Foreign common law marriage, validity: see Annotation, 5 D. L. R. 247.

2.—(*a*) The words "Church and religious denomination" should not be construed so as to confine them to Christian bodies: R. v. Dickout, 24 O. R. 250. "The Re-organized Church of Jesus Christ of Latter-Day Saints" is a religious denomination within the meaning of the Statute: R. v. Dickout, 24 O. R. 250. What amounts to proof of authority under this section: R. v. Brown, 12 O. W. R. 488. Criminal offence of solemnizing a marriage without lawful authority: see Criminal Code, sec. 311.

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2.—(*c*) The powers given by this section, the only instance where legal recognition has been given to or sought by the Salvation Army, were said to constitute the Salvation Army "a religious community or society" within the meaning of and with the powers conferred by R. S. O. 1897, ch. 307: Kingston v. the Salvation Army, 5 O. L. R. 585, but this was doubted in the subsequent proceedings: 6 O. L. R. 406. It was held not applicable so as to

hold the whole society answerable in *tort*: Kingston v. the Salvation Army, 6 O. L. R. 406.

4.—(2) Where banns have been published and no dissent expressed by parents or guardians, the husband being under age is no objection: Reg v. Secker, 14 U. C. R. 604.

15. Absence of parents' consent: Menzies v. Farnon, 18 O. L. R. 175, 13 O. W. R. 586, 711. See secs. 34, 35, and notes.

16. See secs. 34, 35 and notes.

17. Marriage of lunatics, when void: see R. S. O. 1897, ch. 341, sec. 3 (not consolidated).

20. Marriage with deceased husband's brother, if valid by *lex domicilii*, is valid in England, although the wife was a domiciled Englishwoman at the time of her second marriage and merely acquired a foreign domicile by that marriage: Re Bozzelli, 1902, 1 Ch. 751. The Supreme Court of Ontario has no jurisdiction to declare invalid a marriage within the prohibited degrees of consanguinity: May v. May, 16 O. W. R. 1006, 18 O. W. R. 515, 2 O. W. N. 68, 413, 22 O. L. R. 559. By English law adopted in this Province in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes unless annulled during the lifetime of the parties. This remained the law until 45 Vic. ch. 42 D., which removed all disabilities: Re Murray Canal, 6 O. R. 685; Hodgins v. McNeil, 9 Gr. 305. By 53 Vic., ch. 36, sec. 1, " all laws prohibiting marriage between a man and the daughter of his deceased wife's sister, where no law relating to consanguinity is violated, are hereby repealed both as to past and future marriages. See Criminal Code, sec. 204. For article on marriage with deceased wife's sister, the history of the law relating to this in Canada and in England and the position in England of persons contracting such marriages in Canada: see 41 Can. Law Journal, p. 345.

35. The testimony of a woman of the ceremony having been performed and evidence of respectable witnesses of general reputation held sufficient without

proof that the clergyman was duly authorized, and that evidence of reputation alone was sufficient: Baker v. Wilson, 8 Gr. 376. Presumption of marriage may arise from reputation and cohabitation; but such presumption is rebuttable: George v. Thomas, 10 U. C. R. 604; Preston v. Lyons, 24 Gr. 142; Wright v. Skinner, 17 C. P. 317; Doe d. Breakey v. Breakey, 2 U. C. R. 349. Where it is sought to establish marriage it is essential that such repute should be general and uniform: Henderson v. Weis, 25 Gr. 69. A recognition by a party that A. is his wife is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated and though *stricti juris* she is not his wife: Hawley v. Ham, Tay. 385. Where a man and woman are proved to have lived together as man and wife for a considerable time, the law will presume that they were living together in consequence of a valid marriage, unless the contrary is clearly proved: in Re Shephard, George v. Thyer, 1904, 1 Ch. 456.

36. Doubt as to constitutionality of this enactment: May v. May, 16 O. W. R. 1006, 18 O. W. R. 515, 2 O. W. N. 68, 413, 22 O. L. R. 559. Malot v. Malot, 4 O. W. N. 1405, 1577, 24 O. W. R. 714, 884. This section covers cases of infancy where the marriage has been merely a form and when there has been no cohabitation: T—— v. B——, 15 O. L. R. 224, 10 O. W. R. 1030; see Rosney v. Rosney, 35 N. J. Eq. 231. There is no legislation in Ontario which enables the courts of this province to hold suit in cases where the marriage status is involved and the litigation is really *in rem*, dissolving the existing marital union. The only forum open to aggrieved spouses is the High Court of the Dominion Parliament: Per Boyd, C.: T—— v. B——, 15 O. L. R. 224, 10 O. W. R. 1030; Gemmell on Divorce, pp. 111, 191. In order to render void a ceremony of marriage otherwise valid on the ground that the man was intoxicated it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition and to render him incapable of knowing what he was about: Roblin v. Roblin, 28 Gr. 439. A marriage entered into while the man was so intoxicated as to render him incapable of volition is voidable only and may be ratified: Roblin v.

Roblin, 28 Gr. 439. A marriage ceremony is not voidable on the ground of fraud, however gross, unless the defrauded party did not understand the nature of the ceremony: Moss v. Moss, 1897, Prob. 263; Ford v. Stier, 1896, Prob. 1. Where banns have been published and no dissent there expressed by parents or guardians, the husband being under age is no objection, even by the English Marriage Act, 26 Geo. II., ch. 33: Reg v. Secker, 14 U. C. R. 604. But it seems that Act is not in force here: R. v. Secker, 14 U. C. R. 604; R. v. Bell, 15 U. C. R. 287; R. v. Roblin, 21 U. C. R. 352. It is illegal as it was in England before 26 Geo. II., ch. 33, to marry by license, where either of the parties is under 21, without consent of parents or guardians, but the marriage itself is not void, sec. 11 of that Act not being in force here: R. v. Roblin, 21 U. C. R. 352; Lawless v. Chamberlain, 18 O. R. 286; see Wadsworth v. McCord, 12 S. C. R. 466; McMullen v. Wadsworth, 14 App. Cas. 631. The Supreme Court of Ontario has no jurisdiction to declare invalid a marriage on the ground that one of the contracting parties was of unsound mind: Caine v. Birmen, 18 O. W. R. 627, 2 O. W. N. 796; see R. S. O. 1897, ch. 341, sec. 3 (not consolidated). The Supreme Court has no jurisdiction to declare invalid a marriage within the prohibited degrees of consanguinity: May v. May, 16 O. W. R. 1006, 18 O. W. R. 515, 2 O. W. N. 68, 413, 22 O. L. R. 559. Husband, a Frenchman, not being 21 and having married without parents' consent, the marriage was annulled in France. Later the woman married an Englishman in England. Held bigamous and therefore to be annulled at the suit of the man party to it: Ogden v. Ogden, 1907, P. 107. Nullity; no cohabitation; authorities on inference of incapacity: see W. v. W., 1905, P. 231. The Supreme Court has jurisdiction where a marriage, correct in form, is ascertained to be void *de jure* by reason of the absence of some essential preliminary, to declare the same null and void *ab initio*, but nothing short of the most clear and convincing testimony will justify the intervention of the Court: Lawless v. Chamberlain, 18 O. R. 296 (but see later cases). The Supreme Court has no jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of

the parties: T. v. B., 15 O. L. R. 224, 10 O. W. R. 1030. The Supreme Court has no jurisdiction to declare nullity of marriage on grounds of impotency: Leakim v. Leakim, 21 O. W. R. 855, 3 O. W. N. 994, 23 O. W. R. 227, 4 O. W. N. 214; but see P., otherwise C. V. P., 11 B. C. R. 369. Action for nullity: Malot v. Malot, 4 O. W. N. 1405, 1577; Dilts v. Warden, 3 O. W. N. 1319, 22 O. W. R. 228. The Supreme Court has no power to make a declaration of nullity of marriage: A. v. B., 23 O. L. R. 261; Prowd v. Spence, 4 O. W. N. 998, 24 O. W. R. 329.

37. A motion for judgment cannot result in an adjudication under this section; the circumstances establishing the invalidity must be proved in open Court by *viva voce* evidence: Menzies v. Farnon, 18 O. L. R. 174, 13 O. W. R. 586, 711.

CHAPTER 149.

The Married Women's Property Act.

Refer to Holmested, M. W. P. Act; Griffith's M. W. P. Acts; Armour on Titles; Armour on Real Property; Bicknell and Kappele, Practical Statutes, pp. 778-788.

1. At common law a married woman's disabilities were that she could not contract, could not convey and could not sue or be sued alone. The husband could reduce his wife's chattels into possession, dispose of them and bind them by his debts. He could manage his wife's real property, bind it by his debts and dispose of it for the term of their joint lives. He had tenancy by the curtesy, on birth of issue capable of inheriting, of which his wife could not deprive him during her life (tenancy by the curtesy initiate), and on his wife's death seized, leaving issue capable of inheriting, the husband had his estate for life in his wife's lands (tenancy by the curtesy consummate).

The history of legislation may be briefly referred to:

(1) "Fine:" common law method of conveying the whole of the wife's and husband's estate; separate

examination of wife: see Pollock & Maitland, History of Common Law, vol. II. p. 401.

(2) The equitable doctrine of separate estate developed circ. 1738, lands being conveyed to trustees to the use of the married woman, which use she might deal with, alien or charge with her debts within the limits of the powers conferred by the trust deed: see Fullett v. Armstrong, 1 Beav. 22, 23 (1838).

(3) Restraint on anticipation of equitable separate estate, circ. 1788, adopted by Lord Thurlow permitting restrictions on a married woman's power of disposing of her separate estate or charging it with her debts: Fullett v. Armstrong, *supra*.

(4) 1803. 43 Geo. III., ch. 5 (Upper Canada). Abolishing fines as a method of conveyance by married women and substituting deed by her and her husband with separate judicial examination of the wife to ensure freedom from her husband's undue influence.

(5) 1831. 1 Will. IV., ch. 2 (Upper Canada). New but similar powers of disposition, retaining the essentials of joint execution by husband and wife and separate examination of wife.

(6) 1859. 22 Vict., ch. 34 (C. S. U. C. ch. 73). Applies the principle of separate estate to all property of women married after May 4th, 1859, or acquired after that date, not received from husband during coverture and not the subject of a marriage settlement. Frees it from the control and debts of the husband but confers no new power of alienation upon the wife, and no power to contract, and preserves the husband's estate by the curtesy intact (see secs. 1, 2, 3 and 4). Conferred a limited power to devise or bequeath by will to members of her family, if any (sec. 16).

(7) 1872. 35 Vict., ch. 16 (Ont.). Modelled on English Act, 33 and 34 Vict., ch. 93. Applied: (*a*) To women married after 2nd March, 1872. (*b*) To the property of any married woman acquired by her after March 2nd, 1872. The effect of this legislation was that it: (*a*) Preserved all the remedial features of the Act of 1859. (*b*) Enabled a married woman to hold her lands free from her husband's tenancy by the curtesy during her life, but preserved that estate in land which she had not

disposed of by deed *inter vivos* or by will. (*c*) Permitted the wife to sue in her own name for her own "wages, earnings, money and property," (sec. 9); to hold and vote on stocks (sec. 5); and keep a bank account (sec 6). (*d*) Enabled her to dispose of her lands free from her husband's estate by the curtesy, but did not abolish the necessity for his joining in the deed, nor for her separate examination to ensure the validity of the deed as required by the various re-enactments of the Act of 1831 (see these acts consolidated C. S. U. C. ch. 85). This is probably the law, although there is a doubt whether in the case of a woman married after March 2nd, 1872, it is necessary for a husband to join, and whether or not his joining is a mere formality: see Boustead v. Whitmore, 22 Gr. 222; Bryson v. O. and Q. Ry., 8 O. R. 380; Furness v. Mitchell, 3 A. R. 510; Coulter v. Smith, 8 O. R. 536; Moore v. Jackson, 22 S. C. R. 210 at p. 223.

(8) 1873. 36 Vict., ch. 18 (Ont.). The "Married Woman's Real Estate Act. 1873." Dealt only with married women's conveyances of land, abolished the necessity for any separate judicial examination of the wife but retained the requirement that the husband should join in her deeds. While saying nothing about tenancy by the curtesy, it was the attempt to reconcile this Act with the Act of 1872 that led to the difficulties discussed in Furness v. Mitchell, 3 A. R. 510, and other cases, *supra*, namely: (*a*) Whether after 1872 the wife could convey away the husband's estate by the curtesy. (*b*) Whether a deed without her husband's concurrence would validly convey the wife's own interest in the lands. Owing to the lapse of time and subsequent legislation these questions are becoming of historical interest only.

(9) 1877. R. S. O. 1877, ch. 125. This revision consolidated previous Acts and embodied some of the late English provisions passed in 1874 (37-38 Vict., ch. 50). It omitted to provide for the case of lands acquired after March 2nd, 1872, by a woman married before that date, but otherwise re-enacted the provisions of the Acts of 1859 and 1872 and extended them, by providing that the wife might contract on proving that she had real estate at the time of the contract and that she contracted in respect

of it, but any judgment recovered did not bind her, but only her separate *real property* owned at the time of the contract, 40 Vict., ch. 7. Schedule A (156), R. S. O. 1877, ch. 125, sec. 19.

(10) 1884. 47 Vict., ch. 19 (Ont.). July 1st, 1884. A re-enactment largely of the English Married Woman's Property Act, 1882 (45-46 Vict., ch. 75). Retained the provisions of previous Acts so far as they affected women who married or acquired property during coverture before July 1st, 1884, and enlarged the rights and powers of those who married or acquired property during coverture after July 1st, 1884, in the following amongst other respects: (*a*) Enabled her not only to "acquire and hold" but to *dispose of* property real and personal as her separate property as if she were *feme sole*, sec. 2 (1) 3, 5, 6 and 7. (*b*) This general power of disposition applied not only to deeds *inter vivos* but to wills, secs. 2 and 3. (*c*) She might become liable on *any* contract to the extent of her separate property then existing or afterwards acquired during coverture, and bind it, and she might sue and be sued as a *feme sole*, sec. 2; but it would not bind property acquired by her after her husband's death nor would it permit judgment to be entered against her personally, but only against her "separate" property: Hammond v. Keachie, 28 O. R. 455. (*d*) It became no longer necessary to prove that the contract was expressly entered into with respect to and to bind her separate estate, as every such contract was to be deemed to have been so entered into (sec. 2). It was, however, still necessary to prove that she had separate property when she made the contract: Stogdon v. Lee (1891), 1 Q. B. 661; McMichael v. Wilkie, 18 A. R. 464 at p. 469; Re Hamilton v. Perry, 24 O. L. R. 38; and the statutory presumption that the contract was entered into with reference to and with intent to bind her separate property might be rebutted: McMichael v. Wilkie, 18 A. R. at p. 476. (*e*) The provision in 36 Vict., ch. 18, re-enacted in R. S. O. (1877), ch. 127, requiring the concurrence of the husband in deeds made by married women was repealed (47 Vict., ch. 19, sec. 22), and thereafter married women have always been permitted to not only convey their own interest in the lands but also their husband's estate

by the curtesy without his concurrence: (see now, sec. 4 *infra*): Moore v. Jackson, 22 S. C. R. at p. 16.

(11) 1887, R. S. O. 1887, ch. 132. Consolidating the "Married Woman's Property Act" of 1884 and previous Acts with some amendments not very material.

(12) 1887, R. S. O. 1887, ch. 134. Consolidating "The Married Woman's Real Estate Act" but leaving out the provision requiring the husband's concurrence in the wife's conveyances which had been repealed in 1884. Some sections were also enacted for validating earlier irregular deeds.

(13) 1897. 60 Vict., ch. 22. 13th April, 1897, adopting English legislation of 1893 (56-57 Vict., ch. 63) with some changes. It enlarges the powers of a married woman to bind her separate property by enacting: (*a*) That every contract by a married woman shall be deemed to be a contract entered into by her with respect to and shall bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, without formal proof thereof by the creditor (sec. 1). (*b*) That any such contract shall bind "separate" property which she may at the time or thereafter possess (sec. 1). This was the law before: Hammond v. Keachie, 28 O. R. 455. (*c*) That it shall bind any property that she may afterwards acquire "while discovert." That is property acquired when she is a widow (sec. 1). This alters the law as laid down in Hammond v. Keachie, 28 O. R. 455, and gives the creditor recourse to property owned during coverture which is "separate estate" and also property owned or acquired after her husband's death, which never was "separate" property.

(14) 1897. R. S. O. 1897, ch. 163. With these changes and some minor amendments "The Married Woman's Property Act" was consolidated and has since been left unchanged.

(15) 1897. R. S. O. 1897, ch. 165. "The Married Woman's Real Estate Act" consolidated with some changes made in 1888, 1894 and 1897; the most important being the right of an infant wife to bar dower, sec. 9.

(16) 1900. 63 Vict., ch. 17, sec. 21. "The Married Woman's Real Estate Act," sec. 7, amended by

validating certain deeds previously executed without the necessary formalities.

(17) 1910. 10 Edward VII., ch. 26, sec. 10. "The Married Woman's Real Estate Act," sec. 3, amended by enabling a married woman to execute a valid discharge of mortgage.

(18) 1913. 3-4 Geo. V., ch. 29, R. S. O. 1914, ch. 149. The Married Women's Property Act. A consolidation with few changes of R. S. O., 1897, cap. 163. The only important change in the wording is in sec. 4 (2) providing that a married woman may sue or be sued alone in respect of a tort. This right appeared in the English Act of 1882, but in R. S. O., 1897, cap. 163, sec. 3 (2), the right to sue or be sued alone in respect of a tort was not expressly given. The husband may apparently yet be sued with the wife for the wife's tort if the plaintiff so elects: see Earle v. Kingscote (1900), 2 Ch. 585.

(19) 1913. 3-4 Geo. V., ch. 30, R. S. O. 1914, ch. 150. The Married Woman's Conveyances Act embodying the provisions of R. S. O., 1897, ch. 165, 63 Vict., ch. 17, sec. 21, and 10 Edw. III., ch. 26, sec. 10.

4.—(1) *Lands as separate estate*: see general note, sec. 1 *supra*. The statutes providing that the property of a married woman should vest in her as separate property free from the control of her husband and not liable for payment of his debts did not, except in the cases especially provided for, enlarge her power for disposing of such property or allow her to enter into contracts which at common law would be void: Moore v. Jackson, 22 S. C. R. 210; Lea v. Wallace, 28 S. C. R. 595. A married woman was able to contract so as to bind her "separate property." What this was depended on the date of her marriage and whether the property was real or personal. In determining what is "separate property within the meaning of the Act, it must be property which the married woman has the right to convey free from the control of her husband but not necessarily property in which he has no interest or estate: Moore v. Jackson, 22 S. C. R. 210. A man married in 1854 conveyed certain lands in 1870 to his wife by ordinary short forms deed in consideration of "respect and one dollar." Held

a valid transfer of the equitable estate in the property to the separate use of the wife: Kent v. Kent, 20 O. R. 445, 19 A. R. 352. A conveyance made by a married woman made in 1846, whose husband did not join in the conveyance, was totally inoperative and not validated by 59 Vic. ch. 41: Hartley v. Maycock, 28 O. R. 508. A husband agreed to purchase land, and his wife, married to him without a settlement in 1866 and who had acquired lands, joined in the agreement to secure its being carried out and charged her land with a portion of the purchase money. It was held that the wife's land was separate estate and properly charged: Dame v. Slater, 21 O. R. 375. Where land has been conveyed to husband and wife jointly after the (Eng.) Act of 1882, the wife after divorce takes a joint tenancy for her separate use: Thornley v. Thornley, 1893, 2 Ch. 229. (See R. S. O. 1914, ch. 109, sec. 13, and notes). Since March 2nd, 1884, wife may convey or devise lands free from her husband's curtesy and without his consent: Moore v. Jackson, 22 S. C. R. pp. 223, 238. Statutory separate estate under the various M. W. P. Acts: see Armour, Titles, p. 374, *et seq.*; see also Armour, Real Property, p. 303.

Personal property of married woman. Although sec. 6 (5) does not carry an express power to dispose of personal property, money and many other descriptions of personal property cannot be enjoyed without being disposed of, and to hold that the married woman should require the consent of her husband to the disposition of any of her personal property would be to make her subject to his control which the statute says shall not be: Chamberlain v. McDonald, 14 Gr. 447. It would seem that married women therefore, no matter when married, can contract in respect of separate personal estate, not actually reduced into possession of their husbands on 4th May, 1859, provided it is not the subject-matter of a settlement: *Ib.* A married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband. Where a husband bought pictures and on taking them home gave them to his wife, the subsequent

possession of the pictures was the wife's, although the house was occupied by husband and wife: Shuttleworth v. McGillivray, 5 O. L. R. 537. A sale of chattels of household furniture in their residence from a husband to his wife living together without a registered bill of sale, is void as against creditors for lack of actual, open and continued charge of possession required by the Bill of Sale Act: Hogaboom v. Graydon, 26 O. R. 298. Where before the Married Woman's Property Act a gift by the husband to a trustee for the wife, would be good as against creditors, it is good if to the wife direct: Shuttleworth v. McGillivray, 5 O. L. R. 537; Sheratt v. Merchants Bank, 21 A. R. 473; O'Doherty v. Ontario Bank, 32 C. P. 285. Purchase of goods by wife and chattel mortgage by her: Halpenny v. Pennock, 33 U. C. R. 229. This section would appear to apply only to the married woman's beneficial interest. As to property held in trust there would seem still to be a necessity for the husband to join except as regards personal property covered by sec. 11: see English Amending Act of 1907, correcting this anomaly: see Re Harkness and Allsopp, 1896, 2 Ch. 358.

The husband's interest in his wife's land. Where a woman was married on or before 4th May, 1859, her husband is entitled to his full common law rights in all those lands which were taken possession of by him or his tenants (Thompson v. Dickson, 28 C. P. 225), on or before that date, provided the lands are not affected by a marriage settlement: Dawson v. Moffat, 13 O. R. 170. Where a woman was married on or before 4th May, 1859, then, in respect of lands which her husband had not taken possession of on or before that date and in respect of lands acquired by her afterwards and before the 1st July, 1884, her husband has no interest during her life nor are they subject to his debts but the husband is entitled to an estate by the curtesy in case he survives her, and this estate cannot be defeated by the wife's will or sale deed: Moore v. Jackson, 22 S. C. R. 210; Wylie v. Frampton, 17 O. R. 515. Where a woman was married in 1867, had issue born alive and acquired lands in 1879 and 1882, it was held that she could

not convey to a purchaser alone so as to give a title free from the husband's claim, without an order of the Court. But she could convey her own estate in the land: Wylie v. Frampton, 17 O. R. 515; see Gracey v. Toronto Real Estate Co., 16 O. R. 226. Where a woman was married after 4th May, 1859, and before 2nd March, 1872, in respect of lands which she may have acquired before 1st July, 1884, the husband has no interest in such lands during her life nor are they subject to his debts, except such lands as he himself may have given her during coverture, but the husband is entitled to an estate by the curtesy in case he survives her, and his estate cannot be defeated by the wife's will or sole deed: Moore v. Jackson, 19 A. R. 383, 22 S. C. R. 210. It is concluded in view of Moore v. Jackson, 19 A. R. 383; and Wallace v. Lea, 28 S. C. R. 595, that the safer practice is to add the husband of a married woman mortgagor as a party defendant in an action for foreclosure or sale: Holmested and Langton notes, p. 334. Where a woman was married after the 2nd March, 1872, the husband appears to have no interest in her lands, except a possible right to curtesy in whatever lands may remain undisposed of at the time of his wife's death. As to lands acquired after 1st July, 1884, the husband appears to have no interest except a possible right to the curtesy in whatever may remain undisposed of at the time of his wife's death: Hope v. Hope, 1892, 2 Ch. 336. The Act (Eng. 1882), has not affected the right of a husband to an estate by the curtesy in the undisposed of real estate of his wife: Hope v. Hope, 1892, 2 Ch. 336. The question of tenancy by the curtesy in view of the various M. W. P. Acts is very fully discussed in Armour on Titles, pp. 207-221.

4.—(2) To entitle a plaintiff to recover judgment on a contract entered into by a married woman it is necessary to shew, where the action is brought in respect of a contract made before 13th April, 1897 (and subject to sub-sec. (4)) that at the time the contract was made the married woman making it had separate property of a substantial character (Braunstein v. Lewis, 65 L. T. 449), with reference to which

she could contract (Re Shakspear, Deakin v. Larkin, 30 Ch. D. 169; Leake v. Driffield, 24 Q. B. D. 98; Hammond v. Keachie, 28 O. R. 455; Moore v. Jackson, 16 A. R. 431; Robertson v. Laroque, 18 O. R. 469; Barnett v. Howard, 1900, 2 Q. B. 784), or the contract was void *ab initio* (Palliser v. Gurney, 19 Q. B. D. 519; Stogden v. Lee, 1891, 1 Q. B. 661) and no personal liability was incurred by a married woman having separate estate entering into a contract (Scott v. Morley, 20 Q. B. 120). A married woman was informed by a relative that he had made his will in her favour. Three days after his death she signed a note before she had seen the will, which in fact gave her a vested interest in property, and several weeks before it was proved. Held she was possessed of separate estate and had contracted in respect of it: Mulcahy v. Collins, 24 O. R. 441, 25 O. R. 241. Where at the time of entering into a contract by a married woman the only property possessed by her consisted of her clothing and some trifling jewelry, it was held that this was not separate estate with respect to which she could reasonably be deemed to have contracted: Abraham v. Hacking, 27 O. R. 431; Leake v. Driffield, 24 Q. B. D. 98; Braunstein v. Lewis, 65 L. T. N. S. 449. A married woman on the day of entering into a money bond deposited in her own name in a savings bank, a sum of money given to her by her husband but of which she had the absolute disposal. This was sufficient to found a proprietory judgment against her and the exact time of making the deposit and signing the bond was not enquired into: Sweetland v. Neville, 21 O. R. 412. A married woman possessed of separate estate entered into a covenant to pay money. In an action against her after her husband's death, it was held that the liability which she undertook was expressly limited by the extent of her separate property then existing and thereafter acquired during coverture: Hammond v. Keachie, 28 O. R. 455. The implied obligation to pay off the incumbrance which is ordinarily implied in the case of a conveyance of land was held not enforceable against a married woman. It was not a contract or promise in respect of separate property: McMichael v. Wilkie, 18 A. R. 464, 19 O. R. 739. But where

the assumption of the incumbrance was recited as part of the consideration and a covenant to the same effect was inserted in the conveyance, although the deed was not executed by the purchaser, she having taken the benefit under the deed, was held bound by the obligations therein and the covenant was held enforceable against her separate estate: Small v. Thompson, 28 S. C. R. 219 (see now sec. 5 (1)). The interest of a wife in a policy of insurance effected by her husband on his own life and which has been declared by him to be for her benefit under the provisions of the Insurance Act, is her separate estate and may be assigned by her during her husband's lifetime: Graham v. Canada Life, 24 O. R. 607. Since the passing of sec. 5 a married woman can in all respects and for all purposes contract with her husband as if she were a *feme sole*, every contract being now deemed (under sec. 5) to be made with respect to and to bind her separate property: Gibson v. Le Temps, 8 O. L. R. 707. A husband of a married woman is put to his election where her will affects to dispose away from him of clearly indentified property which is in fact his even if he has acquired it in her right and also confers benefits on him: Re Harris, Leacroft v. Harris, 1909, 2 Ch. 206. Covenant entered into by married woman during coverture. Action for breach: Re Fieldwick, Johnson v. Adamson, 1909, 1 Ch. 1. In spite of the power a married woman now has to bind her separate estate she cannot act as next friend of infant plaintiff: Booth v. Toronto General Trusts, 14 O. W. R. 87, 128; and see H. & L. notes, p. 355. How far a guarantee given by a married woman in respect of her husband's indebtedness and a subsequent conveyance of her property in satisfaction of it can be attacked for lack of independent advice: Stuart v. Bank of Montreal, 11 O. W. R. 1032, 12 O. W. R. 958, 17 O. L. R. 436, 41 S. C. R. 616, 103 L. T. R. 641. The effect of the Privy Council decision in Stuart v. Bank of Montreal, 103 T. L. R. 641 is to overrule Cox v. Adams, 35 S. C. R. 393; see Euclid Ave. Trusts v. Hohs, 13 O. W. R. 1050, 18 O. W. R. 787, 2 O. W. N. 825, 23 O. L. R. 377; see also Sawyer Massey v. Hodgson, 13 O. W. R. 980, 18 O. L. R.

333. "A married woman when contracting otherwise than for the benefit of her husband, has all the capacity of a *feme sole* to bind her separate estate:" Sawyer Massey v. Hodgson, 18 O. L. R. 333. See also articles in wife's right to independent advice: 45 C. L. J. 653, 47 C. L. J. 41. As to what goods may be seized under execution against husband: see Crowe v. Adams, 21 S. C. R. 342. A creditor's rights against a married woman is determined by the statute at the time the debt is contracted and cannot be enlarged by the debtor subsequently becoming a widow: Re McLeod v. Emigh, 12 P. R. 450.

"Either in contract or in tort." This is an amendment of R. S. O. 1897, ch. 163, sec. 3 (2). A married woman may bring an action of tort in her own name without joining her husband as plaintiff: Spahr v. Bean, 18 O. R. 70. Neither at common law nor under the M. W. P. Act will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections and for committing adultery with him: Lellis v. Lambert, 24 A. R. 653 (overruling Quick v. Church, 23 O. R. 262); Weston v. Perry, 14 O. L. R. 956, 1 O. W. N. 155. A married woman has no right of action against the relatives of her husband for misrepresentations made by them before marriage as to her husband's character and financial position: Brennan v. Brennan, 19 O. R. 327. Apart from statute, a married woman may be liable for her own torts, where she has not been acting under her husband's coercion: Consolidated Bank v. Henderson, 29 U. C. C. P. 549; Stone v. Knapp, 29 U. C. C. P. 609; Wagner v. Jefferson, 37 U. C. R. 551; Shaw v. McCreary, 19 O. R. 39. A married woman may be sued alone to have a conveyance made by her husband to her in fraud of creditors set aside, the taking of such conveyance being a tort for which since 1872 the wife could be sued alone: McFarlane v. Murphy, 21 Gr. 80. A husband may apparently yet be sued with the wife for the wife's tort: see Earle v. Kingscote, 1900, 2 Ch. 585; Traviss v. Hales, 6 O. L. R. 574, see sec. 18 *post*. A husband as agent for his wife purchased goods from the

plaintiffs who were ignorant that she was the purchaser. On becoming aware of it it was held that they could not have judgment against both husband and wife but must elect as to which they desired to hold: Davidson v. McLelland, 32 O. R. 382. See as to suit of wife against husband for tort: sec. 16, notes. Husband's liability for wife's tort: sec. 18, notes.

5.—(1) See Imperial Act, 56 and 57 Vic., ch. 60. The Act does not even yet give a married woman a general power to contract. No "personal liability" is yet incurred (Scott v. Morley, 20 Q. B. D. 120), but the difficulties arising out of the necessity for proving that the married woman has substantial separate property (Braunstein v. Lewis, 65 L. T. 449), seem to be obviated as also do those arising from the cases holding that failing proof of separate estate the contract is void *ab initio* (Palliser v. Gurney, 19 Q. B. D. 519; Stogdon v. Lee, 1891, 1 Q. B. 661). When actions are founded on contracts made since 13th April, 1897, it is no longer necessary to allege in the indorsement of the writ that when the married woman made the contract sued on she had and still has separate estate, so that interlocutory judgment or judgment in default of appearance may be signed: Gibson v. Le Temps, 8 O. L. R. 707; see formerly, Nesbitt v. Armstrong, 14 P. R. 366; Cameron v. Heighs, 14 P. R. 56; and as to *fi. fas.* see Douglas v. Hutchinson, 12 A. R. 110; Beemer v. Oliver, 10 A. R. 656, at p. 661; H. & L. notes, p. 790. A married woman contracted trade debts subsequent to 13th April, 1897, and afterwards on the death of her husband became entitled to the proceeds of a policy of life insurance which he had made payable to her as beneficiary, The effect of R. S. O. 1897, ch. 203, sec 159 (R. S. O. 1914, ch. 183, sec. 178, is to create a trust in respect of such moneys in favour of the wife without restraint on anticipation and such interest is separate property. On her husband's death the fruits of the trust must be regarded as separate property and liable to satisfy the trade debts: Doull v. Doelle, 10 O. L. R. 411. An acknowledgment given by a married woman of advances previously made to her by a testator in respect of which she could not have been sued, not

having separate property at the time the advances were made, will not render her liable although the acknowledgment be such as would take the debt out of the statute of limitations: Re Wheeler, Hankinson v. Hayter, 1904, 2 Ch. 66. As to liability of married women on implied contracts: see McMichael v. Wilkie, 18 A. R. 464; Small v. Thompson, 28 S. C. R. 219. It follows from the wording of this section that a contract made by a wife through her husband as agent is by law a contract with respect to and binding on her separate estate: Davidson v. McClelland, 32 O. R. 382. Business of married woman managed by the husband: Re Simon, 1909, 1 K. B. 201. Where in fact a married woman contracts by her husband's authority it is immaterial whether or not the other party to the contract is aware that the wife is acting as her husband's agent: Paquin v. Beauclerk, 1906, A. C. 148. The separate estate of a married woman is liable for her funeral expenses: Re Gibbons, 31 O. R. 252. There is still no personal liability by a married woman under a judgment recovered by a creditor: Doull v. Doelle, 10 O. L. R. 411, at p. 418; Re Hamilton v. Perry, 24 O. L. R. 38. Effect of judgment against married woman before 1897; Hamilton v. Perry, 2 O. W. N. 1181, 19 O. W. R. 370, 24 O. L. R. 38; and see Teasdell v. Brady, 18 P. R. 104. It is only a matter of convenience to say that the judgment against a married woman is "proprietary" and not "personal." It is really personal but can only be enforced against her property: Pelton v. Harrison, 1891, 2 Q. B. 422; Holtby v. Hodgson, 24 Q. B. D. 105. Jurisdiction of Division Court to give judgment against married woman dates from 1897: Re Hamilton v. Perry, 24 O. L. R. 38. Liability of married woman to be examined as judgment debtor in High Court and Division Court proceedings and to be committed to gaol in default: see Re McLeod v. Emigh, 12 P. R. 450; Watson v. Ontario Supply Co., 14 P. R. 96; Pearson v. Essery, 12 P. R. 466. As to arrest as fraudulent debtor: see Doull v. Doelle, 4 O. L. R. 525, 10 O. L. R. 411. The following form of judgment against a married woman in respect of her separate estate is now in use in the Supreme Court: "This Court doth order

and adjudge that the plaintiff do recover against the defendant the sum of $ to be levied out of the separate property of the said defendant which she is now or may hereafter be possessed of or entitled to, and any property which she may hereafter while discovert be possessed of or entitled to, and not otherwise: but this judgment shall not render available to satisfy the same any separate property which the defendant was or may be restrained from anticipating, unless by reason of sec. 21 of the Married Women's Property Act, such property shall be available to satisfy the judgment notwithstanding such retriction." 1913, Form 110, and see 10 O. L. R., p. 418. This form should have certain verbal alterations where the married woman has become a widow: Softlaw v. Welch, 1899, 2 Q. B. 419. Enforcing judgments against married women: H. & L. notes, pp. 352-354. Married woman's liability for costs: see Perrins v. Bellamy, 68 L. J. Ch. 397; Hood Barrs v. Heriot, 1897, A. C. 177; Moran v. Place,' 1896, P. 214; Paget v. Paget, 1898, 1 Ch. 470; Pawley v. Pawley, 1905, 1 Ch. 593; Dresell v. Ellis, 1905, 1 K. B. 574; Nunn v. Tyson, 1901, 2 K. B. 487; Hood Barrs v. Cathcart, 63 L. J. Ch. 793, 1894, 3 Ch. 376; Crickitt v. Crickitt, 71 L. J. P. 65, 1902, P. 177; Gordon v. Gordon, 73 L. J. P. 41, 1904, P. 163.

5.—(2) It is doubtful whether this exception applies to damages for a tort. As to effect of this section on property subject to restraint on anticipation: see sec. 21, notes.

6.—(1) The arrangement of this section has apparently not aided the Courts in their interpretation of the statute as to property of women married at the various periods mentioned: see general note, sec. 1 and note to 4 (1), *ante*. Conveyances by married woman: Necessity of joinder of husband: Statutory separate estate under the various Acts: see Armour, Titles, pp. 362-382. Marriage before 1859: see Lett v. Commercial Bank, 24 U. C. R. 552; Feys v. McPherson, 17 C. P. 266.

6—(2) See Kent v. Kent, 19 A. R. 352; Re Gracey, 16 O. R. 226; Dame v. Slater, 21 O. R. 375, note to sec. 4 (2); also Moore v. Jackson, 20 O. R. 652,

19 A. R. 383, 22 S. C. R. 210. Interest in former husband's estate: Robertson v. Larocque, 18 O. R. 469. Title of married woman accruing before the Act, property falling into possession after: Re Tench, L. R. 15 I. R. 406; Re Tucker, 52 L. T. 923; Reid v. Reid, 31 Ch. D. 402; Re Hobson, 55 L. J. Ch. 300; Re Beaupre, 21 L. R. Ir. 397; Re Thompson, 29 Ch. D. 177; Re Bacon, Toovey v. Turner, 1907, 1 Ch. 475.

6.—(4) Where a woman is in possession of lands before and at the time of her marriage, her possession being such as would in time ripen into title by possession, such an interest is secured to her as her separate property by the M. W. P. Act, of 1872, free from control of her husband: Myers v. Ruport, 8 O. L. R. 669. Under the Act of 1872, in the case of husbands married before it came into force, the husband only could maintain an action to recover possession of his wife's real estate: Dingman v. Austin, 33 U. C. R. 190; see also Scouler v. Scouler, 19 U. C. R. 106.

6.—(5) The effect of the words "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from her husband during marriage liable to the husband's debts: Shuttleworth v. McGillivray, 5 O. L. R. 536. Where the only property of a married woman without a settlement, consisted of personal property given by the husband to her during coverture, this was separate estate and liable for her debts: Trusts Corporation v. Clue, 28 O. R. 116. Goods acquired by a married woman from her husband after marriage seized under an execution against husband: Crowe v. Adams, 21 S. C. R. 342. Since the M. W. P. Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of trustee: Sheratt v. Merchants Bank, 21 A. R. 473. Formerly neither a married woman nor her husband could be bound by her husband entering into a contract for building on the land without her express authority: Wagner v. Jefferson, 37 U. C. R. 551; Kincaid v. Reid, 7 O. R. 12, but now see as to presumption of agency: R. S. O. 1897, ch. 153, sec. 5; R. S. O.

1914, ch. 140, sec. 7. Interest in policy of insurance effected by husband in wife's favour under R. S. O. 1897, ch. 203, sec. 159 (R. S. O. 1914, ch. 183, sec. 178), is separate estate: see Graham v. Canada Life, 24 O. R. 607, note to sec. 3 (2); Doull v. Doelle, 10 O. L. R. 411. Alimony is not separate property: Vandergucht v. De Blaguière, 8 Sim. 315; Anderson v. Hay, 55 J. P. 295. This Act does not affect a gift of "paraphernalia:" Tasker v. Tasker, 1895, P. 1. Personal ornaments and jewelry not property amounting to separate estate: Re Fieldwick, Johnson v. Adamson, 1909, 1 Ch. 1. Married woman's wearing apparel purchased by her: Masson v. De Fries, 1909, 2 K. B. 831. In an action for personal injuries to wife brought by the husband and wife, the sum awarded by the jury to the wife is her separate property: Beasley v. Roney, 1891, 1 Q. B. 509. Application of Act in case of bankruptcy of husband and who had taken his wife's separate estate and then made settlement on her: MacIntyre v. Pogose, 1895, 1 Ch. 505; Ex parte Tidswell, 35 W. R. 669. The separate estate of a married woman is liable for her funeral expenses: Re Gibbins, 21 O. R. 252.

7.—(1) "Proprietary interest" means "interest as an owner" or legal right or title:" Cooney v. Sheppard, 23 A. R. 4. A married woman can enter into a trading partnership with her husband: Gibson v. Le Temps Pub. Co., 8 O. L. R. 707. The earnings of a married woman in a trade or occupation in which her husband has no proprietary interest is separate property: Robertson v. Larocque, 18 O. R. 469. Where a woman is carrying on trade which is under the control and management of her husband for her benefit, it is a trade carried on separately from her husband within the meaning of the Act: Re Simon, 1909, 1 K. B. 201. Where a married woman living in a house furnished by her husband and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which her husband has no proprietary interest: Young v. Ward, 27 O. R. 423, 24 A. R. 147. Property

acquired by the wife in separate business: Kelly v. Macklem, 3 O. W. N. 873. When a married woman rents a farm and employs her husband to work it, he has no proprietary interest in the produce and it is not liable to be seized by his creditors: Cooney v. Sheppard, 23 A. R. 4.

7.—(2) Since the M. W. P. Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee: Sherratt v. Merchants Bank, 21 A. R. 473; see also Shuttleworth v. McGillivray, 5 O. L. R. 536, noted *ante*. The M. W. P. Act of 1884, is not retrospective: Scott v. Wye, 11 P. R. 93. See Armour, Titles, p. 378.

8. Under the English M. W. P. Act, 1882, sec. 5, it was held that that Act did not affect a title in remainder or reversion before the Act, although it did not become an estate in possession until afterwards, because in such a case the title was acquired before the Act: Reid v. Reid, 31 Ch. D. 402; but under the Ontario Act where a married woman, married before 1859, acquired a reversion under her father's will, it was held that there was such a difference between the Ontario Consolidated Statute, C. S. U. C. 73, sec. 2, and the English Act that Reid v. Reid, 31 Ch. D. 402, was not applicable and the married woman could dispose of the property by her will: Jordan v. Frogley, 8 O. W. R. 265. For construction of M. W. P. Acts of 1884 and 1887, capacity of married woman to sue and be sued and right of creditor to obtain fruits of judgment by execution against her separate property: see Moore v. Jackson, 20 O. R. 652, 19 A. R. 383, 22 S. C. R. 210; see Armour, Titles, p. 369, Armour, Real Property, p. 300.

9 Property appointed by a married woman by will under a general testamentary power becomes on death liable for her debts, even though she may have had no separate estate when she contracted them: Re Ann, Wilson v. Ann, 1894, 1 Ch. 549. Appointment by married woman: Intention to pay husband's debts: Re Hodgson, Darley v. Hodgson, 1899, 1 Ch. 666.

10. Conditions under which Court will allow removal of restraint: Paget v. Paget, 1898, 1 Ch. 470; see also Re Pollard, 1896, 2 Ch. 552.

11. As to necessity for husband's concurrence in conveyances of personal property except as provided in this section: see secs. 1 and 4 (1) notes, *ante*.

16. The Statute of Limitations applies to a claim of a wife against her husband in the same way as if she were not his wife: In re Starr, Starr v. Starr, 2 O. L. R. 762. It may be noted that the provision in 21 Jac. I., ch. 16 enabling a married woman to bring an action within 6 years after becoming discovert (Carroll v. Fitzgerald, 5 A. R. 322), was omitted from R. S. O. 324, secs. 38 and 39, where this Act was consolidated. Action of assault and false imprisonment by wife against husband: Jordan v. Jordan, 4 O. W. N. 1219, 24 O. W. R. 525. Action by wife against her husband for certain chattels, and damages for detention of them. Husband's reasons for refusal to give up possession: Lintner v. Lintner, 6 O. L. R. 643. A married woman can maintain an action of detinue against her husband in respect of her separate property: Larner v. Larner, 1905, 2 K. B. 539. A married woman may sue her husband in alimony without the intervention of a next friend: see Con. Rule 199, H. & L. notes, p. 350, *et seq.*

17. Debt contracted during former marriage is a debt contracted before marriage within the meaning of this section: Jay v. Robinson, 25 Q. B. D. 467. Considerable doubt has arisen as to the proper form of judgment against a married woman in respect of ante-nuptial debts. Whether the judgment is properly personal or in the restricted form of Scott v. Morley, 20 Q. B. D. 120 (see form given in note *ante* sec. 5 (1)), and whether such a judgment should except property subject to restraint on anticipation: see Oxford v. Reid, 22 Q. B. D. 548; Robinson v. Lynes, 1894, 2 Q. B. 577. The latter case decided that the judgment was personal. But in an action against a married woman to recover a debt contracted by her before her marriage in 1902, a judgment was entered adjudging the sum due

to be payable out of her separate property whether subject to restraint on anticipation or not. After the judgment a deed of separation was made by which her husband covenanted to pay her a monthly sum subject to restraint on anticipation. On the true construction of sec. 19 of the M. W. P. Act, 1882, the money payable under the deed was not available to pay the ante-nuptial debt, and the judgment was amended by striking out the words "whether subject to restraint on anticipation or not": Birmingham Excelsior Money Society v. Haywood, 75 L. J. K. B. 28, 1904, 1 K. B. 35. See generally as to wife's ante-nuptial debts and liabilities: Dig. Eng. Case Law, VII., cols. 1091-5.

18. There has been considerable diversity of opinion whether the M. W. P. Act applicable to persons married before 1st July, 1884, has the effect of relieving the husband for liability for torts of his wife committed during coverture: see Amer v. Rogers, 31 C. P. 195; Lee v. Hopkins, 20 O. R. 666; 16 Law Quarterly Review, 191, Lush on Husband and Wife, 2nd Ed., pp. 290-1. It was finally decided that the effect of the English Acts was not to relieve the husband of his liability: Earle v. Kingscote, 1900, 2 Ch. 585. And now it has been held by a Divisional Court that there is no such difference between the English Acts and the Ontario Acts as justify any other conclusion in our Courts. The common law right to sue the husband and wife jointly has never been taken away: Traviss v. Hales, 6 O. L. R. 574. A husband is still liable for the torts of his wife if the marriage took place before 1st July, 1884. The liability at common law was direct against the husband and he was not joined in the action merely as a matter of procedure. There is nothing in this section to relieve him: Traviss v. Hales, 6 O. L. R. 574. A husband is subject to the same liability for his wife's torts committed during coverture as previously to the M. W. P. Act (Eng.) 1882. He will be exempt from liability only in cases where the tort is directly connected with her contract and parcel of the same transaction: Fairhurst v. Liverpool Adelphi, 9 Ex 422; Wright v. Leonard, 11 C. B.

N. S. 258; Seroka v. Kattenburg, 17 Q. B. D. 177; Earle v. Kingscote, 1900, 2 Ch. 585; see 45 and 46 Vic. (Eng.) ch. 75 sec. 14. Husband not liable in respect of tort committed by wife during coverture where a decree of judicial separation is obtained while action for tort is pending and before judgment: Cuenod v. Leslie, 1909, 1 K. B. 880. Liability of husband for wife's post-nuptial torts: Cuenod v. Leslie, 1909, 1 K. B. 880. Action against husband and wife for wife's tort: Beaumont v. Kaye, 1904, 1 K. B. 292. Liability of husband for wife's tort: see article by G. S. Holmested, 49 C. L. J. 174. Actions for torts: see H. & L. notes, p. 354. As to husband's liability for wife's torts after marriage: see Dig Eng. Case Law, VII., cols. 1219-1221.

In an action against husband who had acquired property from his wife, the fact that judgment was recovered against the wife was no defence: Beck v. Pierce, 23 Q. B. D. 316. A husband is not liable after his wife's death for her debts contracted before the marriage: Bell v. Stocker, 10 Q. B. D. 129. Application of Statute of Limitations: A husband cannot be made liable for an ante-nuptial debt of his wife which accrued due against the wife more than 6 years before the commencement of the action: Beck v. Pierce, 23 Q. B. D. 316. Husband's liability on wife's ante-nuptial contract: see Kirchoffer v. Ross, 11 C. P. 467. During coverture husband liable for goods supplied, but where goods were supplied to wife, and husband and wife were sued jointly, and the evidence shewed no joint liability but that the wife acted as her husband's agent, the creditor having elected to pursue a joint remedy and having recovered against the agent, could not proceed against the husband as principal: Morel v. Westmoreland (1903), 1 K. B. 64, (1904) A. C. 11. Generally as to husband's liability for wife's debts contracted before marriage: see Dig. Eng. Case Law, VII., cols. 1195-1198.

21. A judgment against a married woman possessed of separate property which she is restrained from anticipating cannot be enforced in respect of income accruing due after the date of the judgment: Bolitho v. Gidley, 1905, A. C. 98; Whiteley v.

Edwards, 1896, 2 Q. B. 48. A judgment creditor who has obtained judgment against a woman married since the English M. W. P. Act, 1882 (Ont. 1884), in an action commenced after the death of her husband upon a contract made by her during coverture, is not entitled since the Act of 1893 (Ont. 1897), to have a receiver appointed by way of equitable execution of the income of property which at the date of the contract was settled on the woman without power of anticipation: Brown v. Dimbleby, 1904, 1 K. B. 28. Judgment against a married woman in respect of her ante-nuptial debt is to be restricted by adjudging the sum payable out of her separate property. Money received by her, e. g., under a separation deed subject to restraint on anticipation is not available to pay such a judgment: Birmingham Excelsior Money Society v. Haywood, 1904, 1 K. B. 35, and see also note to sec. 17. Income of property vested in trustees for the separate use of a married woman subject to restraint on anticipation though paid into her hands after determination of the coverture, is not since the English M. W. P. Act, 1893, available to satisfy an obligation arising out of a contract entered into by her during coverture: Barnett v. Howard, 69 L. J. Q. B. 995, 1900, 2 Q. B. 784. Where a debt was contracted during marriage, a judgment obtained after her husband's death against a woman's separate property not subject to restraint against anticipation cannot, though she is discovert, be enforced against property which during coverture was her separate estate without power of anticipation: Pelton v. Harrison, 1891, 2 Q. B. 422. Liability of a married woman's property subject to restraint on alienation for costs in respect of "proceedings instituted" by her: Nunn v. Tyson, 1901, 2 K. B. 487; Hood Barrs v. Cathcart, 1894, 3 Ch. 376; Crickitt v. Crickett, 1902, P. 177. Settlement: Infant married woman: Repudiation: Buckland v. Buckland, 1900, 2 Ch. 534. Married woman trading separately from husband: Bankruptcy of married woman: Death of husband: Construction of restraint or anticipation: Re Wheeler, 1899, 2 Ch. 717: (see English M. W. P. Act, 1882, sec. 19). Enforcing judgments against married woman where restraint on anticipation: see H. & L. notes, p. 353, *et seq.*

Restraint on anticipation: see Dig. Eng. Case Law, VII., cols. 1064-1091.

23. See Armour, Titles, pp. 216-221, where the effect of this section is specially considered in connection with the Devolution of Estates Act, R. S. O. 1897, ch. 127; R. S. O. 1914, ch. 119, and the Trustee Act, R. S. O., 1897, ch. 129, sec. 24; R. S. O. 1914, ch. 121, sec. 46; see also Armour, Titles, pp. 335, 336, *et seq.*

CHAPTER 150.

The Married Women's Conveyances Act.

Refer to Armour on Titles; Armour on Real Property; Bicknell and Kappele, Practical Statutes, pp. 804-804.

1. For memo. of history of legislation enabling married women to deal with lands: see R. S. O. 1914, ch. 149, sec. 1, note.

3. This section is 47 Vic. ch. 19, sec. 22, amended. See as to various statutes leading up to it: Armour, R. P., p. 297, *et seq.* Since March 2, 1884, wife may convey or devise lands free from her husband's curtesy without his consent: Moore v. Jackson, 22 S. C. R., pp. 223, 238. For consideration of *jus disponendi* of married women, especially as affecting tenancy by curtesy, to which under certain of the M. W. P. Acts her husband may be entitled to after her death: see Moore v. Jackson, 20 O. R. 652, 19 A. R. 383, 22 S. C. R. 210, and notes to R. S. O. 1914, ch. 149, secs. 1 and 4. The Act of 1872 did not authorize a conveyance from a married woman to her husband: Ogden v. McArthur, 36 U. C. R. 246; see, however, Sanders v. Malsberg, 1 O. R. 178; Street v. Hallett, 21 Gr. 255. A married woman, while under age, but representing herself to be of full age, conveyed to a *bona fide* purchaser for value and the conveyance was duly registered. After attaining majority the married woman and her husband conveyed to another as trustee for her. He sold the land and

his vendee on the same day placed a mortgage on it. The married woman, notwithstanding her nonage, was bound by her representations and the other parties were bound by notice of the first deed and the subsequent conveyances were declared void. It was doubted if the mortgagee could retain possession of the mortgage with a view of recovering the money advanced by him in good faith: Bennetto v. Holden, 21 Gr. 111. Section seven does not make valid deeds executed by an infant married woman. It merely does away with the necessity for acknowledgment: Confederation Life v. Kinnear, 23 A. R. 497; see also Whalls v. Learn, 15 O. R. 481. Bar of dower may now be by deed, to which the husband is not a party. As to this see Armour, Titles, p. 205.

4.—(1) This section was formerly part of R. S. O. 1897, ch. 163, sec. 20. See now R. S. O. 1914, ch. 149, sec. 4 (3). Under English law, real estate vested in a married woman jointly with other persons upon trust for sale cannot be effectually conveyed by her without the concurrence of the husband: Re Harkness and Allsopp, 1896, 2 Ch. 358. On a sale of property by a mortgagor with the concurrence of a married woman mortgagee, it was held not necessary that the mortgagee's husband should concur to give the purchaser a good title. She was in no sense a trustee for the mortgagor until her mortgage had been fully satisfied: Re Brooke and Fremlin, 1898, 1 Ch. 647.

4.—(2) This was formerly R. S. O. 1897, ch. 129, sec. 8.

6. An infant wife joined in a deed from her husband to a purchaser for value and after her husband's death brought an action for dower. It having been found that she knew what she was doing when she executed the release of dower and that the conveyance was for "valuable" as distinguished from "good" consideration, she was not entitled to dower. Where no question of *bona fides* is raised, the question of adequacy of consideration cannot be enquired into: Crossett v. Haycock, 6 O. L. R. 259, 7 O. L. R. 655 This section originated 57 Vic. ch. 41 (1894). See R. S. O. 1897, ch. 164, sec. 22 (3); and see R. S. O. 1914, ch. 70, sec. 20.

7. Before the Act 35 Vic. ch. 18, was passed, a married woman could only convey real estate by deed executed jointly with her husband, and if she were examined as to her consent as required by various statutes and a certificate endorsed on the conveyance. For consideration of the changes effected by this Act and the various statutes pass to validate defective certificates: see Armour Titles, pp. 86 and 362, *et seq.* And see also Elliott v. Brown, 2 O. R. 252, 11 A. R. 228, *infra.* As to necessity for husband joining see sec. 8. This section does not make valid, deeds executed by infant married women. It merely does away with the necessity of acknowledgment: Confederation Life v. Kinnear, 23 A. R. 497; Whalls v. Learn, 15 O. R. 481; see Bennetto v. Holden, 21 Gr. 111, noted *ante*, sec. 3. A., a married woman, purported to convey in 1834 the east half of a lot to B., but the conveyance was invalid for want of a certificate. B. did not take possession but conveyed to C. in 1852, and in 1866 the sons of A. went to reside on the west half of the land under an agreement with their mother that they were to have the whole lot, which was conveyed to them in 1875. Meanwhile they had paid taxes on the east half and had cut timber on it. This was sufficient "actual possession or enjoyment" to prevent the operation of the statute by which such void deed would be rendered valid: Elliott v. Brown, 2 O. R. 252, 11 A. R. 228. And also see this case for consideration of various statutes affecting conveyances by married women. Married woman representing herself as a spinster: see Graham v. Meneilly, 16 Gr. 661. Proof of execution by married woman and certificate: Northwood v. Keating, 17 Gr. 347, 18 Gr. 643. For cases as to certificate and examination: see Dig. Ont. Case Law, col. 3080.

8. For origin of this section see 47 Vic. ch. 18, sec. 22: see Moore v. Jackson, 22 S. C. R. 210. For discussion of necessity of joinder of husband under various statutes: see Armour Titles, p. 369, *et seq.* A wife's conveyance of her equitable estate was valid before 1884 without the husband joining in the deed. The husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband: Adams v. Laomis, 24 Gr. 242.

It seems that a married woman could execute a deed without her husband joining during the imprisonment of the husband and as a felon: Crocker v. Sowden, 33 U. C. R. 397. Even where the husband is entitled to an estate by the curtesy initiate, the wife alone can convey her interest in the land: Wylie v. Frampton, 17 O. R. 515. Conveyance made by a married woman whose husband did not join, and which was in litigation when Act was passed was wholly inoperative: Hartley v. Maycock, 28 O. R. 508. Concealment of coverture: see Graham v. Meneilly, 16 Gr. 661; Hoig v. Gordon, 17 Gr. 599. Invalid conveyance; wife's mortgage signed by husband and not by wife: Foster v. Beall, 15 Gr. 244; Doe d. Bradt v. Hodgins, 2 O. S. 213. Conveyance signed by husband only; subsequent conveyance to one party interested. The grantee in the second deed was held trustee for all concerned: Grace v. Macdermott, 13 Gr. 247.

9. 50 Vic. ch. 7, secs. 23, 24, 25. For object of this enactment: see Armour, Titles, pp. 373-4.

10. These sections originated in 1888, 51 Vic. ch. 21. See R. S. O 1897, 164, sec. 12; R. S. O. 1914, ch. 70, sec. 14, and notes. The practice as settled there, (Re King, 18 P. R. 365, etc.), presumably applies. "Where a husband is entitled to tenancy by the curtesy:" see R. S. O. 1914, ch. 149, secs. 1 and 4, notes. Applications for orders under this section should be made to a Judge in Chambers: Re Nolan, 6 P. R. 115.

CHAPTER 151.

The Fatal Accidents Act.

Refer to Addison on Torts; Underhill on Torts (Can. notes); Clerk and Lindsell on Torts (Can. notes); Bicknell and Kappele, Practical Statutes, pp. 156-160.

1. This statute commonly known as Lord Campbell's Act (9-10 Vic. Imp. ch. 93), changed the common law under which there was no action for damages where an injury resulted in death, even when pecuniary loss was clearly established. See, Monaghan v. Horn, 7 S. C. R. 420; C. P. R. v. Robinson, 19 S. C. R. 292.

2.—(*a*) " Child " includes posthumous child, where such construction is for the child's benefit: Williams v. Ocean Coal Co., 1907, 2 K. B. 422; Villar v. Gilbey, 1907, A. C. 139. Child includes stepchild: Brown v. G. T. R., 28 O. L. R. 354.

2.—(*b*) The mother of the deceased is a person for whose benefit an action can be brought under the Act, although the father is living: Renwick v. Galt Hespeler Ry., 11 O. L. R. 158, 12 O. L. R. 35. Action by grandparents, when wife is living: Mummery v. G. T. R., 1 O. L. R. 622. " Parent " did not formerly include persons whose adopted child has been killed, nor the mother of an illegitimate child: Blayborough v. Brantford Gas, 13 O. W. R. 573, 18 O. L. R. 243.

3. " Caused by such wrongful act." That death was accelerated by an accident is sufficient to satisfy the language of the Statute: Chowley v. Gas Co., 24 Times L. R. 94 (1907): Pow v. West Oxford, 11 O. W. R. 115, at p. 126. The dependants are entitled to compensation if death results in fact from the injury even though at the time of the injury it could not be reasonably expected as the probable consequence: Dunham v. Clare, 1902, 2 K. B. 292. Death was held to arise from the accident itself where the patient died under anæsthetic given in a second operation for skin

grafting in an endeavour to save a hand crushed in a way that ordinarily would have indicated amputation: Shirt v. Calico Printers Assn., 1909, 2 K. B. 51; see also as to death under chloroform: Charles v. Walker, 25 T. L. R. 609.

"Allurement" as a cause of fatal accident to child: Pedlar v. Toronto Power, 5 O. W. N. 319. Death of child trespassing on railway track held due to defendants' negligence in running train through city without the track properly fenced. The child was held incapable of being a trespasser and to have used care expected from one of his tender years: Potvin v. C. P. R., 4 O. W. R. 511; Tabb v. G. T. R., 3 O. W. R. 203, 8 O. L. R. 203. See also Eaton v. Sangster, 24 S. C. R. 708; Merritt v. Hepinstall, 25 S. C. R. 150. See as to contributory negligence of children, note to R. S. O. 1914, ch. 146, sec. 3 (a).

It is not necessary to prove by a demonstration how a death by actionable negligence occurred: Lefebvre v. Trethewey, 22 O. W. R. 694. 3 O. W. N. 1535. Death of employee from unexplained accident: Falconer v. Jones, 4 O. W. N. 709, 1373, 24 O. W. R. 18, 672; Wakelin v. London & S. W. Ry., 12 App. Cas. 41; McArthur v. Dominion Cartridge Co., 1905, A. C. 72; G. T. R. v. Hainer, 36 S. C. R. 180. Where railway company put passenger off train at a bridge and passenger following train on bridge, fell off (whether accidentally or not), and was killed, it was held there was no evidence of negligence: Delahanty v. M. C. R. R., 10 O. L. R. 388; and see note to R. S. O. 1914, ch. 146, sec. 3 (a), "evidence of cause of death."

Liability for neglect of statutory duty: see Pressick v. Cordova Mines, 24 O. W. R. 631, 25 O. W. R. 228, 4 O. W. N. 1334, 5 O. W. N. 263; Groves v. Wimborne, 1897, 2 Q. B. 402; Jones v. C. P. R., 13 D. L. R. 900 (P.C.). Contributory negligence may be a defence even where there was a breach of statutory duty: Muma v. C. P. R., 14 O. L. R. 147; Deyo v. Kingston and Pembroke Ry., 8 O. L. R. 588.; and see notes to R. S. O. 1914, ch. 146, sec. 3 (a), 5, 6 (a).

Volenti non fit injuria: application and review of cases: see Fairweather v. Can. Gen. Electric, 4 O.

W. N. 892, 24 O. W. R. 164; and see note to R. S. O. 1914, ch. 146, sec. 6 (c).

Liability of municipality and Electric Light Co. for death of person killed by electric wire: Johnston v. Clark, 4 O. W. N. 202, 23 O. W. R. 196; and see note to R. S. O. 1914, ch. 146, sec. 3 (a), "electric wires, etc."

The right of dependants to compensation where death ultimately results from the injury is a separate and independent right and cannot under the English Act be released by the workman: Williams v. Vauxhall Colliery Co., 1907, 2 K. B. 433. A workman may so contract with his employer as to exonerate the latter from liability for negligence (subject to R. S. O. 1914, ch. 146, sec. 10), and such renunciation would be an answer to an action under Lord Campbell's Act: Grenier v. The Queen, 30 S. C. R. 42. Effect of membership in a relief and assurance association to which employer contributes an annual sum, the employee renouncing claims for injury or death in the course of employment: Grenier v. The Queen, 30 S. C. R. 42; see cases noted R. S. O. 1914, 146, sec. 10. *Quære,* if an infant employed as a newsboy on a train, can enter into a binding agreement, exempting the railway company from liability: Alexander v. Toronto and Nipissing Ry., 33 U. C. R. 474, 35 U. C. R. 453; Flower v. L. & N. W. Ry., 1894, 2 Q. B. 65; Clements v. L. &. N. W. Ry., 1894, 2 Q. B. 482; and notes to R. S. O. 1914, ch. 146, sec. 10.

Where the injury inflicted amounts to an infringement of the civil rights of an individual and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted: Per Cockburn C.S., Wells v. Abraham, L. R. 7 Q. B. 554, at p. 557; see also Crosby v. Leng, 12 East. 413; Taylor v. McCullough, 8 O. R. 309. In actions under this Act, the section of the Code which is apt to be involved is sec. 284 (R. S. C. 1906, ch. 146, sec. 284). Query whether the above rule can be applied to cases under this Act, also whether the abolition of the distinction between felonies and misdemeanours

alters the rule, and also whether the fact that a servant of the defendants is guilty of manslaughter, would cause the action to be stayed as against the defendants. It will not apply to prevent a pecuniary settlement of the civil injury: Villeneuve v. C. P. R., 10 O. W. R. 287. Death caused by circumstances amounting to breach of Criminal Code: Pennock v. Mitchell, 17 O. L. R. 286. Consideration of this section and of R. S. O. 1914, ch. 146, secs. 3, 7: Dawson v. Niagara, 2 O. W. N. 1080, 19 O. W. R. 242, 22 O. L. R. 69, 23 O. L. R. 670.

4. The administrator within this province of a foreigner who was killed in an accident here, through his employer's negligence, can maintain an action on behalf of the deceased's family, foreigners, residing out of Canada, for damages sustained by reason of his death: Gyorgy v. Dawson, 13 O. L. R. 381, 8 O. W. R. 784; Davidson v. Hill, 1901, 2 K. B. 606. The plaintiff alleged that she was the widow and obtained *pendente lite*, letters of administration to the estate of the deceased. If the letters of administration were rightly granted to the plaintiff as widow they related back so as to validate the action: Doyle v. Diamond Flint Glass, 7 O. L. R. 747, 8 O. L. R. 499, 10 O. L. R. 567; Trice v. Robinson, 16 O. R. 433; see also Chard v. Rae, 18 O. R. 371; Bradshaw v. London & Yorkshire Rw., L. R. 10 C. P. 189; Murphy v. G. T. R., 27th May, 1889, referred to 8 O. L. R. 499. Although the widow's right of action under Lord Campbell's Act, is in several respects distinct from her husband's right of action in his lifetime arising out of the same circumstances, still the issues are so far connected and identical that the examination *de bene esse* of the husband in an action brought by him in his lifetime, but which abated at his death is admissible evidence in the widow's action against the same defendants, the husband having been cross-examined by them: Erdman v. Walkerton, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352. An administrator appointed for the purpose of bringing an action for the benefit of another under this Act is not a nominal plaintiff in the sense of the rule which enables a defendant to get security for costs upon shewing that such nominal plaintiff is insolvent, even where such action is taken under circumstances which give forms for the suspicion that

the object is to escape liability: Sharp v. G. T. R., 1 O. L. R. 200; see H. & L. notes, p. 1430. Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under this Act, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative: McHugh v. G. T. R., 32 O. R. 234, 2 O. L. R. 600; see Seward v. Vera Cruz, 10 App. Cas. 59; Pyne v. Great Northern Ry., 2 B. & S. 759, 4 B. & S. 396. Death of beneficiary after judgment: see Sibbald v. G. T. R., 19 O. R. 164; Kramer v. Waymark, L. R. 1 Ex. 241. "When actions survive:" see H. & L. notes, p. 609. The administrator has a right in his action to claim for damages sustained by the personal estate of the deceased: Mummery v. G. T. R., 1 O. L. R. 622; Leggatt v. Great Northern Ry., 1 Q. B. D. 599. Administrator suing under this Act: notice under Workmen's Compensation Act: Giovinazzo v. C. P. R., 13 O. W. R. 24, 1200. Those entitled to bring an action must bring it themselves, and not by attorney or assignee: Luciani v. Toronto Construction, 24 O. W. R. 381, 4 O. W. N. 1073. To an action under this Act, the defendants pleaded that it was brought and maintained under a champertous agreement, which disentitled the plaintiff to sue. This defence was struck out, and it was left to the Court to say what effect should follow: Welbourne v. C. P. R., 16 P. R. 343. The Court may in a proper case, stay the trial of an action pending an appeal to the Court of Appeal from an order directing a new trial, but only under special circumstances: Arnold v. Toronto Railway, 16 P. R. 394. The Court refused to order a stay where the plaintiff was a young widow, suing under this Act on behalf of herself and her infant child. The possibility of death of the young infant and consequent reduction of compensation, was held entitled to great weight: Hockley v. G. T. R., 7 O. L. R. 186; see Webb v. Canadian General Electric, 2 O. W. R. 865, 1113. An unsuccessful action for negligence is not a bar to a subsequent action for damages to deceased's estate: Monaghan v. Horn, 7 S. C. R. 409. Con. Rule 195, could not be invoked in the case of a plaintiff, who had commenced an action without right, and who

sought to legalize his acts by an order of the Court: Fairfield v. Ross, 4 O. L. R. 534. Article 1056, of the Quebec Civil Code, while resembling the provisions of this Act, gives a right of action fundamentally different: Robinson v. C. P. R., 1892, A. C. 481; Miller v. G. T. R., 1906, A. C. 187.

It was intended by the act to give compensation for injury sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs (per Pollock, C.B.), Duckwart v. Johnson, 4 H. & N. 653, 656. If no pecuniary damage is proved, defendants are entitled to verdict: Pym v. Great Northern Ry., 2 B. & S. 759, 4 B. & S. 396. It is not a case where nominal damages may be awarded, where no actual loss is proved: Moir v. C. P. R., 10 O. W. R. 413. Where there is "a reasonable expectation of pecuniary advantage," by the relatives remaining alive, damages may be given in respect of that expectation if it be disappointed, and the probable pecuniary loss occasioned thereby: Dalton v. South Eastern Ry., 4 C. B. N. S. 296; Pym v. Great Northern Ry., 2 B. & S. 759, 4 B. & S. 396. In considering this "reasonable expectation," there are to be considered the legal liability of the deceased to the plaintiff, the conduct of the deceased to the plaintiff, the "benevolent intent" and the probability of the deceased being able to exercise the "benevolent intent," but a jury ought not to make a guess on the matter: Franklin v. South Eastern Ry, 3 H. & N. 211; and see further cases collected in judgment of Riddell, J.: Dewey v. Hamilton & Dundas Ry., 9 O. W. R. 511. The right of action for compensation for injury or death by negligence of Government employees, does not abate on the demise of the Crown: The King v. Desrosiers, 41 S. C. R. 71. There is always a presumption that the wife was dependent on her husband for support, which is not rebutted by proof that at the time of his death he was not in fact supporting her: Williams v. Ocean Coal Co., 1907, 2 K. B. 422. A wife separated from her husband and not maintained by him, but who expected her husband back to maintain a home, is dependent upon the earnings of her husband at

the time of his death: Coulthard v. Consett Iron Co., 1905, 2 K. B. 869, 75 L. J. K. B. 60. Evidence of expressed "benevolent intention," is admissible, not necessarily as shewing a promise to pay, but as evidence of being well disposed to the plaintiff: Stephens v. Toronto Ry., 11 O. L. R. 19. The damages recoverable under this Act are entirely pecuniary. The plaintiff's must shew not merely willingness, but the means to do that which was not done because of the death: Ronson v. C. P. R., 13 O. W. R. 1179, 18 O. L. R. 337. It is not necessary to shew that any pecuniary benefit had been actually received from the deceased: Ricketts v. Markdale, 31 O. R. 180, 610; Lett v. St. Lawrence and Ottawa, 11 A. R. 1, 11 S. C. R. 422. Claim of mother of infant plaintiff to recover for her services in attending upon him during his illness and for money expended and liabilities incurred for medical attendance, nursing and supplies: see Wilson v. Boulton, 26 A. R. 184, at pp. 194-5. An action cannot be maintained under Lord Campbell's Act, or at common law by a parent for the funeral expenses of a child, whose death has been caused by the negligence of another person: Clark v. London General Omnibus Co., 1906, 2 K. B. 648. Funeral expenses not a proper claim under this Act: Makarksy v. C. P. R., 15 Man. L. R. 53. Trial Judge dismissing action on the ground of no evidence to go to jury, directed jury to assess damages in case it should be held on appeal that there was evidence: Whiteman v. Hamilton Steel & Iron Co., Co., 16 O. L. R. 257. In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future capable of being estimated: Rombough v. Balch, 27 A. R. 32; Ricketts v. Markdale, 31 O. R. 610; Blackley v. Toronto Ry, 27 A. R. 44n (where the cases are reviewed), Pym v. Greath Northern Ry., 2 B. & S. 759. Amount of damages in such cases considered: Renwick v. Galt Hespeler Ry., 11 O. L. R. 158, 12 O. L. R. 35. Reasonable expectation of pecuniary benefit as damages for death of child: Taff Vale Ry. Co. v. Jenkins, 1913, A. C. 1; Hurd v. Hamilton, 1 O. W. N. 881; Clairmont v. Ottawa Electric,

17 O. W. R. 52, 2 O. W. N. 108. Failure to shew reasonable expectation of benefit from continuance of life of infant: Pedlar v. Toronto Power, 5 O. W. N. 319. Where an infant of tender years is killed, it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary advantage in the future capable of being estimated: McKeown v. Toronto Railway, 12 O. W. R. 1297, 14 O. W. R. 572, 1 O. W. N. 3, 19 O. L. R. 361. The principle of McKeown v. Toronto Ry., 19 O. L. R. 361, discussed, 46 C. L. J. 1. Pecuniary loss to parents of young man killed by negligence: London and Western Trusts v. G. T. R., 2 O. W. N. 225, 17 O. W. R. 413, 22 O. L. R. 262. Consideration of amount of damage to surviving relatives of man of 26: Rorison v. Butler Bros., 2 O. W. N. 312, 17 O. W. R. 595. Mother's interest in and expectation from adult son: Doyle v. Diamond Flint Glass, 7 O. L. R. 747, 8 O. L. R. 499, 10 O. L. R. 567. Pecuniary expectation, where boy of 11 killed: Beahan v. Neven, 4 O. W. N. 1399, 24 O. W. R. 712. Where boy of 13 killed: Thompson v. Trenton Electric, 11 O. W. R. 1009. Damages for death of an aged man, anticipated savings from pension. Goodwin v. M. C. R. R., 5 O. W. N. 198, 25 O. W. R. 182. The actual pecuniary loss is to be ascertained by the jury: Dawson v. Niagara, etc., Ry., 22 O. L. R. 69, 23 O. L. R. 670. Consideration of elements and amount of damages and evidence of pecuniary loss: McKay v. Wabash Ry., 10 O. W. R. 416, at p. 424; Fraser v. London St. Ry., 29 O. R. 411, 26 A. R. 383; Hansford v. G. T. R., 13 O. W. R. 1184; Stephens v. Toronto Ry., 11 O. L. R. 19; Atcheson v. G. T. R., 1 O L. R. 168; Lamond v. G. T. R., 16 O. L. R. 365; C. P. R. v. LaChance, 41 S. C. R. 205; Delyea v. White Pine Lumber Co., 3 O. W. N. 823, 21 O. W. R. 665; Grand Trunk v. Jennings, 13 App. Cas. 800; Rembough v. Balch, 27 A. R. 32; Blackley v. Toronto Ry., 27 A. R. 44n; Stephens v. Toronto Ry., 11 O. L. R. 19; Pow v. West Oxford, 11 O. W. R. 115, at 126.

Release of claim given by widow as result of defendant's importunity shortly after husband's death, and while she was in weak health, held not binding: Doyle v. Diamond Flint Glass Co., 7 O. L. R. 747, 8 O. L. R. 499. The plaintiff, not electing before

action to affirm or disaffirm the release transaction, it was held that bringing action was a declaration to disaffirm, and the release having been found invalid, she could not be deprived of the benefit of that finding by not having restored or offered to restore the money paid her as consideration for the release. She was, however, required to account for the money and permitted to bring it into Court: Doyle v. Diamond Flint Glass Co., 7 O. L. R. 747, 8 O. L. R. 499, 10 O. L. R. 567. A settlement of a pending action agreed to by an illiterate plaintiff without communication with her solicitor, and without fair disclosure of facts cannot stand, and its validity may be tried in the pending action if pleaded at bar: Johnson v. G. T. R., 25 O. R. 64, 21 A. R. 408; see also as to what may constitute accord and satisfaction: Haist v. G. T. R. 26 O. R. 19, 22 A. R. 504. An issue as to the effect of the payment and its procurement by fraud, may be tried by the Judge presiding at the trial, and need not necessarily be left to the jury: Haist v. G. T. R., 22 A. R. 504; see also Davidson v. Merriton Wood Co., 18 P. R. 139. Pleading release under seal given for a small sum: validity: Arkles v. G. T. R., 5 O. W. N. 462.

4.—(2) Formerly in cases under this Act, the jury were instructed to take into consideration the sums received for benefit and accident insurance, as the cause of action is the pecuniary loss caused by death: Hicks v. Newport Ry., 4 B. & S. 403n; Jennings v. G. T. R., 15 A. R. 477, 13 App. Cas. 800; Misner v. Toronto and York Radial, 11 O. W. R. 1064; McKay v. Wabash Ry., 10 O. W. R. 416, at p. 424. Former rule as to insurance money: Dawson v. Niagara, etc., Ry., 22 O. L. R. 69, 23 O. L. R. 670. Indemnity received from insurance: see Meller v. G. T. R., 1906, A. C. 187; The King v. Armstrong, 40 S. C. R. 229. Former rule as to deduction of insurance in computation of damages under Lord Campbell's Act: see Article, 48 C. L. J. 314. See note to R. S. O. 1914, ch. 146, sec. 10, and ch. 185, secs. 99 (12), and 266.

5. Garnishment of moneys recovered in action under this Act: McEwan v. Spekt, 4 W. L. R. 325.

6. The provisions of Lord Campbell's Act are not affected by special railway legislation, providing that actions for "damages sustained by reason of the

railway," be brought within six months: Zimmer v. G. T. R., 19 A. R. 693. Limitation where death caused by negligence of public authority: Williams v. Mersey Docks, 1905, 1 K. B. 804.

7. Transmission of interest: United Collieries v. Simpson, 1909, A. C. 383.

8. The widow and child of a person killed in consequence of the defendant's negligence may, when letters of administration to his estate have not been issued, bring an action without waiting six months: Curran v. G. T. R. 25 A. R. 407. Where action was brought by widow alone, infants were added as parties plaintiffs, or claim should be amended to shew that action brought on their behalf as well as on behalf of widow: Linden v. Trussed Concrete Steel Co., 11 O. W. R. 1003, 18 O. L. R. 540. Action must be brought in name of parents. Their attorney cannot sue: Luciani v. Toronto Construction Co., 4 O. W. N. 1025, 24 O. W. R. 319. Staying action pending action by administratrix: Mummery v. G. T. R. 1 O. L. R. 622.

9. Where damages are recovered, the jury usually apportions them among those entitled to share, but where this is not done or where the matter does not go before a jury, the matter may be brought summarily before a Judge to make a just distribution: Burkholder v. G. T. R., 5 O. L. R. 429. The Judge may follow the analogy of the Statute of Distributions, but will not be bound by its exact terms: Bulmer v. Bulmer, 25 Ch. D. 409. And will consider the fact that some provision has been made certain applicants under an insurance policy: Burkholder v. G. T. R. 5 O. L. R. 429. Where the persons entitled to the fund are a widow and a number of children, the Court will take into consideration the pecuniary benefit received by the widow under the will: O'Donnell v. C. P. R., 11 O. W. R. 110. Apportionment of damages: Scarlett v. C. P. R., 4 O. W. N. 718, 23 O. W. R. 948; Brown v. G. T. R., 4 O. W. N. 942, 24 O. W. R. 255, 28 O. L. R. 354.

10. Two actions were brought by two women each claiming to be the widow of the deceased, and each

with children as co-plaintiffs. Held that only one action would lie under the Act, and that action should be for the benefit of the persons entitled in fact. The marriage to the plaintiff in the second action having taken place after an alleged divorce from the plaintiff in the first action, and the children in the first action being undoubtedly entitled, that action was ordered to proceed and the rights of all parties worked out in it: Morton v. G. T. R., 8 O. L. R. 373. Two actions on account of death of same person: Scarlett v. C. P. R., 3 O. W. N. 1006. An unmarried man having come to his death by injuries inflicted by the defendants, two actions were brought, the first by his paternal grandfather and grandmother, and the second by his mother, who had obtained letters of administration after the bringing of the first action. Although the plaintiffs in the first action could legally proceed so long as there was no administrator, yet an administratrix having been appointed and her action brought within 6 months, she was held entitled to proceed with it, and the first action should be stayed: Mummery v. Grand Trunk, 1 O. L. R. 622.

CHAPTER 152.

The Deserted Wives Maintenance Act.

2. Where the plaintiff wife obtained an order under this Act soon after issuing writ, her motion for interim alimony was dismissed: Cowardine v. Cowardine, 2 O. W. N. 44, 16 O. W. R. 963. Where a wife obtained a Magistrate's order under this Act, her remedies were held limited to those given by the statute and an action in the Division Court for arrears of payments under the order could not be maintained: Re Sims v. Kelly, 20 O. R. 291. As to criminal responsibility for not providing necessaries: see R. S. C. 1906, ch. 146, sec. 242 (2). Proceedings taken on an information under the above section of the Criminal Code will not support an order under this section: Re Woodruff, 16 O. L. R. 348, 11 O. W. R. 430.

10. Appeal: see Re Coe v. Coe, 21 O. R. 409; and see now provisions of R. S. O. 1914, ch. 90, sec. 10.

CHAPTER 153.

THE INFANTS ACT.

Refer to: Simpson on Infants, Eversley Domestic Relations, Stephen's New Commentaries, Bullen & Leake's Pleadings; Bicknell and Kappele, Practical Statutes, pp. 285-289.

2. The right of a father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have charge of any child at all, or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with no doubt a corresponding legal duty, but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with:" Per James, L.J.: In re Agar Ellis, 1878, 10 Ch. D. 49, at p. 71. Quoted with approval: Re Mathieu, 29 O. R. 546; In re Newton, 1896, 1 Ch. 740; Re Faulds, 12 O. L. R. 245; see also In re Fynn, 1848, 2 De G. & Sm. 457; In re Goldsworthy, 8 Q. B. D. 75; The Queen v. Gyngall, 1893, 2 Q. B. 232. While the welfare of the child is in one sense paramount, the paternal right to custody and control is supreme unless a very extreme case can be made out shewing that it is imperative for the protection of the child that the Court should interfere with that right: Re Faulds, 12 O. L. R. 245; In re McGrath, 1893, 1 Ch. 143. How the effect to be given to paternal rights on the one hand and the supposed welfare of the child on the other are to be weighed and balanced: see In re O'Hara, 1900, 2

I. R. 232. Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child merely because his wife chooses to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father: Re Mathieu, 29 O. R. 546. Paternal right to custody of children: Ney v. Ney, 4 O. W. N. 1536. Habitual drunkenness on the part of a father may justify a finding of unfitness as would justify an interference with his rights: In re Goldsworthy, 2 Q. B. D. 75. See also as to what constitutes unfitness: The Queen v. Barnardo, 1891, 1 Q. B. 194. Drunkenness and evil conversation on the part of the husband and ill-treatment of his wife as reason for giving control to mother: Re Dickson, 12 P. R. 659. The discretion given to the Court over the custody of infants is to be exercised as a shield for the wife where a shield is required against a husband with whom she cannot properly be expected to live. It is not to be exercised so as to put a weapon in the hands of a wife with which she may compel an unoffending husband to live where she sees fit: Re Matthieu, 29 O. R. 546. Right of father to custody of daughter: discretion: Re Ethel Phillips, 4 O. W. N. 1408, 24 O. W. R. 709. Where a mother could not have succeeded in getting custody of her children as against their father, she cannot succeed against the father's agent: In re Ross, 6 P. R. 285. The order of the Court commanding the wife to deliver up the child to her husband is complied with by placing the child in his charge. If the child returns of its own free-will to its mother and is not forcibly detained the Court will not interfere further: Reg v. Sheriff, 7 U. C. R. 403. On petition of the mother, the Court may order the father to disclose the whereabouts of the children in his custody and allow the mother access to them: Re Keith, 7 P. R. 138. Election on part of infant may be allowed after a certain age, but if a child were removed from the custody of its father it would be ordered to return without reference to its own choice, at all events up to the age of sixteen: In re Kinne, 5 P. R. 184. The reluctance of the Court to separate brothers and sisters

is very great: Re Faulds, 12 O. L. R. 245; Smart v. Smart, 1892, A. C. 425, at p. 433; Re Young, 29 O. R. 665; In re McGrath, 1893, 1 Ch. 143; Warde v. Warde, 2 Ph. 786, 791. The age of the child may be a determining factor in refusing restoration of custody when sought by a parent: The Queen v. Gyngall, 1893, 2 Q. B. 232, at pp. 243-4, 253; In re Newton, 1896, 1 Ch. 740.

The Ontario Act differs from the English in that it requires equal regard to be paid to the wishes of the mother: Re Young, 29 O. R. 665. The Act requires that weight be given to the wishes of the mother as well as to those of the father, and where these are opposed. the Courts will consider the welfare of the children the principal matter: Re Young, 29 O. R. 665. The statute does not take away the father's common law right, but makes the recognition of this right conditional to some extent on the performance of his marital duty and the interest of the child: In re Leigh, 5 P. R. 402. The question of the right of custody of minor children as between father and mother was fully considered in Smart v. Smart, 1892, A. C. 425. "No one has stated or can state in other than elastic terms the grounds on which the Court should think fit to interfere. There must be a sufficient amount of peril to the children:" (Per Lord Hobhouse, p. 432). The discretion of the Court may be properly exercised to leave children in the custody of their mother, and is materially affected by proof of breach of marital duty by the husband, the welfare of the children and the objection to separating them: Smart v. Smart, 1892, A. C. 425. What must be shewn to oust custody of father: separation deed: maternal right: children born of subsequent cohabitation: Reg. v. Allen, 31 U. C. R. 458, 5 P. R. 443. In an action for alimony and custody of the infants, the Court was held to have had jurisdiction to grant latter relief without petition: Munro v. Munro, 15 Gr. 431. The Court has an absolute right in its discretion to give the custody of a child to its mother: Re Davis, 3 Ch. Ch. 277. Where this right will be exercised: see Re Davis, 3 Ch. Ch. 277; Re Scott, 8 P. R. 58; Re Murdock, 9 P. R. 132. An allegation of "fanatical religious views" is not sufficient: In re Carswell, 6 P. R. 240. She must establish such a case as

would justify her in leaving her husband's home: In re Carswell, 6 P. R. 240. Custody awarded to mother; periodical access of father provided: Re Keys, 12 O. W. R. 160, 269; Re Argles, 10 O. W. R. 801. Rights of mother to custody of children after death of father: Re Maher, 4 O. W. N. 1009.

Custody of illegitimate children: It is in the discretion of the Court to decide who shall have custody of an illegitimate child. The mother being dead, the putative father is entitled to the custody as against the maternal grandfather: Re Brandon, 7 P. R. 347. While it was shewn that the putative father had got possession of the child by agreement with and with the assent of the mother and not by force or fraud, the Court refused to interfere on her behalf: Regina v. Armstrong, 1 P. R. 6. The mother of an illegitimate child is not entitled to all the rights of a guardian for nurture. Her position differs from that of a stranger only in this, that during the period of nurture (under seven) she cannot be deprived of the custody by force or fraud. But when she has abandoned the child and others have adopted it and she afterwards claims it, the Courts will not interfere on her behalf: In re Holeshed, 5 P. R. 251. The father of an illegitimate child has the right to the custody and care thereof, except as against the mother: O'Rourke v. Campbell, 13 O. R. 563. General review of the law: see Re Brandon, 7 P. R. 347. Religious education of illegitimate child: Re Smith, 8 P. R. 23. Right of mother to custody of illegitimate child; welfare of the children: Re McGrath, 1893, 1 Ch. 148; Re Faulds, 12 O. L. R. 245; R. v. Nash, 1 Q. B. D. 454; Barnardo v. McHugh, 1891, A. C. 388; Re Longaker, 12 O. W. R. 1193. Rights of mother and putative father to custody of illegitimate child: Re C., an infant, 20 O. W. R. 669, 3 O. W. N. 391, 25 O. L. R. 218; and see R. S. O. 1914, ch. 154, sec. 2, notes.

Where there is danger of an infant being removed out of the jurisdiction, the Court will intervene summarily on the petition of the Surrogate Court guardian to prevent it, even though no suit is pending respecting the infant's estate: Re Gillrie, 3 Gr. 279. Foreign divorce; competency to consider the

"cause assigned": in Re Kinney, 6 P. R. 245. Foreign divorce of British subjects: application for custody of infants on the part of mother granted where she had obtained a foreign divorce from her husband on the ground of adultery and he had brought the children to Ontario to escape the effect of the foreign judgment: Re Davis, 25 O. R. 579. Habeas corpus: see R. v. Allen, 5 P. R. 453; Re Murdoch, 9 P. R. 132; Re Smart Infants, 11 P. R. 482. A father was proceeding by *habeas corpus* to obtain the custody of children. It was held that a more comprehensive adjudication could be had on a petition and that there was power to direct that a petition be substituted; subsequently it was directed that the proceedings should be concurrent: Re Smart Infants, 12 P. R. 312, 435, 635. The points of difference between the law in England and in Ontario as to the custody of infants: see Re Young, 29 O. R. 665. Jurisdiction as to infants and their custody: see H. & L. notes pp. 18, 19. See Imperial Act. 49-50 Vic. ch. 27, secs. 5, 7. Applications as to the custody of infants under this Act are excepted from the jurisdiction of the Master in Chambers: see Con. Rule 42 (7), 1913 Rule 208 (7). Children within the Children's Protection Act: see R. S. O. 1914, ch. 231. As to support of illegitimate children: see R. S. O. 1914, ch. 154.

3.—(1) Rights of testamentary guardian: see Re Helyar, Helyar v. Beckett, 1902, 1 Ch. 391. Father's right to appoint testamentary guardian and such guardian's powers: see H. & L. notes p. 109. This section is derived from 12 Car. II, ch. 24, secs. 8, 9, through R. S. O. 1897, ch. 340, sec. 2. Consideration of law of adoption: Fidelity Trust Co. v. Buchner, 22 O. W. R. 72, 3 O. W. N. 1208, 26 O. L. R. 367. See also Anon., 6 Gr. 632; Davis v. McCaffrey, 21 Gr. 554; Re Davis, 18 O. L. R. 384; Re Hutchinson, 26 O. L. R. 113, 601, 28 O. L. R. 114 (restoring 26 O. L. R. 113). Repudiation of adoption agreement; right of father against maternal grandparents for custody: Re Hutchinson, 3 O. W. N. 993, 1552, 4 O. W. N. 777, 21 O. W. R. 669, 22 O. W. R. 390, 26 O. L. R. 113, 601, 28 O. L. R. 114. And see also Leach v. R., 1912, A. C. 305; Roberts v. Hall, 1 O. R. 388.

3.—(2) Is the father included in the wording of this subsection: Re Hutchinson, 26 O. L. R. 113, 601, 28 O. L. R. 114.

4. In all questions as to the custody of infants the Rules of Equity shall prevail. This section was formerly R. S. O. 1897, ch. 51, sec. 58 (12): see H. & L. notes, pp. 105-110, where common law rule, equity rule and procedure under the Judicature Act are considered.

5.—(1) Dealing with infants' lands: Collier v. Union Trust, 4 O. W. N. 1465, 24 O. W. R. 761. Re Sugden, 4 O. W. N. 924, 24 O. W. R. 212. As to infants' deeds and conveyances of infant's lands; see note to Devolution of Estates Act, R. S. O. 1914, ch. 119, sec. 19. Maintenance, H. & L. p. 1211. Enquiry as to debts; when principal broken into: H. & L. notes p. 212. As to settled estates in which infants are interested: see R. S. O. 1897, ch. 71, *et seq.;* H. & L. notes, pp. 1218, *et seq.,* R. S. O. 1914, ch. 74, especially sec. 35.

5.—(2) See cases collected: H. & L. notes p. 1209.

13. Mode of procedure in sale of infants' lands: Re Sugden, 4 O. W. N. 924, 24 O. W. R. 212. Jurisdiction of High Court as to infants and their estates: see Judicature Act, R. S. O. 1897, ch. 51, sec. 26 (2); H. & L. notes pp. 18, 19; R. S. O. 1914, ch. 56, sec. 13. Rules as to property of infants: see Con. Rules 960-970; H. & L. notes pp. 1208-1217, 1913 Rules 618-621. Application to sell made to a Judge; official guardian to be notified: see 1913 Rule 618. For note as to grounds on which sale is authorized and how the interest of the infant is to be considered: see H. & L. notes pp. 1208-9. What the affidavits are to state: circumstances which justify a sale of infants' estate: H. & L. notes pp. 1210-1211; see 1913 Rule 619. Provision for examination of infant: see Con. Rules 966, 967; H. & L. notes pp. 1215-1216, 1913 Rule 620. Infant out of Ontario and *viva voce* evidence: see 1913 Rules 620, 621.

14. See Con. Rule 970; H. & L. notes p. 1217, also p. 1209, 1913 Rule 457.

17. Where the conversion of real estate is rightfully directed by the Court for a particular purpose, it effects conversion for all purposes: Burgess v. Booth, 1908, 2 Ch. 648. Where lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty: Thompson v. McCaffrey, 6 P. R. 193. The rule of the Court is that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion so far as the rights of the next-of-kin and heirs at law of the infant are concerned: Fitzpatrick v. Fitzpatrick, 6 P. R. 134; see also Campbell v. Campbell, 19 Gr. 254.

19. Where a widow paying the proceeds of money into Court to the credit of herself and the official guardian on behalf of an infant, reserved the right to elect between her dower and her distributive share and subsequently elected to take the former and died shortly after, it was held that her administrator was entitled to receive the value of her dower according to her expectancy at the time of sale: Re Pettit, 4 O. L. R. 506. As to conveyances by infants where land sold by auction of the Court for payment of debts of ancestor: see the Trustee Act R. S. O. 1914, ch. 121, sec. 61.

21. Costs: see Con. Rule 1130, R. S. O. 1914, ch. 56, sec. 74.

24. Former provisions of R. S. O. 1897, ch. 340, secs. 15-18. Imperial Act, 18-19 vic. ch. 43, secs. 1-4. See also provisions of R. S. O. 1897, ch. 324, secs. 16-17; R. S. O. 1914, ch. 56, secs. 135-136; A. G. v. Toronto General Trusts, 5 O. L. R. at p. 608. See H. & L. notes, p. 33.

26. As to relation of guardian and ward: see Eyre v. Countess of Salisbury; White and Tudor's Leading Cases, vol. I. p. 473 and notes. Agreement by mother to give up natural guardianship in consideration of benefits to child and an allowance to herself: Chisholm v. Chisholm, 40 S. C. R. 115. Jurisdiction of High Court to appoint guardian: when security to be given and when dispensed with: interest of infant considered: removal from jurisdiction: powers of guardians to make leases: H. &

L. notes pp. 1213-1215. Removal of testamentary guardian: see sec. 29, *infra*. Guardian to receive insurance money: see R. S. O. 1897, 203, sec. 155, and now see R. S. O. 1914, ch. 183, secs. 175-176.

27. Application of the 1913 amendment to the Insurance Act as to insurance moneys payable to infants (see R. S. O. 1914, ch. 183, secs. 175-6): Re Rennie Infants, 5 O. W. N. 459. It would seem that such moneys are to be paid to a trustee appointed by the Court: Re Rennie Infants, 5 O. W. N. 459.

28. See H. & L. notes p. 109. Although a wife had obtained from the Court an order giving to her the custody of an infant daughter until she attained the age of 12, this did not prevent the father appointing testamentary guardians: Davis v. McCaffray, 21 Gr. 554. The remarriage of mother, sole surviving guardian, is not in itself a reason for the Court appointing a co-guardian. The benefit of the infant is the sole ground: Re X, X v. Y 1899, 1 Ch. 526. Testamentary control: F. v. F., 1902, 1 Ch. 688; in Re Grey, 1902, 2 Q. R. 684. Right of paternal testamentary guardian to control child's religious education: Re Chillman, 25 O. R. 268. Right of mother to sue for injury to child: Young v. Gravenhurst, 24 O. L. R. 447.

32. Authority of guardian to prevent removal of infant from the jurisdiction: Re Gillrie, 3 Gr. 279, noted *ante*, sec. 2.

33. Appeal to Divisional Court: see H. & L. notes p. 131, R. S. O. 1914, ch. 56, sec. 26 (2) (o), R. S. O. 1914, ch. 62, sec. 34.

36. *Religio sequitur patrem.* It is the duty of the Court to enforce the wishes of the father as to the religious education of his children unless there is strong reason for disregarding them. The Court has jurisdiction to interfere even against the father's wishes to prevent the religious convictions of his child being interfered with, but there must be shewn an abandonment or abdication of the paternal right or that the child has deep religious convictions to disturb which would be dangerous to its

moral welfare: Re Faulds, 12 O. L. R. 245; In re McGrath, 1893, 1 Ch. 143; In re Agar Ellis, 10 Ch. D. 49, pp. 73-5; In re Newton, 1896, 1 Ch. 740; Andrews v. Salt, L. R. 8 Ch. 622; In re Meades, Ir. R. 5 Eq. 98; Davis v. Davis, 10 W. R. 245; Re Chillman, 25 O. R. 268. The law does not impose on the Court the duty of doing more with regard to the religious education of a child who is a ward of Court, than to direct him to be brought up in his father's religion unless there are sufficient reasons to the contrary: Re W., W. v. M., 1907, 2 Ch. 557. Religious education of child originally directed to be in father's religion altered at request of boy of eleven: Re W., W. v. M., 1907, 2 Ch. 557. Testamentary control: F. v. F., 1902, 1 Ch. 688; In re Grey, 1902, 2 I. R. 684. Right of paternal testamentary guardian to control child's religious education: Re Chillman, 25 O. R. 368. Religious conviction of child: see Stourton v. Stourton, 8 D. M. & G. 760; In re Newton, 1896, 1 Ch. 753. Religious training: MacNabb v. McInnes, 25 Gr. 144. The Court cannot compel a father out of his own funds to educate a child in a different religion from his own: In re Nevin, 1891, 2 Ch. 299 at p. 312; Andrews v. Salt, L. R. 8 Ch. 622. In the case of very young children the question of what religion they shall be brought up in is not pressing, and the father will be allowed to raise it at a later date: Re Dickson, 12 P. R. 659. Child's religion; a child may be of sufficient age to have religious views of his own: Re Faulds, 12 O. L. R. 245 at pp. 258-9. Or if of tender years, has no religion of his own nor is his religion a pressing question: Re Dickson Infants, 12 P. R. 659: see Re Kenna, 4 O. W. N. 1395, 24 O. W. R. 690, 5 O. W. N. 392. See further on question of religious education H. & L. notes pp. 109-110.

CHAPTER 154.

The Illegitimate Children's Act.

2. Where a bastardy order has been made directing the putative father to pay a weekly sum for the maintenance of the child, and the father dies leaving arrears unpaid, the mother cannot recover arrears nor accruing payments from the father's estate: Re Harrington, Wilder v. Turner, 1908, 2 Ch. 687. Agreement with mother of child by its father to pay a weekly sum for child's maintenance; death of mother: James v. Morgan, 1909, 1 K. B. 564. Where the plaintiff was a married woman, the presumption arose that the necessities furnished were her husband's: Jackson v. Kassel, 26 U. C. R. 341. Presumption of legitimacy where child born in wedlock: see Ryan v. Miller, 21 U. C. R. 202, 22 U. C. R. 87. An action will lie against representatives of a deceased father for the maintenance of his illegitimate child during his lifetime under this Act: Monohan v. Oke, 1 A. R. 268. The father of an illegitimate child has the right of custody except as against the mother. Her claim is good as against the father. O'Rourke v. Campbell, 13 O. R. 563. It is no defence to an action by the child's grandmother for necessities furnished at the mother's request that the father had demanded the child, had informed the mother that he would support the child, and had always been ready to do so, and that the mother had refused: O'Rourke v. Campbell, 13 O. R. 563. Right of mother to collect damages for death of illegitimate child: see Gibson v. Midland Ry., 2 O. R. 658. See H. & L. notes p. 109. See also as to custody of illegitimate children: R. S. O. 1914, ch. 153, sec. 2, note.

3. Where father of illegitimate child, by falsely representing that he was of full age, procured acceptance of his contract to maintain the child and thereby avoided having affidavit filed, it was held that the contract was not binding and that it was too late to comply with the statute: Jewel v. Broad, 19 O. L. R. 1, 20 O. L. R. 176. An affidavit which stated that the defendant was the father of the child instead of "really the father," was held defective: Jackson

v. Kassel, 26 U. C. R. 341. The affidavit was produced from the office of the City Clerk and purported to be sworn before the City Police Magistrate. Held sufficient evidence to go to a jury that it was deposited in the proper office: Jackson v. Kassel, 26 U. C. R. 341. Attempting to procure a woman falsely to make the affidavit provided is an indictable offence: R. v. Clement, 26 U. C. R. 297. Requirements of pleadings in action under this Act: Morris v. Churchward, 4 O. W. N. 1008, 24 O. W. R. 313.

CHAPTER 155.

The Landlord and Tenant Act.

Refer to: Clarke, Landlord and Tenant (Can.); Bell, Landlord and Tenant (Can.); Bullen and Leakes' Pleadings; Woodfall, Foa, Redman and Lyon on Landlord and Tenant; Williams and Yates on Ejectment; Bewes on Waste; Amos and Ferard on Fixtures; Bythewood & Jarman and Kay & Elphinstone, Conveyancing; Bullen on Distress; Bicknell and Kappele, Practical Statutes, pp. 820-830.

2.—(*b*) Meaning of "landlord:" Re Pepall v. Broom, 2 O. W. N. 1275, 19 O. W. R. 512.

2.—(*d*) As to liability of tenant to pay night watchman: see R. S. O. 1914, ch. 192, sec. 400 (50) (*a*). As to right of tenant to deduct money paid for taxes from rent to collector until taxes are paid: see R. S. O. 1914, ch. 195, secs. 96, 97. As to duty of tenant to notify landlord of construction of ditches: see R. S. O. 1914, ch. 260, sec. 15 (2). As to drainage assessment: see R. S. O. 1914, ch. 198, sec. 92.

PART I.

Relation of Landlord and Tenant.

3. The idea which the framer of the section probably had was to do away with the necessity of having the immediate reversion to entitle to distrain one who had let lands to another: Harpelle v. Carroll,

27 O. R. 240. It is taken from Landlord and Tenant Law Amendment Act, Ireland, 1860, 23 and 24 Vic. ch. 144, sec. 3. For cases where the section has been criticized, see judgment of Meredith, C.J.: Harpelle v. Carroll, 27 O. R. 240 at p. 246, *et seq.* The effect of the section is not to take away the common law right of distress: Harpelle v. Carroll, 27 O. R. 240 at p. 247: see articles 15 C. L. T. 217-8, 245. See Armour Real Property, pp. 135, 333 and 344.

4. Suit by statutory assignee of reversion: Sunderland Orphan Asylum v. River Weir Commissioners, 1912, 1 Ch. 191. Rights of assignee of lessor: Rickett v. Green, 1910, 1 K. B. 253. Covenant to repair: demise by under lessee of part of premises: covenant with under lessee for covenantor and assigns to observe as to part not demised: covenant running with land: see Dewar v. Goodman, 1907, 1 K. B. 612. Covenant by lessor—reversion conveyed to wife: see Ambrose v. Fraser, 14 O. R. 551. Covenant by tenant of a "tied house" to buy beer from landlord and his successors in business—assigns not mentioned: see Manchester Brewery v. Coombs, 1901, 2 Ch. 608. A covenant running with the reversion entered into by a lessor with his lessee remains binding on the lessor notwithstanding that he has assigned the reversion: Stuart v. Joy and Nantes, 1904, 1 K. B. 362.

Mortgagee's right to rent: see Moss v. Gallimore, 1 Smith L. C. 514. Rights and liabilities of mortgagor's tenant by a demise made subsequently to the mortgage: Keech v. Hall, 1 Smith L. C. 511. 32 Henry VIII., ch. 34, does not apply to leases not under seal: Rogers v. National Drug and Chemical Co., 2 O. W. N. 763, 18 O. W. R. 686, 23 O. L. R. 234, 24 O. L. R. 486.

What covenants run with the land: see Spencer's Case, 1 Smith L. C., p. 52. A covenant running with the reversion entered into by the lessor with the lessee remains binding on the lessor notwithstanding he has assigned the reversion: Eccles v. Mills, 1898, A. C. 360; Stuart v. Joy, 1904, 1 K. B. 362. Assignment of reversion: subsequent purchase of adjoining property by assignee: liability

of assignee for nuisance on the adjoining premises: Davis v. Town Properties, 1903, 1 Ch. 797. Covenant running with land: covenant to repair: Dewar v. Goodman, 1908, 1 K. B. 94.

8. See Armour, R. P., pp. 155 and 356.

11. See Morris v. Cairncross, 9 O. W. R. 918, at p. 925, 14 O. L. R. 544. A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, is entitled to exercise the power of leasing conveyed by R. S. O. 1897, ch. 71, sec. 42; R. S. O., 1914, ch. 74, sec. 33; see also National Trust v. Shore, 11 O. W. R. 228, 16 O. L. R. 177. Right to call for valid lease in exercise of power: Atkinson v. Farrell, 27 O. L. R. 204.

19. Armour, R. P., p. 150; see R. S. O. 1914, ch. 116, schd. B., cl. 12 and notes.

20.—(1*f*) In an action for recovery of demised premises where rent is in arrear, a sub-lessee who has paid rent to the lessors is a "tenant," and is entitled to a stay of proceedings upon payment of arrears and costs: Moore v. Smee, 1907, 2 K. B. 8.

20.—(2) Relief against forfeiture may arise at common law, in equity or under the Judicature Act, R. S. O. 1914, ch. 56. Relief against forfeiture is refused: (a) where non-payment of rent, right to relief being limited under sec. 20 (2), (3), (6); (b) where breach of covenant not to assign or sub-let, 20 (9*a*); (c) bankruptcy, 20 (9*a*). (d) Mining leases, 20 (9*b*). As to notice of breach and intention to forfeit—principles and form of notice discussed: see Rose v. Spicer, 1911, 2 K. B. 234; Holman v. Knox, 25 O. L. R. 588. Remedies on forfeiture: (a) Re-entry without action (eviction); (b) action claiming forfeiture; (c) Summary ejectment under sec. 75, etc. Requirements of the statute considered: Holman v. Knox, 20 O. W. R. 121, 3 O. W. N. 151, 21 O. W. R. 325, 3 O. W. N. 745, 25 O. L. R. 588; McMullen v. Vannatto, 24 O. R. 625. Notice specifying breach: Walters v. Wylie, 20 O. W. R. 994, 3 O. W. N. 567. The

notice required under this section is applicable to summary proceedings under the Overholding Tenants Act. Proceedings under a forfeiture without such notice are nugatory, (see Part iii): Re Snure and Davis, 4 O. L. R. 82; Armour, R. P., pp. 138, 152-156; see also cases noted, R. S. O. 1914, ch. 116.

20.—(3) What amounts to breach of covenant to repair amounting to waste. Conversion of building from chapel to theatre, held not to amount to this: Hyman v. Rose, (Rose v. Spicer), 1911, 2 K. B. 234, 1912, A. C. 623. Mere alterations to make building more suitable for business carried on there are not breaches of covenant against waste, and in any case relief against forfeiture would be given upon payment into Court of a sum adequate to reinstate the buildings into their former plight: Sullivan v. Doré, 5 O. W. N. 70, 25 O. W. R. 31; (following Hyman v. Rose, 1912, A. C. 623). Measure of damages for breach of covenant to keep in repair: Joyner v. Weeks, 1891, 2 Q. B. 31. Relief against forfeiture of right of renewal: Grenville v. Parker, 1910, A. C. 335. Effect of order relieving against forfeiture: Dendy v. Evans, 1909, 2 K. B. 894, 1910, 1 K. B. 263. Parties necessary to application for relief against forfeiture, when original lessee not necessary party: Humphreys v. Morten, 1905, 1 Ch. 739. Who are necessary parties to a claim for relief against forfeiture: Hare v. Elms, 1893, 1 Q. B. 604. Relief against forfeiture for breach of covenant to insure: see H. & L. notes, pp. 26, 27. Relief against penalties and forfeitures generally: R. S. O. 1897, ch. 51, sec. 57 (3); H. & L. notes, pp. 48-49; R. S. O. 1914, ch. 56, sec. 19.

20.—(6) Rent under a lease under the Short Forms Act becoming in arrear, the landlord served the statutory notice of forfeiture and brought an action for the recovery of the premises and rent. Before trial the two tenants paid the arrears and costs. Held that bringing the action was election to forfeit which could not be retracted, and could only be got rid of by a request from the tenants, in which they both should concur. A mere payment after the forfeiture, of rent accrued due before, would not

amount to such a request: Denison v. Maitland, 22 O. R. 166. The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action takes place after the term has expired: Coventry v. McLean, 22 O. R. 1, 21 A. R. 176. Forfeiture of lease for non-payment of rent: Fenny v. Casson, 12 O. W. R. 404; see Armour, R. P., pp. 148, *et seq.*

20.—(7) After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due. This course did not *per se* set up the former tenancy, but was evidence for the jury of a new tenancy on the same terms from year to year: McMullen v. Vannatto, 24 O. R. 625.

20.—(9) Covenant not to assign without license: see Dumpor's Case, 1 Smith L. C. 31. Court will not grant relief against forfeiture of lease on account of breach of covenant not to assign or underlet: see Eastern Tel. Co. v. Dent, 1899, 1 Q. B. 835. Action for possession on ground of breach of covenant not to sublet: Curry v. Pennich, 4 O. W. N. 712, 23 O. W. R. 922. Condition against assigning: Fitzgerald v. Barbour, 17 O. L. R. 254, 11 O. W. R. 390, 12 O. W. R. 807. As to whether Court can grant relief from forfeiture for breach of covenant not to assign or sublet without leave: see H. & L. notes, p. 48. Assignment for benefit of creditors as breach of covenant not to assign or sublet: Gentle v. Faulkner (1900), 2 Q. B. 267. As to breach of covenant not to assign or sublet: see also sec. 23, *post*; and R. S. O. 1914, ch. 116, sch. B, cl. 8, notes.

Mortgagees of the demised premises having notified the subtenants to pay rent to them, the assignee for benefit of creditors in possession paid to them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. Held that this was no waiver of the lessors' right to claim a forfeiture under proviso in lease against assignments and bankruptcy: Littlejohn v. Soper, 1 O. L. R. 172, 31

S. C. R. 572. A lease to a joint stock company provided that in case the lessee should assign for benefit of creditors, 6 months' rent should become due and the lease should be forfeited. The fact that the lessors were principal shareholders and had moved the by-law for winding-up, made no difference in their position as individuals. The assignee held possession three months and the lessors accepted rent from him for that time, and from sub-lessees for the month following. The lessors had claimed the 6 months' rent and elected to forfeit. The assignee had a statutory right to remain in possession 3 months. The lessors were held not to have waived their right to forfeit: Littlejohn v. Soper, 1 O. L. R. 172, 31 S. C. R. 572. Forfeiture of lease by solvent company going into voluntary liquidation: Freyer v. Ewart, 1902, A. C. 187. Apart from the provisions of sec. 38, an assignment for benefit of creditors by a tenant who holds under a lease with a covenant " not to assign or sublet " or with the common provision " if the term hereby granted shall, etc. . . . or if the lessee or his assigns shall make any assignment, etc. . . . ," gives the landlord an immediate right to eject, and without giving notice of breach: Kerr v. Hastings, 25 C. P. 429; Magee v. Rankin, 29 U. C. R. 257; Argles v. McMath, 26 O. R. 224, 23 A. R. 44. There must be an election to forfeit on the part of the landlord: Linton v. Imperial Hotel Co., 16 A. R. 337; Palmer v. Mail Printing Co., 28 O. R. 656. Acceptance of arrears of rent is not an election not to forfeit: Soper v. Littlejohn, 1 O. L. R. 172, 31 S. C. R. 572. Making a new lease is an undoubted election to forfeit: Tew v. Routley, 31 O. R. 358. Covenant or condition for forfeiture on bankruptcy of lessee: see sec. 38 note.

23. See notes to sec. 20 (9) *ante*, and notes to R. S. O. 1914, ch. 116, sch. B, cl. 8. In line 1 for " commencement of this Act " read " 24th day of March, 1911:" 4 Geo. V. ch. 2, Schedule (26).

24. Secs. 24 and 25 are to be read together, the former referring to all cases and making licenses to alien applicable *pro hac vice* only, the latter referring to specific cases of licensing the alienation of a

part and reserving the right of re-entry as to the remainder: Baldwin v. Wanzer, 22 O. R. 612. Under a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised premises, he may re-enter upon the remainder for breach of the covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole: Baldwin v. Wanzer, 22 O. R. 612; see R. S. O. 1914, ch. 116, sch. B, cl. 12, notes. See Armour, R. P., p. 156.

30. Seizure of implements of trade (note difference in wording of English Act): Boyd v. Bilham, 1909, 1 K. B. 14. Goods exempt from execution: see R. S. O. 1914, ch. 80, secs. 3 to 9.

31.—(1) Goods of tenant's wife under hire purchase agreement: Shenstone v. Freeman, 1910, 2 K. B. 84; Rogers v. Martin, 1911, 1 K. B. 19. Distress for rent—goods on hire purchase: Hackney Furnishing Co. v. Watts, 1912, 3 K. B. 225.

31.—(3) Persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees and without authority to let or grant possession of them, are not in occupation "under" the assignees, and their goods are not liable for distress: Farwell v. Jamieson, 27 O. R. 141, 23 A. R. 517, 26 S. C. R. 588.

32.—(1) An inventory is sufficiently "subscribed" if it is referred to in the declaration to which it is annexed, and the declaration signed: Godlonton v. Fulham, etc., Co., 1905, 1 K. B. 431.

32.—(2) An action for illegal distress lies against the bailiff who proceeds with a distress on lodger's goods after being served with the declaration and inventory, and after the lodger has paid or tendered to the superior landlord the rent, if any, due from him to his immediate landlord: Lowe v. Darling, 1905, 2 K. B. 501, 1906, 2 K. B. 772.

35. Damages for breach of covenant to repair are not a "debt" so as to constitute a set-off against the rent, although under the Judicature Act, they might be the subject of counterclaim: Walton v. Henry, 18 O. R. 620. The service by the tenant after distress, but before sale, of a notice of set-off pursuant to this section of an amount in excess of the rent does not make the distress illegal, and the landlord is not liable for double value under R. S. O. 1897, ch. 342, sec. 18 (2), which required both seizure and sale to be illegal: Brillinger v. Ambler, 28 O. R. 368. See sec. 54 (2) *post*.

38.—(1) A landlord has no preferential claim for rent against an insolvent estate if there were no distrainable goods on the premises at the time of the assignment: Magann v. Ferguson, 29 O. R. 235. The landlord's right to preferential payment depends on the existence of distrainable effects, though an actual distress need not be made: Re McCracken, 4 A. R. 486; Eacrett v. Kent, 15 O. R. 9; Lazier v. Henderson, 29 O. R. 673; Linton v. Imperial Hotel Co., 16 A. R. 337. The landlord's right to a preference does not depend on the existence of a formal lease: Re Erly, 2 A. R. 617. Under a lease reserving rent payable quarterly in advance and containing the usual forfeiture and three months' acceleration clause in case the lessee makes assignment for benefit of creditors, the landlord, in case of such assignment, becomes entitled to recover by distress and has a preferential lien for—in addition to the rent due and in arrear for the quarter preceding the assignment—the rent for the current quarter in which the assignment is made which was also due and in arrear, as well as a further quarter's rent: Tew v. The Toronto Savings and Loan, 30 O. R. 76. "Arrears of rent due, for three months, following the execution of such assignment" means "arrears of rent becoming due during the three months following the execution of the assignment." Under the usual provision therefore the landlord is entitled to the current quarter's rent and, in addition, to the quarter's rent payable in advance on the quarter day next after the assignment. The expression "the preferential lien of

the landlord for rent," means that the landlord is entitled to be paid the amount found due to him as a preferred creditor out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress: Lazier v. Henderson, 29 O. R. 673. The restriction on the landlord's rights as provided in this section applies only for the benefit of the creditors: Railton v. Wood, 15 App. Cas. 363. Acceleration clauses in leases which work adversely to creditors have been attacked (Re Hoskins, 1 A. R. 379), but it is now clear the landlord may recover: Linton v. Imperial Hotel Co., 16 A. R. 337; Eacrett v. Kent, 15 O. R. 9. As to agreements between the parties regarding accelerated rent: see Linton v. Imperial Hotel Co., 16 A. R. 337; London and Westminster Loan, etc., Co. v. London & N. W. Ry. (1893), 2 Q. B. 49. The provision of the section is intended to prevent a landlord, where there is an acceleration clause, getting an unreasonable amount of rent in advance: Langley v. Meir, 25 A. R. 372. In the case of Langley v. Meir, 25 A. R. 372, the learned Judges do not seem to have been entirely in accord in their views in regard to the meaning and effect of this statute. It was held however, per Burton, C.J.O., and MacLennan, J. A., that sub-sec. 1 is a restrictive provision and limits the landlord's lien, even though in the lease which he claims there is an acceleration clause wider in its terms than the statutory provisions, and it does not give to the landlord an absolute right to three months' rent upon an assignment for benefit of creditors being made. See also Clarke v. Reid, 27 O. R. 618, where a different conclusion was reached, criticised in Langley v. Meir, *ante*. See also as to forfeiture and right of assignee to retain possession: Littlejohn v. Soper, 1 O. L. R. 172, 31 S. C. R. 572, noted *ante* sec. 20 (9). The landlord may distrain for rent accruing due after assignment: Linton v. Imperial Hotel Co., 16 A. R. 337; Eacrett v. Kent, 15 O. R. 9. The statute does not apply to a tenancy from month to month, but to a case where there is a term of at least a year's duration: Semi-Ready v. Tew, 13 O. W. R. 476, 14 O. W. R. 393, 576, 19 O. L. R. 227. Where tenant's goods, in the hands of assignee

are destroyed by fire, landlord not entitled to rank for preferential lien on the insurance moneys representing them, but must rank rateably with other creditors: Miller v. Tew, 1 O. W. N. 269, 14 O. W. R. 207, 1173, 20 O. L. R. 77.

38.—(2) The effect of this section is to place the assignee who has elected by notice in writing to retain the premises occupied by the assignor for the unexpired term of the lease, in the same position as respects the lease as if the assignment had not been made, the landlord being entitled to the full amount of the rent under the lease but nothing more. Where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment being made by the lessor, had been paid by the assignee who had elected to retain the premises to the end of the term, he was entitled to recover back a further sum for rent of the premises for a portion of the same period which he had paid under protest to avoid distress: Kennedy v. MacDonell, 1 O. L. R. 250. See also Lazier v. Armstrong, 5 O. W. R. 596. A lease contained the usual forfeiture and acceleration condition in case of assignment by the lessee. The lessee made an assignment for benefit of creditors. Subsequently the lessor distrained for rent and taxes due by virtue of the provisions of the lease at the date of the assignment, and afterwards granted a new lease of the premises. The assignee had not given the notice required by this section. It was held that the distress was not a waiver of the forfeiture. The granting of the new lease was election to forfeit and dated back to the time of the forfeiture, viz., the date of the assignment. The assignor might have avoided the forfeiture and the acceleration of the payment of the rent and taxes by giving the notice provided in sub-sec. 2: Tew v. Routley, 31 O. R. 358.

As to position of mortgagee claiming rent: see Munro v. Commercial Building, etc., Society, 36 U. C. R. 464; Hobbs v. Ontario Loan and Debenture Co., 18 S. C. R. 483; and see R. S. O. 1914, ch. 112, sec. 14, notes.

39. A sublease for a period co-extensive with or longer than the sublessor's term, operates as an assignment and the sublessor cannot distrain for rent in arrear: Lewis v. Baker, 1905, 1 Ch. 46. As to power of landlord's assignee to distrain: Hope v. White, 18 C. P. 430, 19 C. P. 479.

40. Permission to a tenant to remain in possession after expiry of lease does not create a new tenancy so as to bar landlord's right of distress for previously accrued rent: Lewis v. Davies, 1913, 2 K. B. 37. Attornment, demise to mortgagor, rent reserved, intention: see Hobbs v. Ontario Loan, etc., Co., 18 S. C. R. 483. See also as to distress by mortgagee after termination of implied tenancy: Lambert v. Marsh, 2 U. C. R. 39. Distress by landlord whose interest has expired: see Hartley v. Jarvis, 7 U. C. R. 545.

43. What things are privileged from distress: Simpson v. Hartopp, 1 Smith's L. C. 437. Where a landlord has distrained goods belonging in part to the tenant and in part to a third person, such third person has no right to compel or to ask the Court to compel the landlord to sell the part belonging to the tenant before selling the part belonging to the third persons: Pegg v. Starr, 23 O. R. 83.

47. A tenant is not liable to prosecution under this statute for the fraudulent and clandestine removal of goods not his own property, nor can goods which are not the tenant's property be distrained off the premises: Martin v. Hutchinson, 21 O. R. 388. Fraudulent removal of goods: see also Reg. v. Lackie, 7 O. R. 431.

49. See R. v. Lackie, 7 O. R. 431.

50. Where cattle shall be taken: Coaker v. Willcocks, 1911, 1 K. B. 649, 2 K. B. 124. Removal of goods to a distance to sell: see Macgregor v. Defoe, 14 O. R. 87. Where interpleader questions arise: see Con. Rules, 1102, 1122; 1913 Rules, 625, *et seq.* Where goods have been impounded under this section: see particularly, H. & L. notes, p. 1314.

52. A landlord cannot himself become the purchaser of goods sold by him under distress: Moore Nettlefield Co. v. Singer, 1904, 1 K. B. 820. Seizure by mortgagee of goods in custody of landlord's bailiff: agreement between tenant and bailiff: see Langtry v. Clark, 27 O. R. 280; but see Anderson v. Henry, 29 O. R. 719.

53. This section is taken from 11 Geo. II., ch. 19, sec. 19. For 11 Geo. II., ch. 19, sec. 20, see now R. S. O., 1914, ch. 56, sec. 71, tender of amends. Sec. 54 (1) is taken from 52 Hen. III. (Statutes of Marlbridge) ch. 4 in part, and 3 Ed. I., (Statutes of Westminster Prim.) ch. 16. The right to damages for excessive distress given by the Statute of Marlbridge was not interfered with or modified by 11 Geo. II., ch. 19, sec. 19. Consideration of these statutes and amount of damages recoverable: Hessey v. Quinn, 1 O. W. N. 1039, 20 O. L. R. 442, 21 O. L. R. 519. A landlord's right of distress is suspended as to that portion of the rent which has accrued up to the garnishment and distress for such portion is wrongful: Paterson v. King, 27 O. R. 56. Liability for conversion: Peasycoed Collieries v. Partridge, 1912, 2 K. B. 345. Rights of distrainor to climb over wall of next house: Long v. Clarke, 1894, 1 Q. B. 119. When rightfully on the premises, distrainor has no right to break open door of warehouse: American Concentrated Meat v. Hendry, 68 L. T. Rep. 742.

54.—(1) Origin of section: see note to sec. 53 *ante*. Section considered: Jarvis v. Hall, 4 O. W. N. 232, 23 O. W. R. 282. Damages for excessive distress: Hessey v. Quinn, 15 O. W. R. 505, 20 O. L. R. 442, 16 O. W. R. 628, 21 O. L. R. 519, noted sec. 53 *ante*. Measure of damages: Lee v. Ianson, 1 O. W. N. 586.

54.—(2) This section originated in 2 W. & M., sess. 1, ch. 5, sec. 4. Under the reading of R. S. O. 342, sec. 18 (2), it was held that the substitution in this enactment of the word " may " instead of " shall and may " in 2 W. & M. sess. 1, ch. 5, sec. 4, effects no difference. The Court had no discretion as to amount or as to the costs: Webb v. Box, 19 O. L. R.

540, 20 O. L. R. 220, 14 O. W. R. 802, 15 O. W. R. 205, 1 O. W. N. 112, 317. Both seizure and sale must be unlawful; service of a notice of set-off under section 35 *ante*, does not make the distress illegal and the landlord is not liable for double value for selling: Brillinger v. Ambler, 28 O. R. 368; see sec. 35, *ante*. "Recover" means recover by the verdict of a jury; not by arbitration: Clark v. Irwin, 8 U. C. L. J. 21. In an action for wrongful distress for rent before it was due, it must be alleged that the goods were sold and "double value" (under the former wording) claimed pursuant to the statute, otherwise the action is simply for conversion: Williams v. Thomas, 25 O. R. 536. No tenancy need be pleaded; it is sufficient if it appear that the seizure was made under colour of distress: Stoddart v. Arderly, 6 O. S. 305. "Full satisfaction," formerly "double value:" see cases collected Ont. Dig. Case Law, col. 1991.

55. The Assessment Act does not warrant a municipal tax collector* seizing for arrears of taxes goods which being under distraint by a landlord are *in custodia legis*: Knyston v. Rogers, 31 O. R. 119. Demise to mortgagor: seizure of mortgagor's goods: mortgagee's claim under this statute: see Hobbs v. Ontario Loan and Debenture Co., 18 S. C. R. 483; also Ont. L. & D. Co. v. Hobbs, 15 O. R. 440, 16 A. R. 525. Landlord's claim for rent: chattel mortgagee's claim and execution creditor: see Clarke v. Farrell, 31 C. P. 584. Where landlord makes a mistake as to particulars of rent due: Tomlinson v. Jarvis, 11 U. C. R. 60. The sheriff is not liable for removing goods when rent is due unless he has notice: Kingston v. Shaw, 6 L. J. 280; see also S. C. 20 U. C. R. 223. Formal notice is not necessary; it may be implied from the landlord's acts: Sharpe v. Fortune, 9 C. P. 523; or it may be oral: Brown v. Ruttan, 7 U. C. R. 97. Where goods are seized under execution on leasehold premises and claimed by a third party, and where the goods are sold under an interpleader order: see as to landlord's rights: Robinson v. McIntosh, 4 Terr. L. R. 102. Landlord's right to rent as against execution creditor: Cox v. Harper, 1910, 1 Ch. 480. Payment by execution creditors of rent claimed; recovery back:

Baker v. Atkinson, 11 O. R. 735, 14 A. R. 409. Seizure for taxes; priorities: Kingston v. Rogers, 31 O. R. 19. Mortgagee's rights as against execution creditor: see Trust & Loan v. Lawrason, 6 A. R. 286, 10 S. C. R. 679; Ontario Loan and Debenture Co. v. Hobbs, 16 A. R. 255. After sale by sheriff, the goods must be removed within a reasonable time or they will be liable to distress for rent: Hughes v. Towers, 16 C. P. 287; Langton v. Bacon, 17 U. C. R. 559. Mutual rights of landlord's bailiff and sheriff's officer: Beatty v. Rumble, 21 O. R. 184; Gordon v. Rumble, 19 A. R. 440. Sheriff disobeying interpleader order liable to attachment: McLean v. Anthony, 6 O. R. 330; Henderson v. Wilde, 5 U. C. R. 585. Landlord cannot distrain goods held under execution and *in custodia legis*: Grant v. Grant, 10 P. R. 40. But the sheriff's possession may be such as will not preclude the landlord from distraining: McIntyre v. Stata, 4 C. P. 248; Roe v. Roper, 23 C. P. 76; Whimsell v. Gifford, 3 O. R. 1; Langtry v. Clark, 27 O. R. 280; Anderson v. Henry, 29 O. R. 719. Where the sheriff realized under his execution and paid over money, taking a bond of indemnity, he was held not entitled to an interpleader against the landlord: Adams v. Blackwall, 10 P. R. 168; and see as to sheriff's interpleader: Dig. Ont. Case Law, col. 3499, *et seq.* See as to interpleader: see Con. Rules 1102-1132, 1913 Rules, 625, *et seq.* As to this section: H. & L. notes p. 1313. See also provisions of R. S. O. 1914, ch. 63, sec. 216.

57. A claim for damages under this section is an unliquidated claim and not provable against an estate in the hands of an assignee under R. S. O. 1897, ch. 147 (R. S. O. 1914, ch. 134); Magann v. Ferguson, 29 O. R. 235. A claim for double damages under this section is not within Con. Rule 138: see H. & L. notes p. 269, 1913, Rule 33.

59. As to waste see Law and Transfer of Property Act, R. S. O. 1914, ch. 109, sec. 29, *et seq.*

60. This was formerly R. S. O. 1897, ch. 342, sec. 23; 11 Geo. II., ch. 19, sec. 11.

61. This was formerly R. S. O. 1897, ch. 342, sec. 24; 4 and 5 Anne, ch. 3 (or 16 Ruffhead's Edn.), secs. 9 and 10. Necessity for attornment: Horn v. Beard, 1912, 3 K. B. 181. Landlord's agent: Hope v. White, 17 C. P. 52.

63.—(6) As to costs: see R. S. O. 1914, ch. 56, sec. 74.

PART II.

DISPUTES AS TO RIGHT TO DISTRAIN.

PART III.

OVERHOLDING TENANTS.

75.—(1) Occupant: see Re Grant v. Robertson, 8 O. L. R. 297.

75.—(2) It is now competent for a County Judge to try and determine a question of fact where the testimony is conflicting: Re Graham and Yardley, 14 O. W. R. 30.

75.—(3) A tenant overholding after 1st March did so by the landlord's consent pending negotiations. When these ended on March 19 the landlord served a notice demanding possession on March 23. On the tenant's failure to give up possession on that day, the landlord instituted proceedings under this Act without further demand of possession. Held that the tenant was a tenant at will. The notice of 19th March had the effect of extending his tenancy to March 23 and a demand of possession after that date was necessary to give the County Court Judge jurisdiction: Re Grant and Robertson, 3 O. W. R. 846, 8 O. L. R. 297. Where entry is sought for breach of provision in a lease the notice under R. S. O. 1914, ch. 155, sec. 20 (2), specifying the breach, must be given, as that is applicable to summary proceedings under this Act: Re Snure and Davis, 4 O. L. R. 82; see *ante*, sec. 20. On an application for an order under this Act a copy of the affidavit filed on the application was not served. Counsel appeared and took the objection and the application was adjourned to have the affidavit served and the matter was subsequently heard, argued, and the order made. It was held that the right to have

a copy of the affidavit served could be and had been waived: Re Dewar and Dumas, 8 O. L. R. 141.

77.—(2) Under this Act two things must concur to justify the summary interference of the County Court Judge: (1) the tenant must *wrongfully* refuse to go out of possession, and (2) it must appear to the Judge that the case is *clearly* within the purview of the Act: Re Snure and Davis, 4 O. L. R. 82. Since the words "without colour of right" have been struck out of the statute by 58 Vic. ch. 13, sec. 23, the County Court Judge has jurisdiction to decide applications where there is some contest, but only simple, clear cases may be tried in this summary way: In re Lumbers and Howard, 9 O. L. R. 680; Re Grant and Robertson, 8 O. L. R. 297; Moore v. Gillies, 28 O. R. 358; Ryan v. Turner, 14 Man. L. R. 624; Magann v. Bonner, 28 O. R. 37. Where the dispute was whether the tenancy was monthly or yearly the County Judge had jurisdiction: Moore v. Gillies, 28 O. R. 358. Dispute as to tenancy in overholding proceedings: see St. David's Spring v. Lahey, 23 O. W. R. 12, 4 O. W. N. 32. Right of Judge to decide on conflicting evidence: Re Dickson and Graham, 4 O. W. N. 100, 27 O. L. R. 239. See under R. S. O. 1887, ch. 144; Price v. Guinane, 16 O. R. 264; Bartlett v. Thompson, 16 O. R. 716; Longhi v. Sanson, 46 U. C. R. 446; Dobson v. Sootheran, 15 O. R. 15. For cases under 31 Vic. ch. 26, 27 and 28, Vic. ch. 30, 4 Wm. IV. ch. 1, C. S. U. C. 27: see Dig. Ont. Case Law; cols. 3845, 3848. For general law affecting overholding tenants: see Armour, R. P. p. 148, *et seq.*

78.—(1) Injunction not granted to stop proceedings under this Act; proceedings cannot be removed until writ of possession issued: Re Brown and Godwin, 17 O. W. R. 102, 2 O. W. N. 125. It is only the proceedings and evidence before the Judge sent up pursuant to *certiorari*, at which the Supreme Court may look for the purpose of determining what is to be decided under this section. Where there was nothing in the evidence to shew that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter the Court set aside the order for possession: Re

Snure and Davis, 4 O. L. R. 82. It seems that proceedings under this Act can be removed into the Supreme Court only when this section applies, *i.e.*, after a writ of possession has been issued: Re Warwick and Rutherford, 6 O. L. R. 431. Appeal from refusal to grant writ: Re Dickson and Graham, 27 O. L. R. 239. An application under this section should be made to a Divisional Court: Re Scottish Ontario and Manitoba Land Co., 21 O. R. 676; see Con. Rule 117, H. & L. notes p. 255, R. S. O. 1914, ch. 56, sec. 26 (2), (*t*).

78.—(2) It is open to the Court reviewing the decision of the County Judge to say that upon the facts or upon the law the case is not a clear one and thereupon discharge the order: Re Lumbers and Howard, 9 O. L. R. 680. Matters for the Appellate Court: Re Dickson and Graham, 27 O. L. R. 239.

CHAPTER 156.

The Apportionment Act.

4. Where demised property is sold by a prior mortgagee under power of sale and the lease is thereby determined between two gale days, the rent is apportionable and the tenant liable to pay rent up to the day of such determination: Kinnear v. Aspden, 19 A. R. 468. Where rent was paid to a tenant for life and to his executor, it was held to be paid for the use of those entitled to it, and that it was apportionable between the executor of the tenant for life and the remainderman: Dennis v. Hoover, 27 O. R. 376. Whether apportionment of dividends can be negatived by anything in the articles of the company declaring the dividends, *quaere*: Re Oppenheimer, Oppenheimer v. Boatman, 1907, 1 Ch. 399. Adverse holding of parts of demised premises: Neale v. McKenzie, 1 M. & W. 763; Kelly v. Irwin, 17 C. P. 351; Holland v. Vanstone, 27 U. C. R. 15. Ejectment, eviction: Boulton v. Blake, 12 O. R. 532. In an

action on the covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt: Shuttleworth v. Shaw, 6 U. C. R. 539. Where a landlord devises the demised premises among several persons, these persons may bring separate actions for the rent according to their respective shares, which the jury in each suit can apportion: Hare v. Proudfoot, 6 O. S. 617. A landlord's right to distrain is suspended as to that portion of the rent which has accrued up to garnishment by the service on the tenant before such distress of an order attaching the rent and distress for such portion is wrongful: Patterson v. King, 27 O. R. 56. As to attachment of rent: see also Massie v. Toronto Printing Co., 12 P. R. 12; Barnes v. Bellamy, 44 U. C. R. 303; Barnett v. Eastman, 67 L. J. Q. B. 517. Attachment of rent: see Con. Rule 911, H. & L. notes p. 1150, 1913 Rule 590. Attachment of rent in Division Court. see R. S. O. 1897, ch. 60, sec. 179: see Bicknell and Seager, p. 323, R. S. O. 1914, ch. 63, sec. 146. Rent accruing due but not yet payable cannot be attached in the Division Court: Christie v Casey, 15 C. L. T. Occ. N. 13, 31 C. L. J. 35; Birmingham v. Malone, 32 C. L. J. 717; and see also general application of this: Bennett v. Eastman, 67 L. J. Q. B. 517.

5. Where a judgment creditor garnished rents accruing due from several tenants to the judgment debtor before any of the gales had arrived, he was held entitled to payment over on the gale days of the proportion of the rents which had accrued due on the day of the serving of the attaching order: Massie v. Toronto Printing Co., 12 P. R. 12. See sec. 4, notes.

7. An "annuity bond" is not within the exception of this section: Cuthbert v. North American Life, 24 O. R. 511.

CHAPTER 157.

THE LAW SOCIETY ACT.

7. A Judge of the Superior Court of this province, who, before he was entitled to a retiring allowance, tendered his voluntary resignation, which was accepted, and who then resumed the practice of his profession, was held to be a "retired Judge," within the then wording of this section: Macdonell v. Blake, 17 A. R. 312.

7.—(2*b*) Omit the words "judicature for:" 4 Geo. V. ch. 2, Schedule (27).

39. Discussion and difference of opinion on the question whether the Discipline Committee were bound to take evidence on oath, and, if so, what amounts to a waiver of the right to have it so taken: see Hands v. the Law Society, 16 O. R. 625, 17 O. R. 300, 17 A. R. 41.

46. What amounts to "due enquiry?" How committee should be called and what notice should be given: see Hands v. the Law Society, 16 O. R. 625, 17 O. R. 300, 17 A. R. 41. Powers extend to deal with cases where there is a charge of violation of the conventional or other regulations which are either prescribed or commonly observed in the profession: Re Rythe, 6 B. & S. 704. Comparison of powers given to the Benchers and to the Medical Council: see Re Crighton, 13 O. L. R. 271 at p. 287.

53. As to powers of the Law Society to make by-laws imposing term fees: see Law Society v. Dougall, 9 U. C. R. 541.

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CHAPTER 158.

The Barristers Act.

3. See Con. Rule 87, 1913 Rule 763.

6. Precedence: see Re Boulton, 1 U. C. R. 317. According to the true construction of B. N. A. Act, sec. 92, sub-secs. 1, 4 and 14, the enactment empowering the Lieutenant-Governor to appoint King's Counsel is *intra vires*: A.-G. for Canada v. A.-G. for Ontario, 1898, A. C. 247; see also Queen's Counsel, 23 A. R. 792; Lenoir v. Ritchie, 3 S. C. R. 575, 1 Cart. 488.

CHAPTER 159.

The Solicitors Act.

Refer to: White on Solicitors; Cordery on Solicitors; Widdifield on Costs (Can.); Cameron on Costs (Can.); Holmested and Langton, Judicature Act and Rules; Annual Practice, etc.

4. The mischief against which the Act is directed is the doing of the prohibited acts for profit; it does not cover gratuitous assistance to poor suitors: Allen v. Jarvis, 32 U. C. R. 56. Unqualified person giving notice of appearance as agent of defendant is guilty of contempt: Re Ainsworth, 1905, 2 K. B. 103. As to practising in Division Courts: see R. S. O. 1914, ch. 63, sec. 110. As to proceedings to enforce mechanics' liens of $100 and under: see R. S. O. 1914, ch. 140, sec. 37 (7).

5. See Con. Rules 88, 89, H. & L. notes p. 239, 1913 Rule 763.

11. Expiry of articles: In re McGachen, 20 U. C. R. 321. Loss of articles: In re Loring, M. T., 2 Vic. Affidavit: *Ex parte* Radenhurst, Tay. 138; *Ex parte* Lyons, Tay. 171. Service with absconding attorney: In re

McGregor, 15 C. P. 54. Refusal of attorney to release clerk or assign articles: In re Patterson, 18 U. C. R. 250. Absence abroad: In re Hagerty, 6 O. S. 188. Business elsewhere: McIntosh v. McKenzie, M. T. 1 Vic. Engaging in other pursuits: In re Hume, 19 U. C. R. 373. Absence through ill-health: In re Holland, 6 O. S. 441. Employment in public office: Re Ridout, T. T., 2 and 3 Vic. Absence of attorney abroad: *Ex parte* McIntyre, 10 U. C. R. 294.

20. A Crown Attorney practising only as such need not take out a certificate: Re Coleman, 33 U. C. R. 51. A solicitor who has not taken out his annual certificate cannot practice even in an isolated instance, nor even when he is interested in the subject matter of the litigation: Re Clarke, 32 O. R. 237.

24. A solicitor is not estopped by permitting his name to appear as a member of a firm of practising solicitors from shewing that he was not a member in fact: Macdougall v. the Law Society, 18 S. C. R. 203.

27. Costs of uncertificated solicitor: Browne v. Barber, 1913, 2 K. B. 553.

28. An attorney agreed with a clerk to take him into partnership at the expiration of his articles and that his share of the profits should commence from the date of his articles. A separation took place. It was held that an action for compensation for services could not be maintained: Dunne v. O'Reilly, 11 C. P. 404.

29. This Act does not deprive the Court of its inherent jurisdiction over solicitors as officers of the Court: Re McBrady and O'Connor, 19 P. R. 37. As to procedure to strike a solicitor off the rolls and full annotation on matters of law and practice regarding answering affidavits, non-payment of money, striking off the roll, suspension, restoration to roll, appeal, restitution and enforcing undertakings: see H. & L. notes pp. 239-243. Jurisdiction of Supreme Court: see Re O'Donohoe, 14 P. R. 317; O'Donohoe v. Beatty, 19 S. C. R. 356.

34. This section, formerly R. S. O. 1897, ch. 174, sec. 34, and following sections will be found fully annotated in H. & L. 3rd edition pp. 1398-1410. It may be convenient to observe that present sec. 34 (1) was formerly R. S. O. 1897, ch. 174, sec. 34; sec. 34 (2) was sec. 43; sec. 36 (1) was 37; sec. 36 (2) was 41; sec. 37 was 38; sec. 38 was Con. Rules 1185-6-7; sec. 39 was 44; sec. 40 (1) was 45; sec. 40 (2) was 46; sec. 40 (3) was 47; sec. 40 (5) (6) was Con. Rule 1188; sec. 41 was 48; sec. 42 was 49; sec. 43 was 50; and sec. 45 was 51.

"No bill rendered" as defence to action: Section 34 of the Solicitors Act, R. S. O. 1897, ch. 174, requires the delivery of a bill of "fees, charges or disbursements for business done by a solicitor as such," as a condition precedent to an action therefor. In Belcourt v. Crain, 22 O. L. R. 591, after the solicitors had rendered the services in question to the client, and, while they had in their possession a cheque from a government department for a portion of the amount recovered, an agreement was made by which the solicitors' charges were fixed at $1,200. A portion of this was then paid, and, on the faith of the defendant's promise to pay the balance, the cheque was handed over to him. Suit was brought for the balance remaining due. The agreement was found as a fact, and also that it was fair. The Court then proceeded: "In Jeffreys v. Evans (1845), 14 M. & W. 210, an action was brought upon a note given by a client to his solicitor in payment for professional services. The defendant by his plea set up this fact, and that no bill had been delivered. The plaintiff demurred upon the ground that his action was upon the note, which was a new and independent cause of action, and his counsel contended that the Solicitors Act afforded no answer to his claim to enforce payment of the note. Had his client paid without a bill, he could not maintain an action to recover the money back. Lush, for the client, contended that in truth the action, though based on the new promise, was to recover fees, etc. To this Pollock, C.B., answered: "No; he is only suing on the security given to him, and which must be considered as having been given in discharge of so much of his bills;" and Parke,

B., said: "It is perfectly clear what the statute meant—to protect clients if they chose to be protected, not if they chose to give a bond or bill for the debt." In Thomas v. Cross (1864), 13 W. R. 166, Lord Chancellor Westbury had before him an action to enforce a mortgage taken by a solicitor from his client in payment of costs, no bill having been rendered. At p. 167 it is said: "His Lordship then proceeded to consider the statute with respect to which the question arose, whether there was any prohibition by reason of no bill of costs being delivered. He had a strong impression that those words had been construed judicially to prohibit suits and actions upon that particular contract or assumption that arose between attorney and client. But when a suit had been commenced on another contract into which the client had entered, there was nothing to which the statute applied. It contained no prohibition against enforcing collateral engagements. His Lordship, therefore, wholly recognized the decision of the Court of Exchequer in Jeffreys v. Evans, as applicable to the present case." His Lordship follows this by drawing attention to the fact that the action, a mortgage action, could not be regarded as an action to recover fees, etc., but this in no way detracts from the earlier statement. In Brooks v. Bockett (1847), 9 Q. B. 847, and Scadding v. Eyles (1846), *ib.* 858, it was held that a mere statement of account did not take the case out of the statute, as the action still was one for the recovery of fees, etc. That services rendered afford a basis for such a new promise is clear from the following extract from Halsbury's Laws of England, vol. 7, p. 388, based *inter alia* upon a statement of Bowen, L. J., in Stewart v. Casey (1892), 1 Ch. 104, at p. 115: "When services have been rendered by one person to another at his request, a subsequent promise to pay for the services can be enforced. This is, perhaps, not a real exception to the rule stated above" (*i.e.*, that a past consideration though a motive for a promise, is not a real consideration). "for in such a case there may be an implied promise to pay for the service, and the subsequent express promise may be treated either as an admission which evidences, or as a positive bargain

which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered." Belcourt v. Crain, 22 O. L. R. 591. In this case there was not considered the question of what constitutes payment to preclude taxation (see sec. 42), but merely the question arising under sec. 34: Belcourt v. Crain, *Ib.* Making of agreement and taking bill of exchange held not a bar to client's right to bill of costs: Ray v. Newton, 1913, 1 K. B. 249. An agreement by a solicitor to take a gross sum from a client is regarded by the Court with jealousy as the knowledge is all on one side: Re Whitcombe, 8 Beav. 140. Agreement followed by taking of notes in settlement: Re Ker, 1849, 12 Beav. 390. Clients applied to tax bill for which promissory notes had been given, which notes were overdue and unpaid. The usual order for taxation was made, the clients swearing that there never was an agreement, that the notes were taken as payment, and that there was to be no taxation: Re Solicitors, 13 O. W. R. 680. Without a bill duly rendered or an agreement in writing, it is impossible for the solicitor to maintain an action to recover remuneration for his services: Re Curry v. MacLaren, 12 O. W. R. 1108. Where a solicitor has rendered bills and statements of a cash account which are agreed to by the client who executes a mortgage to the solicitor and covenants to pay the amount due on the account stated, the client's trustee in bankruptcy is not estopped and may enquire into the real indebtedness: Re Van Laun, *ex p.* Chatterton, 1907, 2 K. B. 23. Effect of Private Act, 2 Geo. V. ch. 125, sec. 6, on this provision: Gundy v. Johnston, 23 O. W. R. 101, 4 O. W. N. 121, 28 O. L. R. 121. Where a solicitor having sent in a bill of costs, subsequently sends in an amended bill for a larger amount and brings an action to recover the second bill, the first bill is cogent, but not conclusive evidence of the amount due him: Lumsden v. Shipcote Land Co., 1906, 2 K. B. 433. Delivery of solicitor's bill by post: Brown v. Black, 1911, 1 K. B. 975, 1912, 1 K. B. 316. Delivery of bill of "fees, charges and disbursements:" Gundy v. Johnston, 28 O. L. R. 121. 4 O. W. N. 788; Gould v. Ferguson, 4 O. W. N. 1493. "Retainer" considered: a promise to pay a retainer is void: Re Solicitor, 2 O. W. N. 67, 21 O. L. R. 255,

17 O. W. R. 2, 22 O. L. R. 30. Cesser of retainer on death of client: Royce & Henderson v. Nat. Trust Co., 13 O. W. R. 1159. The employment of a solicitor to bring or defend an action (subject possibly to his right to claim payment of his costs on judgment being given) does not terminate with the giving of judgment so long as anything remains to be done which is the solicitor's duty to do for the client's protection: Millar v. Kennedy, 5 O. L. R. 412. Bearing of this on the Statute of Limitations: Millar v. Kennedy, 5 O. L. R. 412. Delivery of bill with lump charges for conveyancing: Consideration of the items necessary to constitute a proper bill to enable the solicitor to succeed in action brought one month after delivery: Gould v. Ferguson, 29 O. L. R. 191. Query as to bearing of 1913 Tariff on solicitor and client bills and inferentially on conveyancing bills. Signing and delivery of bill: see cases Dig. Ont. Case Law, vol. 3, col. 6568, *et seq.*

35. The well established practice is to take a written retainer: Allen v. Bone, 4 Beav. 431. When the retainer is disputed the question should be tried in the ordinary way rather than by a taxing officer: Re Solicitor, 14 O. W. R. 2, 80, 707; 1 O. W. N. 51. Where the order for taxation of a solicitor's bill obtained at the instance of the client does not reserve the right to dispute the retainer, the retainer must be taken as admitted: Re McCarthy; McCarthy v. Walker, (No. 3), 4 Terr. L. R. 8. Question of retainer on reference at instance of solicitor: Re Solicitor, 10 O. W. R. 951. Where it is admitted that there was an agreement between the solicitors and the client for a fixed remuneration for the services rendered, that fact would render an *ex parte* order irregular: Re Solicitors, 10 O. W. R. 951. See also Re Inderwick, 25 Ch. D. 279; In re Fanshawe (1905), W. N. 64; O'Connor v. Gemmill, 26 A. R. at p. 38. See notes to secs. 34 and 38. The jurisdiction granted by this Act to order delivery of a bill for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed. There is power to order delivery of a bill whether or not it is one which the Court would have power to refer to taxation: Re McBrady, 19 P. R. 37. The Court has no jurisdiction to order a

solicitor to furnish a bill of costs to a client against whom he refuses to make any charges for professional assistance: Re Griffith, 1891, 7 Law Times, Rep. 268. Taxation of agent's bill of costs: In re Wilde, 1910, 1 Ch. 100. Proceedings under common order to tax; defences and effect: Re Brockman, 1909, 2 Ch. 170. Authority of County Court Judge to make order: Re Drinkwater and Kerr, 10 O. W. R. 511, 15 O. L. R. 76. *Ex parte* order for taxation should not be granted where the bill has been rendered for more than 12 months. On an application to set aside an *ex parte* order, if special circumstances are shown which would have warranted the order on special application, the *ex parte* order will be allowed to stand: Re McCarthy, McCarthy v. Walker, 2 Terr. L. R. 346. Where a client obtained the usual order for taxation of a solicitor's bill, in respect of which the solicitor had sued him, and had had the action stayed pending taxation, although he made no submission to pay the amount found due, the solicitor when the taxation is complete and the certificate signed, is entitled to an order for leave to sign judgment for the amount due. The certificate is final unless application is made to review the taxation: Re McCarthy, McCarthy v. Walker (No. 2), 4 Terr. L. R. 1. The established practice is for the Taxing Officer to require the whole bill to be brought in for taxation, including party and party costs, and extra costs as between solicitor and client. It is not proper to deliver the bill in two parts: Cobbett v. Wood, 1908, 2 K. B. 420. Solicitors having delivered an unsigned bill, the client applied for and obtained an order that they do deliver a bill and for taxation of same when delivered. Under this order the solicitors delivered a bill in which certain items were made larger and new items inserted. Held that in applying for the order the clients necessarily consented to the old bill being withdrawn and the solicitors were entitled to do as they had done: Re Walsh and Fish, 7 O. L. R. 41. A client charged for drawing deeds, receiving and paying over money, investigation of title, etc., may require the bill to be taxed. If suit is brought without taxation the amount may be ascertained at trial on a *quantum meruit*. We have no tariff

binding on us, though as understood among solicitors, there is a general tariff or set of ascertained charges: Re Attorneys, 26 U. C. C. P. 495. Solicitor having retained lump sum for costs, client applying within month for a bill for taxation is entitled to have one, but solicitor may deliver one for larger amount than was paid: Re Solicitor, 13 O. W. R. 357. A solicitor, with the consent of the executor, applied for and obtained *ex parte* an order for the taxation in Toronto of a bill against the executor rendered in respect of an estate being wound up in the Surrogate Court. The order was set aside, one sufficient ground being that such taxation would not be binding on the Surrogate Judge: Re Solicitor, 3 O. W. N. 30, 19 O. W. R. 965. Taxation of mortgagee's costs by mortgagor: see R. S. O. 1897, ch. 120, sec. 30.

36. Special circumstances justifying an order for taxation more than 12 months from delivery must be proved by affidavits on the application. The onus lies on the applicant: Re Chisholm and Logie, 16 P. R. 162.

38. Solicitor's costs where approval of Court of settlement on behalf of infant defendant not obtained: Vano v. Canadian Coloured Cotton Co., 21 O. L. R. 144. What is a "reference" under this section: see Lumsden v. Shipcote Land Co., 1906, 2 K. B. 433. Where a solicitor's bill was referred by agreement to an accountant "and in case of dispute in a summary way to —— under R. S. O. 1897, ch. 174, for decision," it was held that this meant "without ceremony or delay," the words "under R. S. O. 174" merely introducing the procedure under this Act and not providing for an appeal: Sale v. Lake Erie and Detroit Ry., 32 O. R. 159. If there is jurisdiction to order taxation, there is also jurisdiction to order delivery of a bill which would be taxed, having regard to the nature and value of the services rendered and business done and the scale of allowances between party and party so far as applicable: Bosse v. Paradis, 1892, 21 S. C. R. 419; Re Sudlow, 1849, 11 Beav. 400. "Upon the ordinary reference to taxation at the instance of a solicitor, the question of retainer is for the determination of the taxing officer. I see no reason

why he should not with equal propriety determine this question of agreement or no agreement. To set aside the present order for taxation would be in effect to give to the client the benefit of an alleged agreement which is not yet established. This I must decline to do:" Per Anglin, J.: Re Solicitor, 10 O. W. R. 951.

Where solicitors are employed to do the work of (*e.g.*,) brokers, whether their fees are taxable depends on Lord Langdale's test. If the business is "business in which the . . . solicitor was employed because he was a solicitor, in which he would not have been employed if the relation of solicitor and client had not subsisted between him and his employer: Allen v. Aldbridge; Re Ward, 1844, 5 Beav. 401, frequently cited and recently applied in Re Baker, Lees & Co., 1903, 1 K. B. 189. For services within the rule of Allen v. Aldbridge the remuneration may be: (1) A percentage, as in Re Richardson, 1870, 3 Ch. Ch. R. 144, when the practice is defined as to the manner in which the master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money, or (2) a lump sum, as in Re Solicitor, 1908, 12 O. W. R. 1074; Re Solicitor, 27 O. L. R. 147. In the case In re Aitken (1820), 4 B. & Ald. 47, Abbott, C.J., said: "Where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." See also in Re Richardson (1870), 3 Ch. Ch. 144. in Re Barker (1834), 6 Sim. 476. The real question is, what sum are the solicitors entitled to for the business done and services rendered by them as solicitors. It is to be observed, however, that the proceeding to ascertain the sum due a solicitor under the Solicitors' Act is therein invariably termed a taxation wholly irrespective of the nature of the business done by the solicitor: in Re O'Connor v. Gemmill, 26 A. R. 27; see also Re McBrady & Co., 19 P. R. 37. As to duty of solicitor not to undertake work of a broker himself, but with the client's assent, to employ a broker, see remarks of Meredith, J.A., Re Solicitor, 4 O. W. N. 47, 27 O. L. R. 147.

"The bill is for business in which the solicitor was employed because he was a solicitor. It comes within the legitimate and peculiar province of solicitors at the present day to draw and prepare agreements, wills, deeds, settlements, securities and documents and also to conduct negotiations and solicit loans, superintend the management and letting, purchasing and selling of property, estates and annuities and to collect and receive rents, debts, etc., invest and dispose of moneys and find sufficient securities for the purpose, thus acting as procurators, negotiators, conveyancers, confidential advisers, agents, stewards, collectors and scriveners. The solicitor is not to act gratuitously, he is to be paid for his services. But paid upon what footing? In the absence of a specific contract, the general custom of solicitors is to be the guide as to the compensation allowed if any custom and practice exists; if not, the value of the service is to be on a *quantum meruit*. The usage of this country as well as in England has been that an agent, whether solicitor or not, instructed to deal with another man's estate, to rent it or sell it or collect the proceeds of sale shall be paid by means of a commission upon the prices obtained and the moneys realized and remitted. The amount of trouble in each case is not to be a criterion. If it were, a percentage basis would not be maintainable." Commission disallowed on money collected and not remitted: Re Richardson, 3 Ch. Ch. R. 144. The Court never interferes with Master's taxation unless to correct error of principle or obvious error of calculation: Burton v. Burton, L. J. N. S., Ex. 291; Re Attorneys, 26 U. C. C. P. 495; Re Attorneys, 29 C. P. 495.

"The evidence shews that a sale having been effected, the solicitor was retained to see that it was carried out. It was found necessary to bring an action against the intending purchaser and another. After action brought, a settlement was arrived at whereby the money was secured. The solicitor, after inquiry from various sources, made a charge of 20 per cent. on the amount realized, *i.e.*, $110. The taxing officer has allowed $60, and the solicitor now appeals. To my

mind the evidence is such that the taxing officer might well have allowed the whole fee charged, and if I had the power I should allow the appeal. There is no doubt that solicitors, being for reasons of public policy, vested with the sole right to take certain proceedings, they cannot complain if they can be allowed a certain fixed sum, however small that may be, as remuneration for their services in such proceedings. There is no compulsion that any person shall become, or becoming, shall continue to be, a solicitor. No solicitor, knowing, as he must, the rate at which such services as he may perform purely as a solicitor are to be remunerated, can feel aggrieved if he, upon a dispute, is not permitted to compel payment of any sum in excess of the fixed tariff rate, inadequate as such rate may be, and in many instances, in my humble judgment, actually is. If solicitors are not satisfied with the law, they have the right, like every other citizen, to endeavor to have it changed. But in proceedings in which there is no monopoly—proceedings taken by persons who indeed are solicitors, but who do not act differently or with any different right from those not solicitors—I cannot see why they should not be paid the same as any other person. But I am bound by authority impossible to get over. The Court will not determine questions relating to *quantum* only, which will be left to the discretion of the taxing officers;" Falconbridge, J., giving the judgment of a Divisional Court in Conmee v. North American Railway Contracting Co., 13 P. R. 433. "The Court never interferes with the Master's taxation except to correct an error of principle into which he may have fallen:" Burton v. Burton, 29 L. J. N. S. Ex. 291, at p. 293, per Pollock, C.B., cited with approval by the Court of Common Pleas in Re Attorneys, 29 C. P. 495, at p. 497. This Court (Common Pleas) said: "We find no principle or rule of decision violated. We find no plain error or mistake;" and refused to interfere. The Court added: "The Court must necessarily possess a general jurisdiction over the taxing officer in all matters to prevent any positive wrong to parties or suitors; but gave no countenance to the proposition that, where the taxing officer has not

made any mistake in principle, and the sum awarded is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court can interfere with the discretion of the taxing officer. Here the taxing officer has made no mistake in principle. He, as his written memorandum shews, has followed the proper principle, and the fact that he, in his discretion, has awarded a smaller sum to the solicitor than I would have done, is no reason for interfering:" Per Riddell, J., in Re Solicitor, 12 O. W. R. 1074; see also Re Solicitors, 2 O. W. N. 1421, 3 O. W. N. 194, 4 O. W. N. 47, 19 O. W. R. 753, 20 O. W. R. 282, 27 O. L. R. 147.

Appeal by solicitors: (1) against the disallowance by the taxing officers of a commission by way of remuneration for services in negotiating and completing a sale of stock and bonds; (2) in not allowing to the solicitors remuneration for the services of the solicitors as directors and officers of a company. It was held that the taxing officer acted upon a proper principle in dealing with the solicitors, and the costs as upon *quantum meruit*. "If the solicitors intended to make a charge of 5 per cent., or any other large sum by way of commission, the clients were entitled to know of it, so that they could at least have endeavoured to separate what may be called the financial part of the business from that which is generally understood to be the work of solicitors, and counsel—the difficult work of organization and steering corporations away from the troubles into which so many fall. It may be accepted, as the solicitors allege, that solicitors are entitled to receive the same remuneration as could be recovered by any person not a solicitor, for the same service. It is not the case, however, that a solicitor employed as such, and doing special work in connection with a company or undertaking and charging for that work, can, at the end, when the undertaking is to be sold—or when bonds are issued and sold, as the result of all the work of solicitor and client, and for which the client has paid the solicitor—charge a commission adding it as "rounding out" the bill of costs. The evidence taken as a whole does not establish that in this case 5 per cent. was only reasonable. As to

the claim for remuneration for the services as directors and officers of the company by members of the firm of solicitors, it was held that the taxing officer was wrong in principle under the circumstances, as the services rendered, while in form and normally for the company, were really and in fact for the clients: Re Solicitors, 2 O. W. N. 1491, 3 O. W. N. 194, 19 O. W. R. 753, 20 O. W. R. 282. This case having been further appealed, it was held that where items are not tariff items, the remuneration of the solicitor is to be based on the value of his services, a question of fact to be determined by the taxing officer on proper evidence, and his conclusion thereon is open to review by the Court, the rule that the Court will not interfere with the taxing officer's discretion having no application to such a case: Re Solicitor, 4 O. W. N. 47, 27 O. L. R. 147 (see last case).

In England there are special statutory provisions for the taxation of the bills of parliamentary agents, and where all the services rendered by a solicitor are such as a parliamentary agent not a solicitor might have rendered, the English Court of Appeal has held that a bill for such services is not taxable under the Solicitors' Act, but if the work done, and for which a bill is rendered, includes services rendered not merely as a parliamentary agent, but such as only a solicitor would be retained to give, the fact that work which might have been done by a parliamentary agent is included in the bill, does not preclude the right of either the solicitor or the client to have the whole submitted to taxation under the Solicitors' Act: Re Baker, Lees, & Co., 1903, 1 K. B. 189. The fact that we have no special provisions for the taxation of the costs of parliamentary agents affords an additional reason for holding such a bill subject to taxation under the Solicitors' Act: Re Solicitor, 10 O. W. R. 951. Taxation of bill as parliamentary agents: Re Strother, 1857, 3 K. & J. 518. Where a bill for $3,500 for services in recovering a considerable sum from the government was under consideration it was said: "The bill rendered covers about 110 folios, and if the charges were extended at from $2 to $5 per

hour, as contended for by clients, the total would probably not amount to more than about $2,000. It does not seem to me, however, that this is necessarily the proper method of assessment, and I am further of opinion that an amount so arrived at would not, in the present case, be adequate remuneration. We are outside the region of tariffs. Any fixed charge per hour or per day would be purely arbitrary. If any analogy is to be drawn to tariff charges, the bulk of these services is in the nature of counsel work. Moreover, it is sworn that very many attendances on members and officials of the government, as well as on clients, do not appear in the bill at all, and it is also sworn, and must indeed be obvious, that an immense amount of study of documents and figures was necessary to familiarise the solicitors with the details of the case. It was even necessary for them to be thoroughly conversant with the details of the negotiations prior to the arbitration in order to meet the objections and smooth out the difficulties which were constantly arising. Then the personal equation counts for a great deal. Much persistence as well as tact and perseverance are necessary in order to carry a matter of this kind to a successful issue." The amount claimed was allowed: Murphy v. Corry, 7 O. W. R. 363, 392, 574. Where a solicitor practices also as a barrister, the client usually obtains the services of counsel without special retainer. A substantial general " fee on settlement " is in the nature of a counsel fee and may be allowed, not on a commission basis, but as a *quantum meruit*: Re Phillips and Whitla, 20 Man. L. R. 154, 20 W. L. R. 533; Re Johnston, 3 O. L. R. 1; Re Phillips and Whitla, 23 W. L. R. 161.

Solicitors practising in Ontario are subject to the provisions of this Act, and work and services performed by them, though done and performed in the Exchequer Court, are none the less done by them in their capacity of Ontario solicitors. It is " business done by a solicitor as such " within the meaning of the Act. By the Exchequer Court Act, R. S. C. ch. 135, the defendants are authorized by reason of their being solicitors in this Province to

practice as solicitors in the Exchequer Court, and are officers of that Court. But that does not alter their status as solicitors in Ontario, nor deprive the Courts of the Province of jurisdiction over them, even in respect of business done by them in the Exchequer Court. The Exchequer Court has not deemed it advisable to provide a tariff of costs between solicitor and client. But even if there was such a tariff, I think that would not oust the jurisdiction of the Courts of Ontario under the Solicitors Act: Re O'Conner and Gemmill, 26 A. R. 27. Proper fees for procuring an option: *quantum meruit*: Aylen v. Lindsay, 23 Que. S. C. 345. Proper charges for collecting large sums without suit. Means of ascertainment of propriety of lump sum charged: Re R. L. Johnston, 3 O. L. R. 1. Entries in solicitors' dockets as evidence of correct charges, and how far binding on solicitors: Re Solicitors, 4 O. W. N. 47, 27 O. L. R. 147. Taxation, statute-barred terms, submission to pay: Re Brockman (1909), 2 Ch. 170.

40. On a taxation at the instance of a third party, the taxing officer is right in disallowing any unusual or unnecessary costs though incurred by special instructions of the person chargeable, which apart from the special instructions would not have been allowed against the person chargeable on an ordinary taxation. This is the case, whether the liability of the third party arises out of an implied contract or under express agreement not amounting to a complete indemnity: In re Longbotham and Sons, 1904, 2 Ch. 152; Re Cohen and Cohen No. 2, 1905, 2 Ch. 137. Note the difference between the Ontario Statute and the corresponding English Act, 6 and 7 Vic., ch. 73, sec. 39. Under the latter a person interested in an estate out of which costs are payable is entitled to have them taxed: see In re Jones, 1904, 2 Ch. 363. While under the Ontario Statute the right is confined to persons "liable to pay or who have paid" any bill: see Re Hague, 12 P. R. 119. Applicants for taxation: parties liable: Dig. Ont. Case Law, vol. 3, col. 6544-5.

42. Where no bill of costs has been delivered by solicitor to his client, there cannot be payment

within the meaning of the Solicitors Act. This is true even where the client paid a lump sum in full settlement. Re Pinkerton and Cooke, 18 P. R. 331. When bills will be treated as not open to taxation: delay and no specific overcharge: Re Beatty Solicitor, 19 P. R. 271. Where in a moment of generosity a client, saying he did not want a bill, pays his solicitor's account, but subsequently repents, an order for delivery will be made, but the solicitor will not be debarred from showing that he is entitled to more than he had received: Re Solicitor, 13 O. W. R. 357. Lapse of year: see cases, Dig. Ont. Case Law, vol. 3, col. 6556, *et seq.*

44. As to general principle observed in taxing solicitor's bill where no tariff is directly applicable: See notes to sec. 38 *ante*. For tentative conveyancing tariffs: see notes to sec. 47 *post*. Costs of services outside of solicitor's services: Re Solicitors, 2 O. W. N. 1421, 19 O. W. R. 753.

47. As there is no official tariff in Ontario for conveyancing and other general legal business, three of the Law Library Associations have adopted minimum tariffs for the guidance of their members, namely, in Toronto, Ottawa and Hamilton. These are as follows:

COUNTY OF YORK LAW ASSOCIATION.

Conveyancing Tariff (Toronto).

Costs of Solicitor for Purchaser or Mortgagee:—(The following fees include the cost of preparing or revising the agreement for sale or mortgage; and all other usual services in investigating and certifying to the title and completing the transaction, *but do not include disbursements*. These fees, however, are not applicable in special cases, where there are different chains of title, or where more than the usual services are rendered, or responsibility incurred.)

(*a*) Where the value of the property in question (inclusive of incumbrances), or the

amount of the loan, is $1,000.00 or under, minimum fee $10.00

(*b*) Where such value is between $1,000.00 and $3,000.00, 1 per cent. on value.

(*c*) Where such value is between $3,000.00 and $20,000.00, $30.00 plus 1-2 of 1 per cent. on value above $3,000.00.

(*d*) Where such value exceeds $20,000.00, $115.00 plus 1-4 of 1 per cent. on value above $20,000.

COSTS OF SOLICITOR FOR THE VENDOR OR MORTGAGOR:

Half fees computed as above, minimum fee 10.00

IN LAND TITLE MATTERS:—

Half fees computed as above, minimum fee 10.00

(*e*) For the preparation of a conveyance, and one counterpart, including attendances, where no other services are rendered, one-quarter fees, computed as above, minimum fee 5.00

And for each folio exceeding seven 1.00

(*f*) For the preparation of a mortgage, and one counterpart, including attendances, where no other services are rendered, one-third fees, computed as above, minimum fee 5.00

And for each folio exceeding seven 1.00

(*g*) For the preparation and completion of a discharge of mortgage, under three folios, including one attendance on execution 2.50

For each additional folio above three, or each additional attendance 0.50

(*h*) For searches at Registry Office, in matters other than above, where no certificate of title is given, for each hour 4.00

(*j*) Minimum fee for any search at Registry Office 2.00

(*k*) Fee for preparation of necessary documents, other than deeds, in connection with completing transaction, 50 cents per folio; minimum fee 1.00

COSTS OF SOLICITOR FOR LESSOR:—

(*l*) For the preparation of a lease (and one counterpart) in statutory form, where the term does not exceed seven years, minimum fee $5.00

And where the annual rent exceeds $500.00, an additional $1.00 for each $100.00 (or fraction thereof) of such rent, between $500.00 and $1,000.00 and an additional 50 cents for each $100.00 (or fraction thereof) of such rent above $1,000.00.

And where such lease contains special provisions, an additional $1.00 for each folio exceeding seven folios.

(*m*) All other leases, (one-third fees, computed as in paragraphs (*a*), (*b*), (*c*) and (*d*), on the value of the demised premises, minimum fee 10.00

And an additional $1.00 for each folio exceeding seven.

COSTS OF SOLICITOR FOR LESSEE:—

For revising and attending to completion of lease, half fees, computed as above, minimum fee 5.00

(*n*) Where the title to the demised premises is investigated, the fees of the solicitor for the lessee, including revision and completion of the lease, to be computed as in paragraphs (*a*), (*b*), (*c*) and (*d*), on the value of the demised premises; minimum fee 10.00

Where the value of the demised premises is in question, it may be fixed by capitalizing the rent, if a rack rent, at 10 per cent., or, if a ground rent, at 5 per cent.

COUNTY OF CARLETON LAW ASSOCIATION.

SOLICITORS' TARIFF OF FEES FOR CONVEYANCING, ETC.

Minimum Charges in Addition to Disbursements.

1. Preparing conveyance, investigating title and completing purchase—

(*a*) On amounts from $1,000.00 to $1,500.00, 1 per cent.

(*b*) On amounts above $1,500.00 and up to $5,000.00 in addition to fees provided for by paragraph (*a*), 1-2 of 1 per cent. on excess above $1,500.00.

(*c*) On amounts above $5,000.00 and up to $10,000.00, in addition to fees provided for by paragraphs (*a*) and (*b*), 1-4 of 1 per cent. on excess above $5,000.00.

NOTE.—Where the amount is over $10,000.00, a fee in addition to the fees provided for by paragraphs (*a*), (*b*) and (*c*) may be arranged for.

2. Preparing mortgage, examining title and completing loan.
   (*a*) On loans from $1,000.00 to $1,500.00, $15.00.
   (*b*) On loans above $1,500.00 and up to $5,000.00, in addition to fee provided for by paragraph (*a*), 1-2 of 1 per cent. on excess above $1,500.00.
   (*c*) On loans above $5,000.00 and up to $10,000.00, in addition to fees provided for by paragraphs (*a*) and (*b*), 1-4 of 1 per cent. on excess above $5,000.00.

   NOTE.—Where the loan is over $10,000.00, a fee in addition to the fees provided for by paragraphs (*a*), (*b*) and (*c*) may be arranged for.

   NOTE.—The above charge is in addition to any fee for negotiating loan.

3. Revising conveyance or mortgage, answering requisitions and completing sale or mortgage, if acting for vendor or mortgagor only, $5.00 and upwards.
4. Short form of conveyance or quit Claim Deed, $5.00.
5. Mortgage, ordinary, or Assignment of Mortgage, $6.00.
6. Discharge of Mortgage, $2.50.
7. Partial Discharge of Mortgage, $3.00.
8. Chattel Mortgage and Bill of Sale—
   For $50.00 and under, $3.00.
   Over $50.00 and up to $100.00, $4.00.

Over $100.00 and up to $500.00, $5.00.
Over $500.00, $6.00 and upwards.
Where schedule is over 3 folios, 40 cents per folio additional.

9. Discharge of Chattel Mortgage, $2.50.
10. Renewal Statement of Chattel Mortgage, $3.50.
11. Assignment for Benefit of Creditors, $10.00.
12. Mechanics' Liens, $5.00 up to $200.00; $7.00 and upwards over that amount.
13. Discharge of Mechanics' Lien, $2.50.
14. Collection of Interest on Mortgage, 2 per cent.
15. Agreement for Renewal of Mortgage, $500 and upwards.
16. Lease, $4.00 and upwards.
17. Wills, $5.00 and upwards.
18. Release of Equity of Redemption, $5.00.
19. Agreement for Sale of Land, $4.00 and upwards.

HAMILTON LAW ASSOCIATION.

Solicitors' Tariff of Fees for Conveyancing, etc.

Minimum Charges in Addition to Disbursements.

1. Negotiating loans, 1-2 per cent. on the amount.
2. Preparing mortgage, examining title and completing loan—
   1 per cent. up to $3,000.00 and 1-2 per cent. on the excess above that amount, but in no case to be less than $10.

   Note.—Fees on amounts in excess of $10,000.00 may be arranged for.

3. Vendors' Solicitor for preparing Deed, answering Requisitions and completing sale—
   1 per cent. up to $3,000.00 and 1-2 per cent. on the excess above that amount, but in no case to be less than $10.

   Note.—Fees on amounts in excess of $10.000.00 may be arranged for.

4. Purchasers' Solicitor for investigating title, revising Deed and completing purchase—
   1 per cent. up to $3,000.00 and 1-2 per cent. on the excess above that amount, but in no case to be less than $10.

NOTE.—Fees on amounts in excess of $10.000.00 may be arranged for.

5. Short Form Deed or Quit Claim Deed, $5.00.
6. Mortgage, ordinary, $6.00.
7. Discharge of Mortgage, ordinary $3.00.
8. Partial Discharge, $4.00.
9. Chattel Mortgage in sums of $100.00 and upwards, $8.00.
10. Discharge of Chattel Mortgage, $2.00.
11. Renewal Statement of Chattel Mortgage, $3.50.
12. Bill of Sale in sums of $100.00 and upwards, $5.00.
13. Assignment for Benefit of Creditors, $10.00.
14. Mechanics' Lien, $5.00 up to $200.00; $10.00 and upwards over that amount.
15. Discharge of Mechanics' Lien, $2.00.
16. Notarial Certificate, $1.00.
17. Notice to Creditors, $2.00.
18. Collection of Interest on Mortgage, 5 per cent.
19. Negotiating and Drawing Renewal of Mortgages, 1-2 per cent. on the amount, but in no case to be less than $5.00.

JOINT STOCK COMPANIES.

The County of York Law Association has also the following tariff regarding company matters:—

COSTS OF SOLICITOR IN CONNECTION WITH INCORPORATION AND ORGANIZATION OF JOINT STOCK COMPANIES.

(*a*) *Incorporation.*

Advising, preparing petition, considering and drafting powers to be applied for, application to Department, and procuring Letters Patent, with necessary attendances; minimum fee $50.00

Where a company has a capital exceeding $50,000.00, this fee to be fixed at 1-10 of 1 per cent. on capitalization.

(*b*) *Organization.*

Preparing by-laws, attendances at and preparing minutes of provisional directors, shareholders, and directors' meetings, and preparation of contracts, special by-laws, etc., and

other services incident to full organization, same fees as in (*a*), minimum fee $50.00

(*c*) *Extra Provincial Companies.*

Obtaining license for extra provincial companies, same fees as in (*a*), based on amount of capital to be used in Ontario; minimum fee 50.00

(*d*) *Supplementary Letters Patent.*

Obtaining same, fees as in (*a*); minimum fee 50.00

Power to fix tariff for company conveyancing: Re Solicitor, 27 O. L. R. 147. Lump charges in bill of conveyancing costs: Gould v. Ferguson, 29 O. L. R. 191, and see note to sec. 34.

49. Application of the provisions of the statute, 9 Edw. VII., ch. 28, sec. 22, *et seq.* "Before this statute, known as the Law Reform Act, 1909, it was incompetent for a solicitor to make a bargain with his client for remuneration upon any other or higher scale than that allowed by law. Charges made by solicitors for services rendered by them were subject to review by the Court, and any attempt to obtain more than the law permitted was most sternly dealt with: see, for example, Re Solicitor, 14 O. L. R. 464. This statute has introduced a new era. It permits an agreement in writing between the solicitor and the client respecting the amount and the manner of payment for either past or future services; and this agreement may be either for the payment of a salary, a lump sum, or a percentage; but the agreement as to percentage is permitted only in non-contentious and conveyancing business, so that champertous bargains are not yet sanctioned. Upon the material I must find that the client understood the document which he signed. But this does not conclude the matter. I must find that this document is an agreement in writing with the client respecting the 'amount and manner of payment for the services of the solicitor in respect of the business done or to be done by him.' On the solicitor's own statement it is not:" Per Middleton, J.: Re Solicitor, 22 O. W. R. 156. There can be no binding settlement between solicitor and client without a bill. Apart

from special statutory authority, any agreement between a solicitor and his client by which the solicitor stipulates for remuneration upon any other basis than that provided by law, *i.e.*, a solicitor and client bill in accordance with any tariff applicable and subject to taxation, is void: Re Solicitor, 1910, 21 O. L. R. 255, 22 O. L. R. 30; Re Solicitor, 1907, 14 O. L. R. 464. Special Act held not to take the place of written agreement as to fixed remuneration: Gundy v. Johnston, 28 O. L. R. 121. Requirement of writing: Elmsley v. Harrison, 17 P. R. 425. Where absence of writing not pleaded as a defence to action to enforce agreement for remuneration: Curry v. Maclaren, 12 O. W. R. 1108 at p. 1114. An agreement by a solicitor to charge a client less than ordinary costs is not required to be in writing when set up by the client: Clare v. Joseph, 1907, 2 K. B. 369. An agreement in writing is a sufficient agreement if it is signed by the client only: Bake v. French, 1907, 2 Ch. 215. Under the Ontario Act, the application of the section relates only to matters of conveyancing, etc., and not to the conduct of an action in the ordinary way: Ford v. Mason, 16 P. R. 25. See also McKee v. Hamlin, 16 P. R. 207; Re Geddes and Wilson, 2 Ch. Ch. 447; Ladd v. London, etc., Ry., 110, L. T. J., p. 80; Rich v. Cook, 110 L. T. J., p. 94. The promise to pay a retainer is void: Re Solicitor, 21 O. L. R. 255, 22 O. L. R. 30. Agreement; solicitor's retainer: Re Solicitor, 3 O. W. N. 1132, 21 O. W. R. 948. Agreement for payment of solicitors: Belcourt v. Crain, 22 O L. R. 591; see notes to sec. 34; see also notes to sec. 61.

52. Impeaching agreement: Preston v. Nugent, 13 Man. R. 511.

61. The confidential relationship existing between a solicitor and his client forbids any bargain between them whereby he is to draw any larger return out of the litigation than is sanctioned by the tariff and the practice of the Courts and especially any agreement whereby the solicitor is to share in the proceeds of a litigated claim as a compensation for his services as being in contravention of the statute relating to champerty, and in violation of the oath of a barrister. Nor is it open to a solicitor during

the progress of a case to call on his client to pay a round sum or any sum other than costs before he will go on with the action: Re Solicitor, 14 O. L. R. 464. Oral agreement by client to pay no costs of action as disentitling plaintiff from recovering costs from defendant: Gundry v. Sainsbury, 1910, 1 K. B. 645. A solicitor's agreement to conduct a case to judgment at his own expense in consideration of 25 per cent. of the sum recovered, which is assigned as security, is champertous and void: O'Connor v. Gemmill, 29 O. R. 47, 26 A. R. 27. Champerty is not obsolete and is illegal: Colville v. Small, 22 O. L. R. 33, 426. See article on maintenance and champerty and referring to Colville v. Small: 46 C. L. J. 712. Champerty: see R. S. O. 1897, ch. 327, secs. 1 and 2; R. S. O. 1914, App. A, p. v. A solicitor may conduct a case out of charity from friendship towards his client: In re Solicitors, 9 O. L. R. 708; see Allen v. Jarvis, 32 U. C. R. 56. Solicitor's lien for costs on property recovered or preserved is discretionary with the Court: Turiff v. McDonald, 13 Man. R. 577. See Con. Rule 1129, 1913 Rule 689, 23-24 Vic. (Imp.) ch. 127. Legislation allowing a solicitor to make agreement with his client to be paid by receiving a share of what might be recovered in an action is not *ultra vires* of the Provincial Legislature of Manitoba as trenching on the criminal law: Thomson v. Wishart, 19 Man. R. 340, 13 W. L. R. 445, 16 Can. Crim. Cas. 446; see Meloche v. Deguire, 34 S. C. R. 24. Agreement with client as to costs of litigation: Bowcher v. Clark, 4 W. L. L. R. 292, 6 W. L. R. 433. The views of the Court regarding bargains with clients looking to the solicitor receiving a share of the fruits of litigation are expressed in the judgment of Boyd, C. (Re Solicitor, 10 O. W. R. 226), where the injury done to professional life through such practices in certain jurisdictions is referred to, as well as the functions of the Law Society in dealing with such matters. For the true method of dealing with impoverished clients, see Ladd v. London, etc., Ry. Co., 110 L. T. Jo. 80; Rich v. Cork, 110 L. T. Jo. 94. See also Chitty, Practice of the Law, vol. 2, p. 28.

70. This section dates from 1912. Apart from its provisions if an executor pays an attorney for his trouble and attendance in the transacting and conduct

of the testator's affairs, he ought to be allowed and repaid what he so pays. But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bona fide*, to the solicitors to the trust, and the officer of the Court, without regularly taxing the bill, will moderate their amount: Johnson v. Telford, 3 Russ. Chanc. Cas. 477. And it may here be observed that an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself. And, therefore, where a solicitor is appointed executor, and is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees and creditors: Harbin v. Darby, 28 Beav. 325; Re Chapple, 27 C. D. 584; "Williams on Executors," vol. 2, p. 1506. For the general rule as to an executor's costs and as to his "charges and expenses" and what are "just allowances:" see Williams on Executors, vol. 2, p. 1552, *et seq.* The general rule was that a solicitor trustee was not allowed to charge the estate with any professional services, for to allow him to do so would be to violate the rule that a trustee is not to be placed in a position where his duty and his interest conflict. An exception is made by the decision of Lord Cottenham in Cradock v. Piper, 1 M. & G. 664. A solicitor trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs therefor and to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been if he had acted for his co-trustee only. This, however, is not to be extended to proceedings or professional services rendered to the estate out of Court: In re Williams, 4 O. L. R. 501; Cradock v. Piper (1850), 1 M. & G. 664. Professional charges of solicitor trustee: see Re Leckie Estate, 36 C. L. J. 136. Position of solicitor director in regard to costs: Re Solicitors, 27 O. L. R. 147. See provisions of R. S. O. 1914, ch. 120, sec. 67 (4); see also Turiff

v. McDonald, 13 Man. R. 577. A solicitor, director of a company, acted for the company. He was held entitled to profit costs of winding-up proceedings in Court, but not in respect of business done out of Court: Re Mimico Sewer Pipe Co.; Pearson's Case, 26 O. R. 289. This was before the enactment of this section.

71. Solicitor on salary; taxation of fees to counsel and solicitor: Ponton v. Winnipeg, 41 S. C. R. 366.

72. No misconduct where a solicitor makes an exorbitant demand, and failing to receive it, refuses to make any charge: Re Griffiths. 1891, 7 Law Times Rep. 268. Professional misconduct in soliciting business for debt collecting company: Re Solicitor, 1912, 1 K. B. 302. As to authority of Court: see McBrady v. O'Connor, 19 P. R. 37.

CHAPTER 160

The Notaries Act.

2. Considerations in regard to appointment of notary: Ecclesiastical jurisdiction: Foy v. Society of Notaries of Victoria, 1909, P. 15.

8. Prior to this: see Boyd v. Spriggins, 17 P. R. 331, and note to that report. Affidavits sworn out of Ontario: see R. S. O. 1914, ch. 76, sec. 38. Affirmations: R. S. O. 1914, ch. 76, sec. 14-15. Commissioners: R. S. O. 1914, ch. 77; see Con. Rule 516, H. & L. notes, pp. 726-8, 1913 Rule 291. See also Guthrie's decisions (Reg. Act), 1897, p. 47.

CHAPTER 161.

The Ontario Medical Act.

Refer to: Glenn on Medical Men; Stephens' New Commentaries, Vol. III. bk. 4; Weightman on Medical Men.

4.—(1*a*) In line 12 for "grand" read "grant:" 4 Geo. V. ch. 21, Schedule (28).

31. Where a medical man in the pursuit of his profession has done something regarded as disgraceful and dishonourable by his professional brethren, it is open to the Council to find him guilty of infamous conduct in a professional respect. Where there was evidence on which the Council could reasonably act the Court could not review their decision: Allinson v. General Council, L. R. 1894, 1 Q. B. 750; see also 1907, W. N. 39; Allbutt v. General Council, 23 Q. B. D. 400; and an accurate report of the proceedings published *bona fide* and without malice is privileged: Allbutt v. General Council, 23 Q. B. D. 400. "Infamous and disgraceful conduct in a professional respect:" see Re Crichton, 13 O. L. R. 271, 8 O. W. R. 841. Conduct "infamous or disgraceful in a professional respect" as affecting a partnership: Hill v. Clifford, 1907, 2 Ch. 236, affirmed, 24 T. L. R. 112 (H.L.) Mere advertising was not in itself disgraceful but advertisements which were studied efforts to impose on the credulity of the public for gain were disgraceful in a professional respect. To represent to persons who were in the last stages of consumption that they had catarrhal bronchitis and to take money from them on the strength of such representations was also disgraceful: Re Washington, 23 O. R. 299. A charge of infamous and disgraceful conduct under this section is not supported by a finding of deceitful and fraudulent advertising: Re Crichton, 13 O. L. R. 271, 8 O. W. R. 841. Professional misconduct: see Little v. Royal College of Dental Surgeons, 11 O. W. R. 973, 12 O. W. R. 170. Practitioner cannot be removed from register without being heard; true

meaning of section: Reg v. Col. Physicians and Surgeons; Re McConnell, 44 U. C. R. 146. Registration in England: the Queen v. Col. Physicians; Re Mallory, 44 U. C. R. 564; see Skirving v. Ross, 31 C. P. 423. Improper removal of name from register: Reg. v. Sparham, 8 O. R. 570. Right of Medical Council to enquire into conduct of physician after his acquittal on criminal charge; analysis of secs. 31, 33 and 34, as amended 1910 and procedure; see Re Stimson and College of Physicians and Surgeons, 17 O. W. R. 565, 18 O. W. R. 38, 2 O. W. N. 298, 512, 4 O. W. N. 627, 22 O. L. R. 627, 27 O. L. R. 565. An enquiry under this section is not a prosecution within the meaning of sec. 59 (now sec. 56): Re Stinson and College of Physicians, 22 O. L. R. 627, 27 O. L. R. 565.

33. Procedure to "ascertain the facts:" notice: Re Stinson and College Physicians and Surgeons, 22 O. L. R. 627, 27 O. L. R. 565.

34. Proper procedure under the Act pointed out: Re Washington, 23 O. R. 299. See also Re Crichton, 13 O. L. R. 271, 8 O. W. R. 841. No appeal under English Act where general council acted *bona fide* and after due enquiry: Albutt v. General Council of Medical Education, 23 Q. B. D. 400. Procedure on appeal, restoration of name: Re Stinson and College Physicians and Surgeons, 27 O. L. R. 565.

38. Recovery of fees of physician and of surgeon: Little v. Oldaker, Car. & M. 370. "Reasonable charges:" scale of remuneration considered: see Gibson v. Mackay, 10 O. W. R. 1081, 11 O. W. R. 449.

39. Malpractice is bad or unskillful practice by a physician or surgeon whereby the health of a patient is injured. Negligent malpractice means gross negligence and lack of the attention which the situation of the patient requires. The burden of proof is upon the plaintiff to shew that there was a want of due care, skill and diligence on the part of the defendant and also that the injury was the result of such want of care, skill and diligence: Town v. Archer, 4 O. L. R. 383. It was not enough to make

the defendant liable that some medical men of far greater experience or ability might have used a greater degree of skill, nor that even he might have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to a bad result: Erle, C.J.: Rich v. Pierpont (1862), 3 F. & F. 35 at p. 40. As to trying cases of malpractice with a jury: see Town v. Archer, 4 O. L. R. 383; McNulty v. Morris, 2 O. L. R. 656; Kempffer v. Conerty, 2 O. L. R. 658 (note): McQuay v. Eastwood, 12 O. R. 402; Fields v. Ratherford, 29 C. P. 113; Jackson v. Hyde, 28 U. C. R. 294. Jury notice and jury: see R. S. O. 1914, ch. 56, secs. 56, 58, *et seq.* Actions against physicians or surgeons for malpractice where the facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment should be tried without a jury: Hodgins v. Banting, 12 O. L. R. 117. Negligence: *res ipsa loquitur* in actions of negligence against physicians: see Hodgins v. Banting, 12 O. L. R. 117. Action for malpractice barred under this section, not having been commenced within one year from the date when in the matter complained of the defendant's professional services terminated, although the plaintiff had twice visited the defendant's offices during the year, but as a person with a grievance: Town v. Archer, 4 O. L. R. 383. Also, action barred when brought within one year from the time when the alleged ill-effects developed, but more than a year from the date when the professional services terminated. Infancy does not prevent the running of the statute: Miller v. Ryerson 22 O. R. 369.

47. "To practice medicine:" for construction of these words so far as they can be construed apart from concrete cases and application of same to druggists, osteopaths, Christian Scientists, medical electricians, masseurs, etc.: see Re Ontario Medical Act, 13 O. L. R. 501, 8 O. W. R. 766. A conviction was held bad for uncertainty in not specifying the particular acts which constituted the practising. The Court refused to amend and quashed the conviction where the practising consisted in telling a man which of several patent medicines was suitable to

the complaint which the man indicated, and selling him some of it: Reg. v. Coulson, 24 O. R. 246. Where the complainant went to the defendant and told him his symptoms, that he did not know what was the matter, and left it to the defendant to choose the medicine and on the defendant's advice underwent and paid for a course of treatment, a conviction was sustained: Regina v. Coulson, 27 O. R. 59. The conviction must state particulars and shew more than a single act within the prescriptive period. The conviction of "R. and others" could not be amended by inserting the names of persons for "and others:" Reg. v. Whelan, 4 Can. C. C. 277. A salaried clerk in the employ of a licensed druggist whom the convicting magistrate had previously refused to hold liable by reason of his not having prepared or supplied in person the remedies applied for, could not be convicted of practising medicine for "hire, gain or hope of reward," no profit inuring to him from the sale: Prust v. Rose, 37 C. L. J. 824. Oculist examining eyes and furnishing glasses, but not treating the eyes, is not practising medicine: R. v. Harvey, 1 O. W. N. 1002. A chemist or druggist is not entitled to ascertain from intending purchasers the symptoms and determine from them the disease and prescribe a remedy; but he may, if the purchaser tells him his complaint and asks for a remedy, inform him what remedies he has for such complaint; and also inform him which in his opinion is the better or best remedy, leaving the purchaser to exercise his own judgment: Rose, J.: Reg. v. Howarth, 24 O. R. 561. A person went into a druggist's shop stating that he was sick and describing his complaint. The druggist advised him as to diet and gave him a bottle of medicine for which he charged him fifty cents. Druggist stated he enquired to decide which mixture to give. This was practising medicine for gain: Reg. v. Howarth, 24 O. R. 561. See also: Regina v. Hall, 8 O. R. 207, where the defendant undertook the cure of cancer by friction, etc., for $3.00 a visit. But where the defendant merely sat still and fixed his eyes on the patient and received no payment, and neither prescribed nor administered medicine nor gave advice, a conviction under this section was quashed: Regina v. Stewart, 17 O. R.

4. Imprisonment: Reg. v. Wright, 14 O. R. 668. Practising osteopathy is not a violation of this section: R. v. Henderson, 16 O. W. R. 1021, 1 O. W. N. 543. An unenfranchised treaty Indian is subject to the terms of this Act and may properly be convicted under this section: R. v. Hill, 15 O. L. R. 406, 11 O. W. R. 20.

48. Where the defendant was practising with two practitioners and used the letters "M. D." it was held not calculated to lead people to infer registration: Regina v. Tefft, 45 U. C. R. Nor was the use of the word "doctor" without supplemental words: Foster v. Rose, 37 Can. L. J. 824. Power to award distress: Reg. v. Sparham, 8 O. R. 570. Pretending to be a physician: Pomeroy v. Wilson, 26 U. C. R. 45. Electro-therapeutics within the Act, but massage not: Reg. v. Vallean, 3 Can. Crim. Cas. 435; Bergman v. Bond, 24 Occ. N. 152, 14 Man. L. R. 503.

50. Fees for electro-therapeutic treatment: see Bergman v. Bond, *supra*. Necessity for registration at time services were rendered: Leman v. Houseley, L. R. 10, Q. B. 66. No recovery by registered practitioner for services rendered by unqualified assistant: Howarth v. Brearley, 19 Q. B. D. 303.

56. What is a "prosecution" within this section: Re Stinson and College of Physicians, 22 O. L. R. 627, 27 O. L. R. 565.

CHAPTER 162.

The Anatomy Act.

CHAPTER 163.

The Dentistry Act.

17. By-laws of College of Dental Surgeons considered: Gordon v. R. C. D. S., 2 O. W. N. 733, 23 O. L. R. 223. By-laws: conduct unbecoming a licentiate of dental surgery: discipline committee: see Little v. Royal College of Dental Surgeons, 11 O. W. R. 973, 12 O. W. R. 170.

25. What amounts to holding out as being a registered dentist: Robertson v. Hawkins, 1913, 1 K. B. 57. "Specially qualified to practice dentistry." Notice containing statement of work done: Bellerby v. Heyworth, 1909, 2 Ch. 23, 1910, A. C. 377. Unregistered dentist offering "advice free:" Barnes v. Brown, 1909, 1 K. B. 38; Bellerby v. Heyworth, 1910, A. C. 377. Company carrying on dentist business: Atty. Gen. v. Smith, 1909, 2 Ch. 524. Unlicensed persons practising by means of hiring: Gordon v. Royal College Dental Surgeons, 2 O. W. N. 733, 18 O. W. R. 149.

25.—(4) Procedure on stated case where summary conviction under this Act: Rex v. Henry, 1 O. W. N. 567, 15 O. W. R. 621.

27. Professional conduct: Gordon v. Royal College Dental Surgeons, 18 O. W. R. 149, 2 O. W. N. 733, 23 O. L. R. 223. Professional misconduct as a ground for dissolution of partnership: Clifford v. Timms, 1908, A. C. 12.

CHAPTER 164.

The Pharmacy Act.

28. The prohibition against the sale of poison extends to the sale of a compound containing a schedule poison as ingredient: Pharm. Soc. v. Armson, 1894, 2 Q. B. 720; Pharm. Soc. v. Piper, 1893, 1 Q. B. 686. But it is not sufficient to prove that the compound contains only an infinitesimally small quantity of a poison as defined by the Act: Pharm. Soc. v. Delve, 1894, 1 Q. B. 71. The defendant being owner of a departmental store, opened a drug department therein and placed it under the sole control of a duly qualified and registered chemist, who sold the drugs in the defendant's name, receiving a weekly salary and a percentage of profits, the defendant himself not being a duly qualified and registered chemist. The defendant was liable to be convicted for keeping an open shop for retailing, dispensing and compounding poisons: Reg ex rel. Warner v. Simpson, 27 O. R. 603; see State v. Norton, 67 Io. 641. Sale of wood alcohol to Indian: Antoine v. Duncombe, 8 O. W. R. 719.

29. Poison in Schedule A., in horse medicine sold by assistant in shop of incorporated company of pharmacists when director, who was a chemist, was not personally managing the shop: McGibbon v. Lawrason, 13 O. W. R. 468.

30. Sale of poison for agricultural use: bottle not labelled with name, etc., of vendor: Pharmaceutical Society v. Jacks, 1911, 2 K. B. 115.

33. Sale of poison under trade name: Edwards v. Pharmaceutical Society, 1910, 2 K. B. 766.

CHAPTER 165.

The Ontario Land Surveyors Act.

3. A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract and is liable only for damages caused by want of reasonable skill or by gross negligence: Stafford v. Bell, 6 A. R. 273. The proper method of making a survey under the statute discussed: Stafford v. Bell, 6 O. R. 273.

25. Plan by draughtsman not an O. L. S.: Cardwell v. Breckenbridge, 4 O. W. N. 1295, 24 O. W. R. 569.

CHAPTER 166.

The Surveys Act.

7. See as to boundary line disputes, the provisions of R. S. O. 1914, ch. 67.

10. The monuments placed in compliance with these provisions must be placed at the true corners, governing points, etc. There is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction: R. v. Crosby, 21 O. R. 591.

13. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data—he should follow the directions of the statute: Charbonneau v. McCusker, 17 O. W. R. 18, 2 O. W. N. 83, 22 O. L. R. 46. Governing line, method adopted: Ib.

14. The requirements of the statute must be complied with to give the Lieutenant-Governor in Council jurisdiction to authorize the survey. Where the survey lacks this, it is illegal and the municipal

council has no power to pass a by-law to levy the cost of it. Where a re-survey is authorized, the cost of it must be borne by the proprietors of the lands in each range or block or part of each range interested, and not of all the proprietors whether interested or not: Sutton v. Port Carling, 3 O. L. R. 445; Re Scott and Peterborough, 26 U. C. R. 36; R. v. McGregor, 19 C. P. 69; Cooper v. Wellbanks, 14 C. P. 364.

17. Act does not apply to the manner of dividing a lot laid out on a private plan: Hooey v. Tripp, 3 O. W. N. 738, 21 O. W. R. 493, 25 O. L. R. 578.

18. History and construction of section: Scryver v. Young, 14 O. W. R. 530. The Act does not apply to the manner of dividing a lot laid out on a private plan. Application of this section: Hooey v. Tripp, 3 O. W. N. 738, 21 O. W. R. 493, 25 O. L. R. 578.

39. Meaning of " half " a lot: see Annotation, 2 D. L. R. 143.

23. Crown grant of land bordering on river: see Williams v. Pickard, 15 O. L. R. 655, 11 O. W. R. 475, 17 O. L. R. 547. Where a grant of land is made bordering on a non-tidal river whether navigable or not, the title in the bed *ad medium filum aquae* is presumed *prima facie* to be in the riparian owner: Keewatin v. Kenora, 13 O. L. R. 237, 16 O. L. R. 184, 11 O. W. R. 266; but see new provisions of R. S. O. 1914, ch. 31, sec. 2, and notes to that chapter.

34. Ownership of soil of island in bed of stream: see Great Torrington Commons Conservators v. Moore Stevens, 1904, 1 Ch 347. Land bordering on river: see Keewatin v. Kenora, 13 O. L. R. 237, 16 O. L. R. 184, 11 O. W. R. 266; Williams v. Pickard, 15 O. L. R. 655, 17 O. L. R. 547, note to sec. 23 *ante;* R. S. O. 1914, ch. 31, notes.

35. See McIntyre v. Thompson, 1 O. L. R. 163.

36. See Marrs v. Davidson, 26 U. C. R. 641; Holmes v. McKechnin, 23 U. C. R. 52; Warnock v. Cowan,

13 U. C. R. 257; McLachlin v. Dixon, 4 C. P. 71, 307. Subsequent survey, authority to change: double front: Murphy v. Healey, 30 U. C. R. 192. What constitutes a double front: Dark v. Hepburn, 27 C. P. 357; McGregor v. McMichael, 41 U. C. R. 128.

39. Proper method of making a survey under the statute: see Stafford v. Bell, 6 A. R. 273.

44. The section is retroactive only in the sense that it is intended only to affect roads or streets which at the time of the passing of the Act were already in existence as private roads, to the use of which purchasers of property abutting thereon were then entitled, which roads and streets so in existence subject to the provision for non-liability of the corporation to keep them in repair were converted into public highways: Gooderham v. Toronto, 21 O. R. 120, 19 A. R. 641, 25 S. C. R. 246; see also as to retroactive force of the section: Wright v. Olmstead, 20 O. W. R. 701. By the filing of a plan and the sale of lots according to it, abutting on a street the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair: Roche v. Ryan, 22 O. R. 107. The Act formerly did not apply to townships: see as to hamlets: Sklitzsky v. Cranston, 22 O. R. 590; and see this case also as to the rights of a purchaser over a private road. A municipal corporation has the right to have it declared as against a private person whether or not certain land is a public highway: Toronto v. Lorsch, 24 O. R. 227; Gooderham v. Toronto, 19 A. R. 641; Fenelon Falls v. Victoria Ry. Co., 29 Gr. 4. A lane is not within the purview of the section: Brett v. Toronto Railway, 13 O. W. R. 552, 14 O. W. R. 74. What amounts to a dedication as a public highway of a bridge and lands on each side of it, and what land such highway includes: Gloster v. Toronto Electric Light, 38 S. C. R. 27. Streets on plan, highways: Peake v. Mitchell: 4 O. W. N. 988, 24 O. W. R. 291. Dedication of road: Plummer v. Davies, 20 O. W. R. 806, 3 O. W. N. 466; Hay v. Bisonette, 17 O.

W. R. 321, 2 O. W. N. 189. Acceptance of dedication of highway by municipality by memorandum of consent endorsed on registered plan: Re Toronto Plan M 188, 28 O. L. R. 41. Where water lots on a lake front are subject to the usual Crown reservation of free passage, the water on such lots is a highway whether when fluid or frozen: Cullerton v. Miller, 26 O. R. 36; see also Pennock v. Mitchell, 12 O. W. R. 767. Encroachments on reservations: Lakefield v. Brown, 15 O. W. R. 656, 1 O. W. N. 589. Ownership of closed allowances by abutting owners: Re Purse and Forbes, 1 O. W. N. 1085. "Townsites:" (see Mines Act, 1906, sec. 109); Re Western and Northern Land Corporation and Goodwin, 13 O. W. R. 177. See R. S. O. 1914, ch. 28, sec. 57. No dower in lands dedicated for streets: see R. S. O. 1914, ch. 70, sec. 8. As to plans under the Registry Act: see R. S. O. 1914, ch. 124, sec. 81, *et seq.*; roads less than 66 feet in width: see sec. 81 (14); consents required: sec. 81 (18); plan not binding until sale made: sec. 86; alteration and closing of roads: sec. 86 (4) and notes. As to plans under the Land Titles Act: see R. S. O. 1914, ch. 126, sec. 105, *et seq.*; filing plans with roads less than 66 feet in width: see sec. 109; plan not binding unless sale made according to it: see sec. 100; amendment of plan: sec. 110; alteration and closing of streets: sec. 110 (4). As to sub-division plans within 5 miles of city of 50,000: see The City and Suburbs Plans Act, R. S. O. 1914, ch. 194. As to what constitute public highways, ownership of, and jurisdiction over same: see R. S. O. 192, secs. 432-3-4; powers of municipality as to naming and surveying streets: see sec. 400 (38); width of highway: see sec. 479. For comment of effect of this section: Armour, Titles, p. 231.

45. Field notes, duty in respect of: Lakefield v. Brown, 15 O. W. R. 656, 1 O. W. N. 589.

CHAPTER 167.

THE ONTARIO ARCHITECTS ACT.

Refer to: Hudson on the Law of Building, etc., Macassey and Strahan on Engineers.

CHAPTER 168.

THE STENOGRAPHIC REPORTERS ACT.

CHAPTER 169.

THE CHARTERED ACCOUNTANTS ACT.

CHAPTER 170.

THE STATIONARY ENGINEERS ACT.

CHAPTER 171.

THE VETERINARY SURGEONS ACT.

Refer to: Oliphant on Horses.

2. One man company as qualified veterinary: Atty. Gen. v. Churchill's Veterinary Sanitorium, 1910, 2 Ch. 401.

3. Unqualified person holding himself out as a "canine specialist:" Royal Col. Vet. Surgeons v. Collinson, 1908, 2 K. B. 248.

CHAPTER 172.

THE ONTARIO CULLERS ACT.

CHAPTER 173.

The Innkeepers Act.

Refer to: Jelf and Hurst on Innkeepers, Beven on Negligence.

3.—(1) Innkeeper's lien was a common law lien: Cummings v. Harris, 23 Am. Dec. 206. Boarding house keeper: see Newman v. Whitehead, 2 Sask. R. 11. Cabman's lien on baggage: McQuarrie v. Duggan, 44 N. S. R. 185. For review of cases on the question of the relation of innkeeper and guest and of the innkeeper's liability for the effects of his guest, and negligence in respect thereof: see judgment of Gorham, Co.J., Fraser v. McGibbon, 10 O. W. R. 54.

3.—(2) A landlord has a right to sell, under this Act, a horse belonging to a boarder to enforce his lien for keep and accommodation. After the lien accrued the boarder took the horse away and subsequently brought it back. Held that the lien revived: Huffman v. Walterhouse, 19 O. R. 186. See Dixon v. Dalby, 11 U. C. R. 79; Neale v. Crooker, 8 C. P. 224; Crabtree v. Griffith, 22 U. C. R. 573. A landlord has no lien on a rented piano which a guest has brought to his room: Newcombe v. Anderson, 11 O. R. 665; see Rees v. McKeown, 7 A. R. 521.

3—(5) The statute does not purport to give a livery stable keeper as wide a lien as the common law gave an innkeeper. It would require express words to give a lien on the property of a third person: statute considered: Automobile and Supply Co., v. Hands Limited, 4 O. W. N. 1210, 28 O. L. R. 585.

3.—(6) The innkeeper cannot become the purchaser at a sale under this Act: Martin v. Howard, 4 O. W. N. 1266, 24 O. W. R. 617.

4. The responsibility of an innkeeper begins with the relation of guest and innkeeper. That relation

arises the moment the guest enters the inn with that intention, and is received on that basis: Wright v. Anderton, 1909, 1 K. B. 209. The relation of innkeeper and guest arises notwithstanding a third person contract to pay for the guest's accommodation: Wright v. Anderton, 1909, 1 K. B. 209. Duties of an innkeeper: Re Karry and Chatham, 15 O. W. R. 1. "Expressly for safe custody:" Whitehouse v. Pickett, 1908, A. C. 357. Liability of innkeeper for effects of guest: Fraser v. McGibbon, 10 O. W. R. 54.

6. No material word must be omitted from the copy of sec. 4 as posted up: Spice v. Bacon, 2 Ex. Div. 465.

CHAPTER 174.

THE EMBALMERS AND UNDERTAKERS ACT.

CHAPTER 175.

THE ONTARIO MONEY LENDERS ACT.

Refer to: Mathews on Money Lending; Bellot on Money Lenders.

5. Oppressive rate of interest: Goodline v. Widdifield, 8 Gr. 531; Teeter v. St. John, 10 Gr. 85; Bellamy v. Porter, 4 O. W. N. 1171. Voluntary payment of unauthorized rate of interest: McHugh v. Union Bank, 1913, A. C. 299.

8. Interest chargeable by a pawnbroker: R. v. Adams, 8 P. R. 462.

11. Misstatement of lender's name in note taken for a loan: Peizer v. Lefkourtz, 1912, 2 K. B. 235.

12. Security taken by unregistered money lender: Re Robinson, Grant v. Hobbs, 1912, 1 Ch. 717.

CHAPTER 176.

THE ONTARIO PAWNBROKERS ACT.

Refer to: Attenborough, Law of Pawnbroking.

2. "Exercising the trade of a pawnbroker:" see R. v. Andrews, 25 U. C. R. 196.

19. Interest chargeable by pawnbroker: see R. v. Adams, 8 P. R. 462.

21. A pawnbroker, who acting honestly, has lost the article pledged with him, is not liable to be convicted for neglecting or refusing to deliver a pledge without reasonable excuse: Allworthy v. Clayton, 1907, 2 K. B. 685.

CHAPTER 177.

THE PRIVATE DETECTIVES ACT.

CHAPTER 178.

The Ontario Companies Act.

Refer to: Parker and Clarke (Can.), Mulvey (Can), White (Can.), Masten Company Law in Canada, Buckley on Companies, Lindley on Companies. Palmer's various works on Company Law, the Companies Acts, on Debentures, Company Precedents and on Winding-up, Hurrell and Hyde on Directors, Lynch on Liquidators, Pixley on Audits.

1. For *resumé* of origin of this Act and review of several of the provisions: see article by Thomas Mulvey, K.C., 45 C. L. J. 220.

2.—(*b*) Corporation: when a "person" within the Criminal Code: see Rex v. Master Plumbers, 14 O. L. R. 295; and see R. S. O. 1914, ch. 1, sec. 29 (x).

PART I.

Incorporation, Re-incorporation, Amalgamation.

3. Meaning of the power reserved by the B. N. A. Act, sec. 92 (11), to the provinces for "the incorporation of companies with provincial objects and to what extent (if any) such limitation is territorial, and whether it has only reference to the powers of the company: see In re Companies, 48 S. C. R. 331. Membership in company and status of shareholder: see article 45 C. L. J. 145, 220, 338; Nicols' Case, 29 Ch. D. 421; Re Haggart Bros. Mfg. Co., 19 A. R. 582. Contrast of the main differences between Imperial and Ontario Statutes: see article 45 C. L. J. 220; Mahoney v. East Holyford Mining Co., 1875, L. R. 7 H. L. 869; County Gloucester Bank v. Rurdy Merthyr, 1895, 1 Ch. 629. Effect of words constituting a corporation: see R. S. O. 1914, ch. 1, sec. 27. After the issue of a winding-up order, a shareholder cannot avoid liability by

setting up defects or irregularities in the organization of the company. Such grounds can only be taken upon direct proceedings at the instance of the Attorney-General: Common v. McArthur, 29 S. C. R. 239. Where a trader who is solvent converts his business into a limited liability company, the Court is not entitled to enter into a speculative analysis of the motives and the exorbitance of the price paid, to decide that it is not validly constituted on account of the non-fulfillment of conditions not found in the Companies Act: Salomon v. Salomon & Co., 1897, A. C. 22, 60 L. J. Ch. 35. "One man companies:" see Salomon v. Salomon and Co., 1897 A. C. 22; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218; Re British Seamless Paper Box Co., 17 Ch. D. 467. Where a limited liability company has been regularly formed for the purpose of taking over the business of a trader who is insolvent, the conveyance of the assets of the latter to a company, though it may be open to attack under the Statute of Elizabeth or under R. S. O. 1914, ch. 134, cannot be set aside on the principle that the company is a mere alias or agent: Rielle v. Reid, 28 O. R. 497, 26 A. R. 54; see Salomon v. Salomon, 1897, A. C. 22. History of the law as to who became shareholders in a company incorporated by letters patent. Departure from prospectus and unreasonable delay may, in certain circumstances, release subscriber: Patterson v. Turner, 3 O. L. R. 373. The fact that in an undefended action brought by a subscriber against a company, judgment is recovered containing a declaration that the subscriber is not a shareholder, does not in itself afford any defence in an action brought against him to compel him to pay for the shares he has subscribed for: Patterson v. Turner, 3 O. L. R. 373. Upon an indictment of two incorporated trade associations in restraint of trade (see Criminal Code, sec. 496), the defendants are to be condemned, if condemned at all, upon the acts proved to have been committed by them after incorporation, but in weighing such act the Court may look at proximately antecedent acts of individuals now comprising and directing the corporations: Rex v. Master Plumbers, 14 O. L. R. 295.

Neither the acquisition of gain nor the division of a dividend among its members is of the essence of a joint stock company: In re Russell Literary and Scientific Association, 1898, 2 Ch. 72, 67 L. J. Ch. 411; In re Jones, Clegg v. Ellison, 1898, 2 Ch. 83, 67 L. J. Ch. 504. Validity of shares issued outside of province: Re York County Loan, 11 O. W. R. 507. A company incorporated under authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin, into a valid contract of insurance relating to property also outside those limits: C. P. R. v. Ottawa Fire, 39 S. C. R. 405. And see also, Kerlin Bros. Co. v. Ontario Pipe Line, 11 O. W. R. 797.

4. Formerly an order in council was required to issue letters patent incorporating a company.

5.—(1) If a company never becomes entitled to commence business, no contract entered into by it is binding on it and no one can sue in respect of any such contract: Re Otto Electrical Mfg. Co., 1906, 2 Ch. 390. A company is under no obligation in equity to pay for work done before its formation merely because it derived benefit from such work. Solicitors, to recover costs of formation of the company, must establish a legal claim against the company, either on their own behalf or on behalf of some person in whose shoes they are entitled to stand. As regards the government fee, they can recover as the company is bound by statute to pay that: Re English and Colonial Produce Co., 1906, 2 Ch. 435. Oral agreement between incorporators before formation: Berkinshaw v. Henderson, 1 O. W. N. 97. See also notes to sec. 112.

5.—(2) Position of nominal applicant for letters patent in winding-up: Re Ontario Sugar Co., McKinnon's Case, 17 O. W. R. 1038, 2 O. W. N. 496, 22 O. L. R. 621. The applicants for incorporation are strictly those who sign the petition, but potentially those others are included who sign the memorandum of agreement to become incorporated: Modern Bedstead Co. v. Tobin, 12 O. W. R. 22.

5.—(3) Signature of agreement under seal to become incorporated is an irrevocable act: Nelson Coke and Gas v. Pellatt, 4 O. L. R. 488, 1 O. W. R. 595. By no act or repudiation of his own can such a signatory cease to be a shareholder unless he can shew a state of facts that would justify a rescission of the contract by the Court: Modern Bedstead Co. v. Tobin, 12 O. W. R. 22. In winding-up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein it was untruly stated that he had taken 250 shares, while the fact was that the shares he held had been voted to him by a resolution of the directors as paid up stock for services rendered in the formation of the company. Held he was a contributory, certainly in respect of the shares voted to him and probably for all mentioned in the petition: Re Collingwood Dry Dock Co., Weddell's Case, 20 O. R. 107. On the issue of the patent; subscribers become liable without more to pay for the stock subscribed for by them: Re Haggert Bros. Mfg. Co., 19 A. R. 582. They do not at once become debtors to the full amount of their shares. They are only liable as other members for calls when made: Alexander v. Automatic Telephone Co., 1899, 2 Ch. 302; see Dalton v. Time Lock, 66 L. T. 704; Re Whitehead Brothers, 1900, 1 Ch. 804, 69 L. J. Ch. 607. The issue of the certificate of incorporation operates as the issue of all shares signed for in the memorandum of association: Re Whitehead, 1900, 1 Ch. 804, 69 L. J. Ch. 607; see Re Jarvis, 68 L. J. Ch. 145, 1899, 1 Ch. 193. Irrevocable application for shares by signature of memorandum of agreement: Re Nipissing Planing Mills, Rankin's Case, 13 O. W. R. 360; Re Provincial Grocers, Calderwood's Case, 10 O. L. R. 705, 6 O. W. R. 744. The memorandum of agreement or stock book is essentially an application for shares: Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 417; Re London Speaker Printing Co., 16 A. R. 508. The memorandum which accompanies the petition is the one, signature of which gives rise to liability: Re Nipissing Planing Mills, 18 O. L. R. 81; see Re Provincial Grocers, 10 O. L. R. 705. Cancellation of subscription by incorporator: Canadian Druggists Syndicate v. Thompson, 24 O. L. R. 108. As to fees to

accompany application, see sec. 138, note. Departmental regulations in regard to application, etc., see sec. 33, note.

6. This section provides for the incorporation of companies and associations formerly incorporated under "The Act respecting Benevolent, Provident and other Societies," R. S. O. 1897, ch. 211, and it may also take the place of R. S. O. 1897, chs. 201 and 202, and facilitate the incorporation of charitable and other corporations. Many sections of the Act apply equally to corporations without share capital as well as to those with shares, e. g., Part II., names, Part V., debentures, Part IX., books, inspection and audit. It is proposed by the department that the memorandum of agreement in each particular case should supplement the parts of the Act mentioned in respect of meetings, directors, their duties, etc. Such corporations may be turned into companies with share capital: see sec. 9. Under R. S. O. 1897, ch. 202, the "Co-operative Associations Act," business was to be for cash only: see sec. 16. Effect of this statutory limitation: see Struthers v. Mackenzie, 28 O. R. 381. For review of the status of companies incorporated under R. S. O. 1897, chs. 202 and 211, before the Criminal Law, and especially with reference to sec. 520 of the Criminal Code: see R. v. Master Plumbers Association, 14 O. L. R. 295, esp. at pp. 313 and 318-321. Construction of rules of such a society with regard to the apportionment of the benefit fund: Johnston v. Catholic Mutual, 24 A. R. 88; Fawcett v. Fawcett, 26 A. R. 335. Initiation and right of a subordinate council of a friendly society to waive its requirements where it is a condition precedent to membership: Hoeffner v. C. O. F., 29 O. R. 125. Under R. S. O. 1897, ch. 211, it was held that a member of a benefit society when accused, was entitled to a fair hearing before being expelled, and where this had not been done the expulsion was not legally accomplished: Gravel v. L'Union St. Thomas, 24 O. R. 1; Béland v. L'Union St. Thomas, 19 O. R. 747. A benevolent society incorporated under R. S. O. 1897, ch. 211, attached to the declaration which they filed a printed book

said to contain a copy of the constitution and by-laws by which the society was to be governed. The constitution and by-laws became a part of the organic law of the society and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding: Re Ontario Insurance Act and Select Knights, 31 O. R. 154. See also as to alteration of constitution and by-laws: Doidge v. Royal Templars, 4 O. L. R. 423. An assignment under R. S. O. 1914, ch. 134, does not pass to the assignee the benefit which a debtor is entitled to under a benefit certificate in a society incorporated under R. S. O. 1897, ch. 211. As to claim on pension: see Slemin v. Slemin, 7 O. L. R. 67. Co-operative associations under R. S. O. 1897, 202 and 211: see R. v. Master Plumbers, 14 O. L. R. 295, esp. pp. 313, 318-321. Liability of members of unincorporated association: Pears v. Stormont, 24 O. L. R. 508. See the provisions as to Friendly Societies, R. S. O. 1914, ch. 183, sec. 72, *et seq.*

6.—(2) The departmental regulation requires the insertion in the charter a condition that the charter shall be forfeited and may be cancelled if there is any trafficking in intoxicating liquor, and that any person guilty of any act of that sort is amenable to the Liquor License Act, R. S. O. 1914, ch. 215. Also the charter shall be forfeited, and may be cancelled if betting or gambling is carried on on the premises of the company. See also, sec. 29, note.

10. Amalgamation of companies; fiduciary position of directors and their duties: Stratford Fuel, etc., Co. v. Mooney, 14 O. W. R. 489, 16 O. W. R. 246.

14. As to fees, see sec. 138, note.

16. R. S. O. 1897, ch. 191, secs. 17-21, 102, 106. See as to effect of subscription before by-law is passed directing the issue of supplementary letters patent: Port Hope B. & M. Co. v. Cavanagh, 8 O. W. R. 985; and see 10 O. W. R. 531. Allotment of new shares of increased capital stock; rights of minority shareholders: Martin v. Gibson, 10 O. W. R. 66, 15 O. L. R. 623. Position of dissentient shareholder in case of

reduction of share capital under English law: Re Thomas De la Rue Co., 1911, 2 Ch. 361.

17. Mandamus to Provincial Secretary: Re Massey Mfg. Co., 11 O. R. 444, 13 A. R. 446.

22. Entity of company with unused powers: Campbell v. Taxicabs Verrals Ltd., 23 O. W. R. 6, 4 O. W. N. 28, 27 O. L. R. 141.

23.—(1) Powers of company "not for profit:" Cyclists Touring Club and Hopkinson, 1910, 1 Ch. 179. Where the primary objects enumerated are followed by general words, the general words are to be read as incidental to the primary objects: Re Amalgamation Syndicates, Ltd., 1897, 2 Ch. 600, 66 L. J. Ch. 783; Re Coolgardie Consolidated Gold Mines, 76 L. T. 269. Where a company ceases to carry on its proper business and carries on a business *ultra vires*, a shareholder is not confined to a remedy by injunction, but may have the company wound up: Re Crown Bank, 44 Ch. D. 634, 59 L. J. Ch. 739. A simple contract creditor has no *locus standi* suing on behalf of himself and other creditors to attack a transaction by his debtor company as *ultra vires*: Northern Electric v. Cordova Mines, 5 O. W. N. 156, 25 O. W. R. 105. Although a limited company may be formed with any number of separate objects of the most diverse kind, provided these objects are precisely discriminated as separate, yet when it is clear from the general construction of the memorandum of association that the company is formed for a single primary object and that the other objects mentioned are intended to be only subordinate or auxiliary, it is not possible to construe each of these other objects as separate even if a clause is inserted that they shall be so construed: Stephens v. Mysore Reefs Mining Co., 1902, 1 Ch. 745, 71 L. J. Ch. 298. Construction of general powers: Pedlar v. Road Block Gold Mines, 1905, 2 Ch. 427, 74 L. J. Ch. 753. General words are to be taken and explained with reference to the words which precede them and with which they are connected in sense: Ashbury Railway Co. v. Riche, L. R. 7 H. L. 653, 44 L. J. Ex.

185. General words are auxiliary only to the primary objects of the company: Re German Date Coffee Co., 20 Ch. D. 169, 51 L. J. Ch. 564. If a corporation having been constituted for a particular object, appropriates its funds to something else than that object, it is doing something that impliedly it is forbidden to do by Act of Parliament. That is *ultra vires*: Per Lord Cranworth: Orr v. Glasgow, etc., Junction Ry., 6 Jur. (N. S.) 877, 2 L. T. 550; see Guinness v. Land Corporation of Ireland, 22 Ch. D. 349, 52 L. J. Ch. 177. Companies' charters in general, see Rutter v. Chapman, 8 M. & W. 1; R. v. Haythorne, 5 B. & C. 410. As to the principles limiting the capacities, powers and liabilities of companies: see Brice on Corporations and Utlra Vires.

23.—(1*b*) A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. To obtain such benefit a new contract must be entered into by the company on the terms of the old contract: Natal Land and Colonization Co. v. Pauline Colliery, 1904, A. C. 120. Allotment of shares in pursuance of agreement to buy property: Bennett v. Havelock, 1 O. W. N. 352, 751. Transfer of assets of partnership to incorporated company; assumption of liability; direct right of action: Stecker v. Ontario Seed Co., 20 O. L. R. 359, 1 O. W. N. 463.

23.—(1*e*) Company cannot traffic in its own shares: Lindsay v. Imperial Steel, 1 O. W. N. 347, 930. Corporations purchasing their own stock: Stavert v. McMillan, 21 O. L. R. 245. Incorporated company becoming shareholder: Foley v. Barber, 1 O. W. N. 1029, 14 O. W. R. 669. Sale of shares, business assets, stock, goodwill; status of liabilities: Strong v. Van Allen, 1 O. W. N. 539.

23.—(1*j*) Building hotel: see Stewart v. Stratford Hotel Co., 12 O. W. R. 157.

23.—(1*k*) It is *ultra vires* of a tug company to guarantee payment by the owner of a tug employed by the company of a boiler purchased by him to operate the tug: The A. R. Williams Machinery Co. v. the

Crawford Tug Co., 16 O. L. R. 245, 11 O. W. R. 321. Guarantee by company signed by president: Thomas v. Standard Bank, 15 O. W. R. 188. Consideration of power of trading company to give guaranty; powers under Company Act of 1897 and under Act of 1907: Union Bank v. McKillop, 4 O. W. N. 1253, 5 O. W. N. 493. As to loan to servant of company: see Rainford v. James Keith Co., 1905, 2 Ch. 147, 74 L. J. Ch. 531.

23.—(1*l*) Signature of promissory note by managing director; personal liability of signatory: Chapman v. Smelthurst, 1909, 1 K. B. 927. Unauthorized acceptance by director of bills in name of company: Premier Industrial Bank v. Carlton Mfg. Co., 1909, 1 K. B. 106. A company president having made a promissory note without authority and discounted it with the company's bankers, the proceeds being credited to the company's account and cheques paid out of the proceeds to company's creditors, whose claims should have been paid out of money which the president had misappropriated, the bankers who took in good faith were entitled when the note fell due to charge it to the company's account: Bridgewater Cheese Co. v. Murphy, 26 O. R. 327, 23 A. R. 66, 26 S. C. R. 443. Effect of acceptance by director of draft in name of company for the price of goods which the company were by statute unable to buy on credit: see Struthers v. Mackenzie, 28 O. R. 381. As to general mercantile powers of management, managing director and manager, see *post*, secs. 78 (3), 91 (*e*), and notes.

23.—(1*m*) Power to sell for shares includes a power to sell for partly paid shares: In re City and County Investment Co., 13 Ch. D. 475, 49 L. J. Ch. 195; Mason v. Motor Traction Co., 1905, 1 Ch. 419, 74 L. J. Ch. 273. Where such a sale was part of a scheme of reconstruction under which it was proposed to distribute the partly paid shares among the (fully paid) shareholders of the selling company: *Quære*, whether the distribution would be *ultra vires*: Mason v. Motor Traction Co., 1905, 1 Ch. 419, 74 L. J. Ch. 273. Sale for partly paid shares: Manners v. St. David's Mines, 1904, 2 Ch. 593. A provisional

agreement between two companies for the sale of one to the other provided a substantial sum for the directors of the selling company. This provision did not render the agreement *ultra vires,* but (*semble*) if the money was a bonus for them for facilitating the agreement, it would not be binding on a dissentient shareholder: Kay v. Croydon Tramways, 1898, 1 Ch. 358. Where the memorandum of association contains power to sell its undertaking for shares in another company and to distribute amongst its members in specie any of its property, a sale can be properly made under this power and it is not vitiated by the fact that it involves the company immediately going into liquidation, and such a sale is not in disguise a sale by the liquidator in terms not justified by sec. 161 of the (Eng.) Companies Act of 1862: Doughty v. Lonagunda Reefs, 1902, 2 Ch. 837, 1903, 1 Ch. 673. A power in a company to sell its undertaking authorizes it to call up its unpaid capital and transfer the same to the purchaser: New Zealand v. Peacock, 1894, 1 Q. B. 622. Sale of company's undertaking for shares in another company: Bisgood v. Nile Valley Co., 1906, 1 Ch. 747; Fuller v. White, 1906, 1 Ch. 823. As to purchase of shares in another company: see sec. 94, and see sec. 184 as to power to accept shares as a consideration for sale of property to another company. See also sec. 91 (*e*) notes.

23.—(1*o*) A company may mortgage not only its real or personal property then owned, but property thereafter acquired: Re Perth Flax and Cordage Co., 13 O. W. R. 1140. See *post,* sec. 78, notes.

23.—(1*q*) "Incidental" powers: Amalgamated Society of Ry. Servants v. Osborne, 1910, A. C. at p. 97. Meaning of "incidental" powers: Union Bank v. McKillop, 4 O. W. N. 1253, 5 O. W. N. 493. Who can bring action in name of company: director controlling majority of votes: majority of board of directors: Marshall's Valve Gear Co. v. Manning, 1909, 1 Ch. 267.

23.—(1) In regard to the foregoing clauses (*a*) to (*q*): see Palmer's Precedents, forms 97-105, 107, 109, 112, 115, 118-120.

24..—(1*b*) A sale in good faith of all the land owned by a mining company at the time by the company is not necessarily invalid, there being nothing to prevent the business of the company being continued by the purchase of other land: Ritchie v. Vermilion Mining Co., 1 O. L. R. 654, 4 O. L. R. 588. On what ground sale of lands may be restrained; irregularity: interest of rival company; auction: Ritchie v. Vermilion Mining Co., 1 O. L. R. 654, 4 O. L. R. 588. The invalidity of a resolution authorizing the purchase of land cannot affect the rights of the vendor in the absence of notice to him: Montreal and St. Lawrence Light and Power Co. v. Robert, 1906, A. C. 196. See further as to lands, sec. 26, notes.

26. Any *bona fide* agreement by the company to sell lands is sufficient to prevent forfeiture even when the sale is not carried out owing to default of the purchaser: conveyancing in such case: see London and Canadian Agency Co. v. Graham, 16 O. R. 329. A conveyance of lands to a corporation not empowered to hold lands is voidable only and not void under the Statutes of Mortmain and the lands can be forfeited by the Crown only: McDiarmid v. Hughes, 16 O. R. 570. Where a corporation purchased lands and continued to hold them when its charter expired, held that the corporators ceased to have any interest and that the lands reverted to the grantors: Lindsay Petroleum Co. v. Pardee, 22 Gr. 18. Where a corporation is empowered to hold lands for a definite period without provision for reverter and holds beyond the period, only the Crown can take advantage of the breach: McDiarmid v. Hughes, 16 O. R. 570.

28. Company with powers unused: see Campbell v. Taxicabs Verrals, 27 O. L. R. 141.

29. An action having been begun against a company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, while the action was pending the defendants were summoned to shew cause why their charter should not be revoked by order in Council. Held that bringing an action does not clothe the Court to restrain the exercise of the power to revoke charters whether

it is a mere statutory right or duty or a prerogative right. The Court cannot restrain the Crown or its officers in discharging discretionary functions committed to them by the Sovereign: A.-G. for Ontario v. Toronto Junction Recreation Club, 8 O. L. R. 440. See note to sec. 6 (2), as to forfeiture and cancellation clauses now inserted in certain charters.

33. The present departmental circular regarding applications for incorporation of companies with share capital is as follows:

HINTS AS TO THE FORMATION OF COMPANIES UNDER THE ONTARIO COMPANIES ACT.

Letters Patent for Incorporation of Companies with Share Capital.

The Application and What It Should Contain.

(1) The application for Letters Patent must be by a formal petition, duly executed, with at least two signatures on the page containing the prayer.

(2) There must be at least five petitioners.

(3) There must be a memorandum of agreement, in duplicate, only executed under seal by at least the five petitioners with, at least, two signatures on the page or sheet containing the undertaking. An agreement made up of two sheets of paper, the one setting forth the undertaking by itself, and the other carrying all the signatures by themselves, will not be accepted. Such agreement should conform, in its essential features, to the form contained in the pamphlet. If the application asks for special provisions in the Letters Patent, such for instance as an issue of preference shares, the memorandum of agreement should contain the special provisions asked for in the petition. The petition, which may be submitted at any time, without Gazette notice, must state:

(*a*) The proposed corporate name of the company. Such proposed name must not contain the words

"Loan," "Mortgage," "Trust," "Investment," or "Guarantee," in combination or connection with any of the words "Corporation," "Company," "Association," or "Society," or in combination or connection with any similar collective term (see R. S. O. 1914, ch. 184, sec. 129). Evidence must also be filed that the corporate name of the company is not on any public ground objectionable and that it is not that of any known corporation or association incorporated or unincorporated, or of any partnership or individual or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive. If the proposed corporate name is that of an existing firm or partnership to be taken over by the company there should be a written consent to use the name, signed by all the members of the firm or partnership, with the execution thereof verified by the affidavit or statutory declaration of a subscribing witness and an affidavit or declaration that the signatories comprise all the members of the firm or partnership. If the existing business is carried on by an incorporated company there should be a resolution of the directors authorizing the application, and undertaking that no further business operations will be carried on by such company and that the Letters Patent of the existing company will be surrendered as soon as its undertaking is transferred to the new company. If the name of the proposed company includes that of an individual, a verified consent of that individual should accompany the application. (See sec. 37.)

(*b*) The name, residence and occupation of such applicant in full, else it will be returned for completion. The word "clerk" must not be used except to describe a clerk in Holy Orders, the Department of the Honourable the Attorney-General having ruled that the word may be used for this purpose only. The objects of a mining company, to which by its Letters Patent, Part XI. of the Act, is made applicable (that is to say, companies "Without Personal Liability"), will be expressed in set terms, a copy of which will be supplied on request. If Part XI. of the Companies Act is to be made applicable to a mining company, the applicants must

add the necessary words to that effect to the prayer of their petition. Sections 23 and 24 of the Ontario Companies Act provide wide incidental and ancillary powers. These have been drawn without change from Palmer's Precedents, and have been made as wide as possible for the purpose of avoiding repeating them in the Letters Patent. Such clauses, therefore, should not be repeated in an application for Letters Patent, nor should variations of them be inserted. There is, however, no objection to other clauses which are not provided and the insertion of which may be required.

(*c*) The names of the applicants, not less than three, who are to be the provisional directors of the company.

(*d*) The names of the provisional directors of the company, who must be at least three in number and who must be shareholders, and

(*e*) The number of shares for which each applicant has subscribed in the memorandum of agreement and stock book.

(*f*) That no public or private interest will be prejudicially affected by the grant of incorporation, if such be the fact.

(*g*) If the applicants desire the insertion in the Letters Patent, as provided by sec. 5, sub-sec. 5, of the Companies Act, of special clauses, they must be set out in the petition, and in the memorandum of agreement and stock book.

(*h*) Signatures should be the ordinary business signatures of the applicants, and must be witnessed and proved by persons who are not petitioners, or directly interested in the formation of the company.

(*i*) Signatures must be verified by statutory declaration or by affidavit, and the witness shall not be one of the petitioners.

(*j*) Signatures by attorney must be made under a specific, not general, power, duly executed and verified.

Special conditions regarding preference stock or otherwise, if any, intended to have a bearing upon the shares of the company, or the manner in which it, or any portion of it, shall or may be subscribed for, must be inserted in the petition and in the memorandum of agreement and stock book as material parts thereof. Letters Patent incorporating clubs or other similar associations will contain the stereotyped form of prohibitive liquor and anti-gaming clause, a copy of which will be supplied on request by the Department.

PART II.

Name of Corporation.

34. In regard to the use of the word "Limited:" see Howell v. Brethour, 30 O. R. 204. Use of the abbreviation "Co." and "Ltd." does not affect validity of note: Thompson v. Big Cities Realty, 21 O. L. R. 394. "Ltd:" Thomas v. Standard Bank, 1 O. W. N. 379, 15 O. W. R. 188.

37. Similarity of proposed name of company to that of existing company: R. v. Registrar of Companies, 1912. 3 K. B. 23. Section considered: Re McGill Chair Co., 26 O. L. R. 254.

38.—(3)Action by shareholder for account: prepaid shares and gross earnings: Leslie v. Canadian Birkbeck, 4 O. W. N. 1102, 24 O. W. R. 407.

PART III.

Meetings of Company.

43. Statutory meeting of public companies except those not offering shares, debentures or debenture stock to the public for subscription: see sec. 117.

44. Posting notice of meeting to registered address of deceased member in accordance with company's articles is good although the directors know of the member's death: Allen v. Gold Reefs, 1900, 1 Ch. 656, 69 L. J. Ch. 266. A notice which states that in the event of certain specified resolutions not being

passed at the meeting called, another meeting will be held immediately afterwards to confirm certain other resolutions which have already been provisionally passed is not bad on account of being conditional: Tressen v. Henderson, 1899, 1 Ch. 861, 68 L. J. ch. 353; see Alexander v. Simpson, 43 Ch. D. 139, 59 L. J. Ch. 137. Two meetings convened by the same notice: in Re North of England Steamship Co., 74 L. J. ch. 404, 1905, 2 Ch. 15. Notice of meetings to shareholders: Normandy v. Ind Coope & Co., 1908, 1 Ch. 84. Notice stating that proposed new articles may be inspected at the office of the company's solicitors is sufficient: Young v. South African, etc., Exploration Syndicate, 1896, 2 Ch. 268, 65 L. J. Ch. 638. Sufficiency of notice: see Kaye v. Croyden Tramways, 1898, 1 Ch. 358, 67 L. J. Ch. 222.

45.—(3) There must be an annual audit resulting in the balance sheet (see sec. 127) as to the accuracy of which the auditors shall speak. The purpose of the balance sheet is to shew that the financial condition of the company is at least as good as stated, not to shew that it is not or may not be better. A balance sheet so worded as to shew that there is an undisclosed asset, the existence of which makes the financial position better than shewn, is not necessarily inconsistent with the Act: Newton v. Birmingham Small Arms Co., 1906, 2 Ch. 378; see also notes to sec. 134.

46. Where the directors are personally interested in the adoption of a scheme the notice calling the extraordinary general meeting to pass the requisite resolutions must disclose such interest: Tiessen v. Henderson, 1899, 1 Ch. 861, 68 L. J. Ch. 353. Where a general meeting is called by the only acting directors and one of the objects of the meeting is to confirm past proceedings, the fact that one or more of the directors have been irregularly appointed will not invalidate a resolution passed at the meeting: Boshock Proprietary Co. v. Fuke, 75 L. J. Ch. 261, 1906, 1 Ch. 148; Browne v. La Trinidad, 57 L. J. Ch. 292; 37 Ch. D. 1; British Asbestos Co. v. Boyd, 73 L. J. Ch. 31, 1903, 2 Ch. 439; see also Re State of Wyoming Syndicate, 1901, 2 Ch. 431, 70 L. J. Ch. 727. Where a notice convening a general meeting

states that the shareholders will be asked to ratify the election of a director, this is a sufficient notice to bring the question of ratification within the competency of the meeting: Irvine v. Bank of Australia, 46 L. J. P. C. 87, 2 App. Cas. 366. The fact that directors have power to fix the time and place of a general meeting gives them no power to postpone a general meeting of shareholders properly called: Smith v. Paringa Mines, 75 L. J. Ch. 702, 1906, 2 Ch. 193. Conformity of resolution with notice: see Torbock v. Lord Westbury, 71 L. J. Ch. 845, 1902, 2 Ch. 871. Sufficiency of notice; setting out business to be transacted: Normandy v. Ind Coope & Co., 1908, 1 Ch. 84. Where it is intended to pass a special resolution, two meetings may be convened by the same notice: Re North of England Steamship Co., 1905, 1 Ch. 609, 2 Ch. 15. It will be noticed that the provisions of the former Act (R. S. O. 191, secs. 56 and 57), providing for a quorum, are omitted. If all the shareholders have notice, the business of the company apparently should proceed.

47. The chairman, by a vote of the majority, can stop the debate after the resolutions have been reasonably discussed: Wall v. London and Northern, etc., Corporation, 67 L. J. Ch. 596, 1898, 2 Ch. 469. An amendment altering the terms of a resolution cannot be moved at a meeting called simply for the purpose of confirming or rejecting the resolution: Wall v. London and Northern etc., Corporation, 67 L. J. Ch. 596, 1898, 2 Ch. 469.

48. The adjournment is the act of the chairman and not that of the meeting. He is not bound to adjourn the meeting even though a majority of those present desire an adjournment: Salisbury Gold Mining Co. v. Hathorn, 66 L. J. P. C. 62, 1897, A. C. 268.

49.—(1) Under section 51 of the English Companies Act of 1862 the declaration of the chairman is deemed "conclusive evidence," which precludes the Court from enquiring into the question the requisite proportion of votes was in fact given: Arnot v. United African Land Co., 70 L. J. Ch. 306, 1901, 1 Ch. 518; see also in Re Gold Co., 11 Ch. D. 701; Re Hadleigh Castle Gold Mining Co., 1900, 2 Ch. 419; Re Harbury

Bridge Coal, etc., Co., 11 Ch. D. 109. But the declaration of the chairman is not conclusive where it is manifest that the statutory majority has not been obtained: in Re Caratal Mines, 71 L. J. Ch. 883, 1902, 2 Ch. 498. In respect of acts within the powers of the company and capable of confirmation by a majority of shareholders the Court will not interfere at the instance of individual shareholders; Foss v. Harbottle, 2 Hare 261; Mozley v. Alston, 1 Ph. 790; Kelly v. Electrical Construction, 10 O. W. R. 704. As to power of general meeting to override directors: see Automatic Self-cleaning Filter v. Cunninghame, 1906, 2 Ch. 34. Rights of minority stockholders: see article 44 C. L. J. 339.

49.—(2) Under a similar provision a poll was demanded and the chairman directed the poll to be taken by means of voting papers. Held that taking the poll by voting papers was unauthorized and invalid: McMillan v. Le Roi Mining Co., 75 L. J. Ch. 174, 1906, 1 Ch. 331. Poll; allowance of votes by chairman: see Wall v. London and Northern Assets Corporation, No. 2, 68 L. J. 248, 1899, 1 Ch. 550.

50. On a show of hands each person has one vote: Ernest v. Loma Gold Mines, 66 L. J. Ch. 17, 1897, 1 Ch. 1. Right of the purchaser of forfeited shares to vote while the calls have not been recovered from the former shareholder: see Randt Gold Mining Co. v. Wainwright, 1901, 1 Ch. 184. Shareholder partially paid up and not in arrear for calls has the same voice as one fully paid up: Purdom v. Ontario Loan, 22 O. R. 597. Manipulating shares with a view to or in a way which results in an unfair control of voting power is *ultra vires* of the directorate and not susceptible of being ratified by a majority of the shareholders: Punt v. Lynn, 1903, 2 Ch. 517; Martin v. Gibson, 10 O. W. R. 66, 15 O. L. R. 623, notes to sec. 91 (*e*). Anything that looks to a confiscation of corporate rights or privileges by a majority at the expense of a minority is frowned upon by the Court: Griffith v. Paget, 5 Ch. D. 898; Meunier v. Hooper, L. R. 9 Ch. 350; Percival v. Bright, 1902, 2 Ch. 425.

51. A company may legitimately do and pay out of its assets for all such acts as are reasonably necessary for procuring its members to express their views on the management of its affairs, *e.g.*, may send out stamped proxy papers: Peel v. London and North Western Ry., 1907, 1 Ch. 5. By-laws regulating the requirements as to proxies are to be made by directors. Shareholders have no power to initiate and pass such a by-law at a general meeting. In the absence of a by-law nothing more is required of a proxy than valid execution by a shareholder: Kelly v. Electrical Construction, 16 O. L. R. 232. Qualification of proxy: see Bombay Burmah Trading Corporation v. Shroff, 74 L. J. P. C. 41, 1905, A. C. 213. A proxy paper may be filled in after signature by any person authorized to do so: Ernest v. Loma Gold Mines, 66 L. J. Ch. 17, 1897, 1 Ch. 1. The provision here as to proxies must be read with sec. 91 (1*d*), the effect being that each shareholder is entitled to the right to vote by proxy subject to one qualification, namely, compliance with the requirements of a directors' by-law, which, if not confirmed, ceases to exist: Kelly v. Electrical Construction, 10 O. W. R. 704, 16 O. L. R. 232.

52. Head office of company abroad; meetings of directors in England and abroad: De Beers Consolidated v. Howe, 1906, A. C. 455.

PART IV.

Shares, Calls.

54.—(1) "'Share' is a term indicating simply a right to participate in the profits of a particular joint stock undertaking:" Per James, L.J.: Morice v. Aylmer, L. R. 10 Ch. 155. Nature of shares in limited company: see Borland's Trustee v. Steel, 70 L. J. Ch. 51, 1901, 1 Ch. 279. A company is not liable in damages for loss sustained by a purchaser for value of a share certificate on which the necessary signatures are forged, although the forgery was committed by the secretary and the certificate handed out to him in the usual form. No estoppel arises from the secretary's action: Ruben v. Great Fingal Consolidated, 1904, 1 K. B. 650, 2 K. B. 712, 75 L. J. K. B.

843, 1906, A. C. 439. Power of officer to sign shares where power exercised fraudulently for officer's own purposes: Mackenzie v. Monarch Life, 18 O. W. R. 325, 23 O. L. R. 342, 21 O. W. R. 98 (S. C. R.), 45 S. C. R. 232. Trustee holding shares in trust for several beneficiaries: right of one beneficiary to apportionment: Bechtel v. Zinkann, 16 O. L. R. 72.

54.—(2) Stock certificate as a document of title to ownership of shares: Mackenzie v. Monarch Life, 23 O. L. R. 342, 45 S. C. R. 232. Liability of company to real owner of shares transferred by person without authority: Stuart v. Hamilton Jockey Club, 2 O. W. R. 673, 1402, 18 O. W. R. 493, 19 O. W. R. 780.

56. Consideration of powers of directors in regard to transfer of paid up shares. Power to regulate does not include power to prohibit: Toronto v. Virgo, 1896, A. C. 88; Re Belleville Driving, etc., Association, 5 O. W. N. 520. The Act nowhere authorizes a company to refuse to transfer on its books fully paid up shares: Re Imperial Starch Co., 10 O. L. R. 22; Re Panton and Cramp Steel Co., 9 O. L. R. 3; (unless that power is conferred in the Company's Letters Patent (sec. 58)); see also Re Good and Shantz, 1 O. W. N. 508, 770, 2 O. W. N. 955, 15 O. W. R. 534, 16 O. W. R. 30, 18 O W. R. 944, 21 O. L. R. 153, 23 O. L. R. 544. Power to make by-laws to regulate transfers: see sec. 91. As to transfer of stock in private companies: see sec. 2 (*c*). Where under resolution of the directors, there being no by-law, the books were closed for a brief period for the alleged purpose of avoiding confusion in ascertaining the shareholders entitled to vote at the annual meeting, a mandamus was granted compelling the company to record a transfer of shares: in Re Panton and the Cramp Steel Co., 9 O. L. R. 3. Paid up shares to be dealt with on open market must be transferred without objection by the company: Re Goldfields and Harris Maxwell Co., 2 O. W. N. 1373, 19 O. W. R. 706. A transfer of shares made not in the books of the company as required, but by endorsement of assignment on the certificate, although for value, confers on the transferee a mere equitable title and may be cut out by a subsequent transfer to an innocent transferee who is duly registered as

holder. The company may insist on the production of the certificate, but are not bound to do so and are not thereby estopped: Smith v. Walkerville M. I. Co., 23 A. R. 95. A provision in a certificate of ownership of paid up shares that "the articles of this company are part and parcel of this contract is not sufficient to make applicable to a *bona fide* purchaser of the shares a by-law of the company giving the company a lien on shares for any accounts owing to the company by the shareholder: Re McKain and Canadian Birkbeck Inv. Co., 7 O. L. R. 241. Registration of transferee where under its articles the company has a lien: see Chida Mines v. Anderson, 22 T. L. R. 27. A person who executes a transfer of shares comes under an implied obligation not to hinder the transferee in obtaining the transfer and this applies to a case where the transfer is made in blank and filled in later by a *bona fide* holder for value: Hooper v. Herts, 75 L. J. Ch. 253, 1906, 1 Ch. 549. Vendors interfering to prevent registration of transfer; resale by purchaser and damages for loss of profit; obligation to see that purchaser registered as owner: see Boultbee v. Wills, 10 O. W. R. 993. Conflicting equities in shares: Peat v. Clayton, 1906, 1 Ch. 659. The certification by the secretary of the transfer of shares by a person who had no power of dealing with the shares cannot operate as an estoppel against the company from denying the title of the alleged transferee or make it liable in damages for refusing to register such transferee as a shareholder: George Whitechurch Lim. v. Cavanagh, 71 L. J. K. B. 400, 1902, A. C. 117. Fraudulent transfer: Longman v. Bath Electric Tramways, 74 L. J. Ch. 424, 1905, 1 Ch. 646. Forged transfer: Where a corporation registers a forged transfer and is compelled to make good the loss to the true owner, it is entitled to recover from the person at whose request the forged transfer was registered: Sheffield Corporation v. Barclay, 74 L. J. K. B. 747, 1905, A. C. 392. Transfer of shares by unauthorized persons; liability of company: Stuart v. Hamilton Jockey Club, 2 O. W. N. 1402, 19 O. W. R. 780. Negligence of company as proximate cause of loss to transferee under fraudulent transfer: Longman v. Bath Electric Trains, 1905, 1 Ch. 646. Transfer in blank: Ireland v. Hart, 1902, 1

Ch. 522. Unreasonable delay in registration: In re Sussex Brick Co., 1904, 1 Ch. 598. A company cannot refuse to register a transfer of shares to a bankrupt on the ground that if registered the shares will pass to the trustee in bankruptcy: Sutton v. English, etc., Produce Co., 1902, 2 Ch. 502. Duty of company as regards transfer; notice of prior charge: Rainford v. Keith, 1905, 2 Ch. 147. Materiality of details as number of the share and address of transferor: Re Letheby, 1904, 1 Ch. 815. Identification of transferor of stock; innocent misrepresentation: Bank of England v. Cutler, 1907, 1 K. B. 889. Enforcing transfer of shares: Nelles v. Windsor Essex and Lake Shore Ry., 16 O. L. R. 359. Charging orders on stocks: see R. S. O. 1897, ch. 324, secs. 21-23; see now R. S. O. 1914, ch. 56, secs. 140-142.

57. Where directors' shares were transferred to irresponsible persons, the directors were held liable for breach of trust in not exercising their powers in the best interests of the company, and were placed on the list of contributories: Re Peterborough Cold Storage Co., 9 O. W. R. 850, 14 O. L. R. 475; see Bennet's Case, 5 De G., M. & G. 284. Transfer of shares to escape liability: Re Discoverers' Finance Co., 1910, 1 Ch. 207, 312. See also Boyle v. Rothschild, 10 O. W. R. 696. Registration of transfer of shares to person indebted to company: Re Polson, 3 O. W. N. 1269.

57.—(1) A statement in a share certificate that the shares are fully paid up will not estop the liquidator in winding up: in Re African Gold Concessions, 68 L. J. Ch. 215, 1899, 1 Ch. 414. See Re Peterborough Cold-Storage Co., 9 O. W. R. 850, 14 O. L. R. 475.

57.—(2) Device of a company to relieve shareholder from his liability to pay the full amount due on his shares: Re McGill Co., Munro's Case, 3 O. W. N. 1074, 21 O. W. R. 921.

57.—(4) The provision of 7 Edw. VII., ch. 34, sec. 54, that stock on which there were unpaid calls could not be transferred was imperative and could not be waived by the company: Gowganda Mines v. Smith, 44 S. C. R. 621.

60. An assignee under an assignment for benefit of creditors which excepts shares in companies not fully paid up, and which declares the assignor his trustee of the shares to transfer them as he should direct, is not entitled to call on the company to account to him for the shares or any dealings therewith: Armstrong v. Merchants Mantle Mfg. Co., 32 O. R. 387. A *bona fide* assignment or pledge for value of shares is valid as between assignor and assignee, notwithstanding that no entry of the assignment is made on the books of the company. The rights of a *bona fide* assignee cannot be cut out by the seizure and sale of the shares under execution against the assignor after assignment: Morton v. Cowan, 25 O. R. 529; see R. S. O. 1914, ch. 80, secs. 12, 19.

62.—(1) The signatories to the memorandum of association do not become debtors to the full amount of their shares. They are only liable as other members for calls when made: Alexander v. Automatic Telephone Co., 1899, 2 Ch. 302; see notes to sec. 5 (3) *ante*. This calling of instalments must be done by a properly constituted board of directors: Twin City Oil Co. v. Christie, 18 O. L. R. 324. 13 O. W. R. 756. When a call is made it is the directors duty to take all reasonable means of enforcing payment: Re Lake Ontario Navigation Co., Hutchenson's Case, 13 O. W. R. 1037. A promissory note given for a subscription to stock may be negotiated. If the contract is not completed and the stock not allotted, this will not affect the note in the hands of holders in due course for value: Standard Bank v. Stephens, 11 O. W. R. 582. Assignment from company of amount due for shares—action: Stephens v. Riddell, 1 O. W. N. 993, 16 O. W. R. 277, 21 O. L. R. 484. Action for calls on subscription for shares: Misrepresentation: Boeckh v. Gowganda Queen, 24 O. L. R. 298, 46 S. C. R. 645.

62.—(3) Stock once allotted can not be surrendered. The only way the directors can regain control is by forfeiture: Gowganda Mines v. Smith, 44 S. C. R. 621. Where no time is limited in the special act, letters patent or by-law making a call, the call

is invalid and an attempted forfeiture of the stock ineffectual: Armstrong v. Merchants Mantle Mfg. Co., 32 O. R. 387. The power given directors as to forfeiture of shares for non-payment of calls, is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company and cannot be employed for the benefit of the shareholders: Common v. McArthur, 29 S. C. R. 239. A company can, in re-allotting forfeited shares, give credit for money already paid in respect of the shares. Such a transaction is not an issue of shares and is not contrary to the principle that a company cannot issue shares at a discount: Morrison v. Trustees, etc., Corporation, 68 L. J. Ch. 11. A surrender of shares which has the effect of reducing capital can only be supported in circumstances which would justify forfeiture, and make it in fact, a form of forfeiture: Trevor v. Whitworth, 12 App. Cas. 499; Ooregum Gold Mining Co. v. Roper, 1892, A. C. 125; British and American Trustee and Finance Corporation v. Couper, 1894, A. C. 399. A surrender of partly paid up shares to the company although voluntary and for the benefit of the company, if it involves the release of the shareholder's liability, constitutes a purchase by the company of those shares and is *ultra vires*: Trevor v. Whitworth, 12 App. Cas. 409; Bellerby v. Rowland, 1902, 2 Ch. 14. Disposal of forfeited shares. Liability of purchaser for prior and subsequent calls: New Balkis Eersteling v. Randt, 73 L. J., K. B. 384, 1904, A. C. 165. The directors have no power to rescind the forfeiture adversely to a shareholder whose shares have been forfeited, so as to reinstate him with a liability of which he had been relieved by the forfeiture: In re Exchange Trust, Larkworth's Case, 1903, 1 Ch. 711, 73 L. J. Ch. 387. Sale of forfeited shares. Liability of purchaser: In re Randt Gold Mining Co., 73 L. J. Ch. 598, 1904, 2 Ch. 486. Sale by company of forfeited shares: the purchasers must be allowed the benefit of payment made by the forfeiting holders in respect of shares: Re Randt Gold Mining Co., 1904, 2 Ch. 468. Forfeiture of partly paid shares: New Balkis v. Randt Gold Mining Co., 1904, A. C.

165; Re Exchange Trust, 1903, 1 Ch. 711. Forfeiture for non-payment of calls: Jones v. N. Vancouver Land Co., 1910, A. C. 317. Promissory note: Freeman v. Canadian Guardian Life Ins. Co., 12 O. W. R. 781.

63. Secs. 63-71 were new in the Act of 1907, and were taken substantially from the English Act of 1867, secs. 27-40.

72. Where transferee of shares held " in trust " is put on enquiry: Bank of Montreal v. Sweeny, 12 S. C. R. 661, 12 App. Cas. 617; see also Simpson v. Molsons Bank, 1895, A. C. 270.

74.—(1) Shares in a joint stock company may be paid in money or moneys worth, and if paid for by a transfer of property, must be treated as fully paid. Fiduciary relation of promoters to company is considered and secret profits taken in the shape of fully paid up shares will cause them to be treated as unpaid: Re Hess Mfg. Co., 23 S. C. R. 644. Where a municipal bonus was applied to issue bonus shares as paid up, the shareholders accepting such stock *bona fide* were yet placed on list of contributories: Re Cornwall Furniture, 20 O. L. R. 521, 14 O. W. R. 352. Treasury stock issued to existing shareholders as paid up: Re Clinton Thresher Co., 20 O. L. R. 555. Application and appropriation of payment by company: Neelon v. Thorold, 22 S. C. R. 390. Where a company is formed for the purpose of trading in a foreign country, a question may arise out of the implied power under foreign law to pledge the personal credit of shareholders. As to liability, in such case, of holders of fully paid up shares: see Resdon Iron and Locomotive Works v. Furness, 1906, 1 K. B. 49. This section (like R. S. C. 144, sec. 51), provides that where a person is once in a position as a member of a company there is a statutory liability to contribute the amount unpaid on his shares: Re Lake Ontario Navigation Co., 13 O. W. R. 1032. Shares issued for value under agreement treated as paid up shares: Jones v. Miller, 24 O. R. 268. Shares issued as paid up in consideration for services to

be rendered must be treated as unpaid: Union Bank v. Morris, 27 A. R. 396; see cases Dig. Ont. Case Law, col. 1065-1075. Shares attempted to be issued at a discount: see sec. 100 (2).

The statutory provision for making a judgment against a company available against a holder of unpaid shares, is in lieu of the common law practice by way of *sci. fa*: Cross v. Law, 6 H. & W. 217, 223; Brice v. Munro, 12 A. R. 453; Gwatkin v. Harrison, 36 U. C. R. 478; Page v. Austin, 26 U. C. C. P. 110; Moore v. Kirkland, 5 U. C. C. P. 452; Jenkins v. Wilcock, 11 U. C. C. P. 505; Shaver v. Cotton, 23 A. R. 426; Grills v. Farah, 1 O. W. N. 978, 21 O. L. R. 457. Section considered: Re McGill Chair Co., 26 O. L. R. 254. After a winding-up order has been made, a judgment creditor of a company cannot bring an action against a contributory for payment of the amount unpaid on his shares: Shaver v. Cotton, 27 O. R. 131, 23 A. R. 426. Action against shareholder: insufficiency of return of *nulla bona*: Grills v. Farah, 21 O. L. R. 457, 1 O. W. N. 978, 16 O. W. R. 285.

74.—(2) The provision as to set off has reference only to an action against a shareholder in the nature of a *sci. fa.*, by a creditor of the company, and its provisions do not extend the right of set off to proceedings against shareholders under this Act: Re Wiarton Beet Sugar Co., 10 O. L. R. 219; see The Maritime Bank v. Troop, 16 S. C. R. 456. Who are within the provision as to set off: history of section and its provisions considered: Grills v. Farah, 1 O. W. N. 978, 21 O. L. R. 457. Counterclaim against company, in *sci. fa.* action: *Ib.* Claim sounding in damages: *Ib.* Set off in respect of unpaid shares: Re Law Car and General Ins. Co., 1912, 1 Ch. 405. Payment by set off: Re C. B. C. Corset Co., 12 O. W. R. 185.

77. A mortgagee of stock, in cases outside of the real property statutes, may sell the same at any time after the day originally fixed for payment of the loan, or if no day is fixed, after reasonable notice and default after such notice: De Verges v. Sanderman, 71 L. J. Ch. 328, 1902, 1 Ch. 579; see

Toronto General Trusts Co. v. Central Ontario Railway, 7 O. L. R. 660, 10 O. L. R. 347. The section has reference to the stock of a shareholder only. A company can not allot their own stock as collateral security for their own debt: Re Perrin Plow Co., Allan's Case, 11 O. W. R. 186, 12 O. W. R. 387. Liability for unpaid stock of person holding it as collateral security: Re Empire Accident Co., 4 O. W. N. 926.

PART V.

Preference and Debenture Stock, Debentures and Mortgages.

78.—(1*a*) Where money is borrowed by a company within the limits of its borrowing powers there is no obligation on the lender to enquire whether the purpose of the loan is or is not within the powers of the company: In re Payne, Young v. Payne, 1904, 2 Ch. 608. Knowledge of a director of a lending company that a borrowing company proposes to use money borrowed on debenture for purposes improper and *ultra vires*, will not be imputed to the lending company so as to avoid the debenture: In re Payne, Young v. Payne, 1904, 2 Ch. 608. Where a company is sued on a contract and admit the claim, but set up that the directors have exceeded their borrowing powers and that when the goods were purchased the company's indebtedness was such that the directors were personally liable, a motion for summary judgment was dismissed: Canadian General Electric v. Tagona Water and Light, 6 O. L. R. 641. Notice of irregularity: *ultra vires* borrowing: when imputed to the leading company when the two companies have an officer in common: Re Hampshire Land Co., 1896, 2 Ch. 743. Borrowing powers: Re Johnston Foreign Patents, 1904, 2 Ch. 234. A company may mortgage its real and personal property including any thereafter acquired: assignment of future choses in action, how far voidable: Re Perth Flax and Cordage Co., 13 O. W. R. 1140. Mortgage to secure liability of company: Hammond v. Bank of Ottawa, 15 O. W. R. 536, 17 O.

W. R. 121, 1 O. W. N. 519, 2 O. W. N. 99, 22 O. L. R. 73. Sufficiency of by-law authorizing hypothecation of company's securities to secure present and future indebtedness: Standard Bank v. Stephens, 16 O. L. R. 115, 11 O. W. R. 582. By-law under this section and under sec. 82: see Hammond v. Bank of Ottawa, 22 O. L. R. 73.

78.—(1*b*) Debentures and company's power to deal with subsequently acquired property: General and specific debentures: Priorities: Re Stephenson Co. v. The Company, 1913, 2 Ch. 201. Debentures, floating charges and notice to creditors: see 45 C. L. J. 25, 145, 220. What modification of trust deed securing debentures a majority of a company can make: see Re New York Taxicab Co., 1913, 1 Ch. 1. Charge on the general property of the company: "Floating security:" Government Stock v. Manila Ry., 1897, A. C., at p. 86. No action will lie for specific performance of contract to lend money on debentures: South African Territories v. Wallington 1898, A. C. 309. The expression "sinking fund," does not necessarily connote accumulation at compound interest, or any mode of application equivalent thereto. The word "redeemable" as applied to debentures *prima facie* imports an option and not an obligation to redeem: Re Chicago and N. W. Granaries Co., 1898, 1 Ch. 263. A charge on "all property to which the company now is, or may hereafter become, entitled and all estate, right, title, etc., to the said premises," does not constitute a charge on the uncalled capital of the Company: Re Russian Spratts Patent, 1898, 2 Ch. 149. Debenture amounting to fraudulent preference: Re Jackson and Bassford, 1906, 2 Ch. 467. The effect of a company purchasing its own debentures is to extinguish the debt: In re Routledge, 2 Ch. 474. Where a company was served with a garnishee order absolute, and afterwards for good consideration issued a debenture to a person having notice of the garnishee order, it was held that the garnishee order created no charge on the property, and the debenture holder was entitled to priority over an execution issued under the garnishee order: Glisse v. Taylor, 1905, 2 K. B. 658. Mutual rights of debenture holder and attaching creditor in respect of

money due to company: Cairney v. Back, 1906, 2 K. B. 746. A *bona fide* holder of a debenture regular on the face of it and issued to him for value and without notice of informality, has priority to an execution creditor, though the debenture is in fact informal: Duck v. Tower Galvanising Co., 1901, 2 K. B. 314. See as to execution creditors who take subject to all equities of debenture holders: Re Standard Mfg. Co., 1891, 1 Ch. 627, 641; Re London Pressed Hinge Co., 1905, 1 Ch. 576. Issue of debentures jointly and severally by several companies may be *ultra vires*, but the debentures will form a valid charge against each company to the extent to which the proceeds came to its coffers: In re Johnston, 1904, 2 Ch. 234. Where there is power for debenture holder to appoint a receiver and manager, such receiver cannot annul the contracts of the company, and the servants of the company do not *ipso facto* become his servants on his appointment: Re Marriage Neave & Co., 1896, 2 Ch. 663. Debenture holder's action: carrying on the business: Re British Power Traction, 1907, 1 Ch. 528; and see Robinson Printing Co. v. " Chic," 1905, 2 Ch. 123, notes to sec. 82 *infra*. Deposit of debentures with bankers as collateral security: payment off of amount secured and further advance on same security: see Re Russian Petroleum, 1907, 2 Ch. 540. A foreclosure order will not be made in an ordinary debenture holder's action without the concurrence of the holders of all the debentures: Re Continental Oxygen Co., 1897, 1 Ch. 511. A plaintiff suing " on behalf of himself and all the other debenture holders," who has had his claims satisfied may discontinue the action, though this cannot be done in a similar manner in a creditor's administration action: In re Alpha Co., 1903, 1 Ch. 203. Costs in debenture actions: see Re New Zealand Midland Ry., 1901, 2 Ch. 357; Mortgage Insurance Co. v. Canadian Agricultural, etc., Co., 1901, 2 Ch. 377. Receivers were appointed in action by debenture holders of a company, and a contract made by the company to sell goods to P. was assigned to a bank. The contract was not fully completed. Held that as against the bank, P. could set off damages for breach of contract by the company: Parsons v. Sovereign Bank, 1913, A. C. 160. A debenture by way of bill

of sale giving a floating charge over the assets of a company, is not within the provisions of the Bills of Sale and Chattel Mortgage Act: Johnston v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, 17 O. L. R. 372. Debenture: note on Johnston v. Wade, 17 O. L. R. 372; see 45 C. L. J. 25. Debentures and chattel mortgages and what transactions are within the Chattel Mortgage Act: see R. S. O. 1914, ch. 135, sec. 24 note, and see *infra* sec. 82 notes.

78.—(1*c*) Irregularity in issue of bonds. Rights of pledgee without notice: Johnson v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, 17 O. L. R. 372. Payment of commission to secretary of company on sale of bonds. Recovery of money paid through *ultra vires* act of directors: Sydney Land Co. v. Roundtree, 39 S. C. R. 614.

78.—(2*a*) Directors with the approbation of general meeting, reissued certain shares purporting to have preferential interest. The shares were issued to A. and sold by him to B. as preference shares. The directors, however, had no power to issue such preference shares. B. was, nevertheless, liable as a contributory: *Ex parte* Worth, 4 Drew 529, 28 L. J. Ch. 589. Preference stock cannot be created by a resolution. The statute requires a by-law: Manes Tailoring Co. v. Willson, 9 O. W. R. 209, 14 O. L. R. 89.

78.—(2*b*) Alteration of articles by imposing lien on fully paid shares must be *bona fide* and not to defeat the rights of a particular shareholder: Allen v. Gold Reefs, 1900, 1 Ch. 656.

78.—(3) Where a loan was made to a company, ostensibly by the general manager, but really by a third person, payments of interest made secretly by the manager to the third person sufficed to estop the company and prevent the statute from running: Nickle v. Kingston and Pembroke Ry., 12 O. L. R. 349, 8 O. W. R. 158, 6 O. W. R. 51. See as to signature of promissory notes, etc, sec. 91 (*e*) notes, *post*.

79. "Two thirds," where there has been no default after a call, is to be computed on the face value of

the number of shares held, not upon the amount paid upon such shares: Purdom v. Ontario Loan and Debenture, 22 O. R. 597. Until the section is complied with there is no valid creation of preference stock, and a subscriber for preference shares cannot be held as a contributory because the company is not in a position to give him that for which he has applied: Re Packenham Pork Packing Co., 12 O. L. R. 100.

80. Preference shares: Dividend "preferential" and "cumulative preferential:" see Foster v. Coles, 22 T. L. R. 555; Staples v. Eastman Photographic Co., 1896, 2 Ch. 303. The necessity for a dividend as a condition precedent to an action for the recovery of such dividend applies to preference as well as ordinary shares. A preference dividend does not partake of the nature of interest: Bond v. Barrow Haemitite Steel Co., 1902, 1 Ch. 353. The claims of shareholders in respect of unclaimed dividends are liable to become barred by the Statute of Limitations: In re Severn and Wye & C. Ry., 1896, 1 Ch. 559. Under the provisions of this section special provisions may be made for preferred or deferred shares to exclude the holders from any control while their dividends are paid. As to different classes of shareholders: see Hemans v. Hotchkiss Ordinance Co., 68 L. J. Ch. 99, 1899, 1 Ch. 115. Where preference shares are given a fixed preferential dividend at a fixed rate, this impliedly negatives a right to any further dividend: Will v. United Lankat Plantations, 1912, 2 Ch. 571. There is no implied condition of equality as to shareholders. A company can alter its articles so as to provide for preference shares: Andrews v. Gas Meter Co., 1897, 1 Ch. 361; see British, etc., Corporation v. Couper, 6 R. 146; Re South Durham Brewery Co., 31 Ch. D. 261; McIlquham v. Taylor, 1895, 1 Ch. 53, 71 L. T. 679.

82. The power to mortgage is not restricted to the existing property of the company. The company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person: Kirkpatrick v. Cornwall Electric Ry., 2 O. L. R. 113. Power of trustees for bondholders to

object to transfer of debts and pledge of materials to a bank: see Trusts and Guarantee v. Abbott Mitchell, etc. Co. 11 O. L. R. 403. Powers of directors to transfer debts to a bank and pledge material manufactured and unmanufactured when this is necessary to carry on the company's business without the two-thirds vote, and notwithstanding a bond mortgage: see Trusts and Guarantee v. The Abbott Mitchell Iron, etc. Co., 11 O. L. R. 403. Holders of debenture stock secured by trust deed are not creditors entitled to present a winding-up petition: see Re Dunderland Iron Ore Co., 1909, 1 Ch. 446. Powers under debenture trust deeds: Re Bentley's Yorkshire Breweries, 1909, 2 Ch. 609. Representative action to enforce debenture trust deed: Calgary and Medicine Hat Land Co., 78 L. J. Ch. 97. "Default in payment:" Re Escalera Silver Lead Mining Co., 25 T. L. R. 87. An execution creditor takes subject to all equities of debenture holders: Re Standard Manufacturing Co., 1891, 1 Ch. 627, 641; Re London Pressed Hinge Co., 1905, 1 Ch. 576. A receiver appointed by debenture holders to carry on the business, may for such purposes create a valid charge on the property prior to the debenture holders and also pledge the personal credit of the debenture holders: Robinson Printing Co. v. "Chic," 1905, 2 Ch. 123. Issue of debentures by companies "jointly and severally:" Re Johnston Foreign Patents, 1904, 2 Ch. 234. It was held sufficient if directors acted under the powers of this section, notwithstanding a recital referring to sec. 78, and failure to refer to this section: Hammond v. Bank of Ottawa, 2 O. W. N. 99, 17 O. W. R. 121, 22 O. L. R. 73. Registration of mortgage over chattels to secure bonds and registration of a floating debenture: Johnston v. Wade, 17 O. L. R. 372; National Trusts v. Trusts & Guarantee Co., 3 O. W. N. 1093, 21 O. W. R. 933, 26 O. L. R. 279. Publicity by registration of mortgages securing debentures: see article 45, C. L. T. 145, at p. 155, 220; Johnston v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, 17 O. L. R. 372; Re Renshaw & Co., (1908), W. N. 210. As to registration of mortgage or conveyance given to "secure" any bonds or debentures: see R. S. O. 1914, ch. 135, sec. 24 and notes. See also notes to sec. 78 *ante*.

PART VI.

Directors and their Powers.

83. A provisional director is a director: Perrins Ltd. v. Algoma Tube Works, 8 O. L. R. 634. Query whether provisional directors are directors for all the purposes of the company: Johnson v. Wade, 11 O. W. R. 598, 12 O. W. R. 951, at p. 952, 17 O. L. R. 372. Powers of provisional directors: see article 45 C. L. J. 145, 220, 338; Johnston v. Wade, 17 O. L. R. 372; Manes Tailoring Co. v. Wilson, 14 O. L. R. 89; Monarch Life v. Brophy, 14 O. L. R. 1; Selkirk v. Windsor, Essex, etc., Ry., 1 O. W. N. 355, 22 O. L. R. 250. Company with unused powers: Campbell v. Taxicabs Verrals, 23 O. W. R. 6, 4 O. W. N. 28, 27 O. L. R. 141.

84. A director is bound to give attention and exercise his judgment. In the absence of grounds for suspicion, he is entitled to rely on the officials of the company and is not bound to examine entries in the company's books: Dovey v. Cory, 1901, A. C. 477. Directors are trustees not only for those who are members at the time, but for all who may come in afterwards: Bennett v. Havelock Electric, 21 O. L. R. 120, 1 O. W. N. 751. Fiduciary relation of directors: Stratford Fuel v. Mooney, 16 O. W. R. 246. Directors are in the position of managing partners and their mandate is the mandate of the whole body of shareholders, not of the majority only. It is not compelent for a simple majority of shareholders, by resolution at an ordinary general meeting, to alter the mandate and override the discretion of the directors: Automatic Self Cleaning Filter v. Cunninghame, 1906, 2 Ch. 34. A director's liability is not governed by the strict rules applied in the case of trustees, but he must shew reasonable diligence: Marzetti's Case, 42 L. T. 206. When directors have acted *ultra vires*, it is no defence that the acts in question were done for the benefit of the company, if they knew or ought to have known that such acts were *ultra vires*: London Trust Co. v. MacKenzie, 62 L. J. Ch. 870. But see Kingston Cotton Mill Co. (No. 2), 1896, 1

Ch. 331. A director is not liable for error of judgment: Overend Gurney Co., L. R. 4 Ch. 701. And to make him liable for misrepresentation it must be wilful and fraudulent: Eaglesfield v. Londonderry, 4 Ch. D. 693. Duties and responsibilities of directors: Twycross v. Grant, 2 C. P. D. 469; Trechmann v. Calthorpe, 1904, 2 Ch. 631, 1906, A. C. 24. Consideration of director's duties: see Parker and Clark, p. 197; see also Re Lake Ontario Navigation Co., Hutchinson's Case, 13 O. W. R. 1037. Director's liability where power of company exceeded: see Canadian General Electric v. Tagona Water and Light Co., 6 O. L. R. 641.

Where there were only sufficient shareholders to form a company and all were entitled to be directors, one of the shareholders dying, bequeathed his shares. Held that there did not need to be an election to constitute the legatee a director: Kiely v. Kiely, 3 A. R. 438. Where the board is reduced to two by reason of vacancies, and the two contract a loan, their act will be binding on the company notwithstanding the reduction: Re Scottish Petroleum Co., 23 Ch. D. 413; Re Bank of Syria, 1901, 1 Ch. 115. Power of reduced directorate: In re Scottish Petroleum Co., 23 Ch. D. 413; In re Bank of Syria, 1900, 2 Ch. 272; Re Manes Tailoring Co., 9 O. W. R. 209, 14 O. L. R. 89. Irregularity in constitution of board of directors as to members: Twin City Oil Co. v. Christie, 18 O. L. R. 324, 13 O. W. R. 756.

Authority to use the name of a company in an action can only be given by resolution of the board of directors or by a properly convened shareholders' meeting: La Compagnie de Mayville v. Whitley, 1896, 1 Ch. 788. A minority of the shareholders cannot have or give such authority: Ritchie v. Vermillion Mining Co., 1 O. L. R. 654, 4 O. L. R. 588. Who can bring action in name of company: Majority of directors or majority of votes: Marshall's Valve Gear Co. v. Manning, 1909, 1 Ch. 267. Rival boards of directors: Boyle v. Rothschild, 11 O. W. R. 963, 12 O. W. R. 168, 13 O. W. R. 800. Directors are not bound to give notice beforehand of extraordinary business to be transacted at a

board meeting: La Compagnie de Mayville v. Whitley, 1896, 1 Ch. 788. May a company be a director of another company? Re Buluwayo Market, 1907, 2 Ch. 458. Powers of directors of religious corporation under this Act: Gold v. Maldaver, 4 O. W. N. 106. Where the contract is one that the directors can lawfully enter into, the fact that it is extensive and important will not alter their power to bind the company: National Malleable Castings Co. v. Smith's Falls M. Castings Co., 9 O. W. R. 165. An allotment of shares to a director though a questionable act may be ratified. It is no part of a director's duty or obligation to pledge their own credit for the benefit of the company: Christopher v. Noxon, 4 O. R. 672. Consideration of director's powers: Webster v. Jury Copper Mines, 12 O. W. R. 632. Foley v. Barber, 1 O. W. N. 41, 14 O. W. R. 669. Duties and liabilities of directors: see also sec. 95 notes. As to internal management: see sec. 91 notes. Director's secret profits: sec. 93 notes.

85. A director may be appointed in an informal manner, provided the requirements of the articles are complied with. He need not be appointed at the company's offices: Smith v. Paringa Mines 1906, 2 Ch. 193. The by-laws of a company provided for seven directors, four to form a quorum. Four directors ceased to be qualified. The remaining directors had not the power to fill the vacancies in spite of the provisions of the Act. The vacancies could only be filled by a meeting of shareholders duly called for the purpose: Sovereen Mitt, etc., Co. v. Whitside, 12 O. L. R. 638, 8 O. W. R. 279.

87. Although, since Pulbrook v. Richmond Consolidated Mining Co., 9 Ch. D. 610, beneficial ownership is not essential to holding shares "in his own right" for the purposes of qualification, yet the shareholder must hold it in such a way that the company may safely deal with the shares as his: Bainbridge v. Smith, 41 Ch. D. 462. Accordingly a director does not hold shares in his own right where the trustee in his bankruptcy has given notice claiming the shares: Sutton v. English & Colonial Produce Co., 1902, 2 Ch. 502. "In his own right:" a liquidator

of another company holding shares as such cannot qualify as a director in respect of them: Boschoek Proprietary Co. v. Fuke, 1906, 1 Ch. 148. "Absolutely in his own right:" see Richie v. Vermilion Mining Co., 4 O. L. R. 588. "He shall thereupon cease." This provision operates automatically and *ipso facto* as soon as the event occurs: in Re Bodega Co., 1904, 1 Ch. 276. Director's qualification shares: where directors of a company become directors of another company for the benefit of their own company: see Re Dover Coalfield Extension, 1907, 2 Ch. 76. Allotment of shares by unqualified directors: see sec. 112.

88.—(*a*) The Court has jurisdiction to set aside an illegal election: Davidson v. Grange, 4 Gr. 377; but will not interfere after a lapse of time where the directors have been acting meanwhile: Re Moore and Port Bruce, 14 U. C. R. 365. Such an action may be brought by some shareholders on behalf of all and need not be in the name of the company: Davidson v. Grange, 4 Gr. 377. Form of action considered: Re Moore and Port Bruce, 14 U. C. R. 365. An election of officers obtained by trick or artifice cannot be considered a fair election. When shares have been purchased and paid for, the fact that this was done with a view to influencing the election is no objection: Toronto Brewing and Malting Co. v. Blake, 2 O. R. 175. A by-law passed by directors and confirmed by the shareholders providing that directors shall hold office for one year can only be repealed at the next general meeting. A by-law passed during the director's year of office providing that the appointment should be terminable by resolution is invalid: Stephenson v. Vokes, 27 O. R. 691.

88.—(*c*) "From time to time:" Steindler v. McLaren, 14 O. W. R. 648. "Managing director" not an employee: Normandy v. Ind Coope & Co., 1908, 1. Ch. 84. Resignation of managing director and withdrawal of resignation: Glossop v. Glossop, 1907, 2 Ch. 370. See Sovereen Mitt, etc., Co. v. Whitside, 12 O. L. R. 638, 8 O. W. R. 279, note to sec. 85 *ante*. See also as to managing director and manager, sec. 91 (*e*) *post*, notes.

90. A resolution purporting to vary the number of directors is invalid: Johnston v. Wade, 11 O. W. R. 598, 17 O. L. R. 372. Validity of reduction of number of directors and of election of reduced number: Clary v. Golden Rose Mining Co., 4 O. W. N. 1491, 24 O. W. R. 813. See *ante*, secs. 84, 85, notes.

91. "A by-law is a rule or law adopted by a corporation or association for the regulation of its own actions and concerns and of the rights and duties of its members among themselves:" 5 Am. & Eng. Enc. of Law, 2nd Ed. p. 87. A resolution is adopted ordinarily to reach special and individual cases. A by-law must operate generally. *Ib.* See Interpretation Act: R. S. O. 1914, ch. 1, sec. 28 (*g*). A seal is not necessary to the validity of a by-law unless required by the constitution or by-laws of the company: Mackenzie v. Maple Mountain, 20 O. L. R. 170, 615. By-laws provided not to be passed without unanimous consent of all shareholders: see Berkinshaw v. Henderson, 14 O. W. R. 833.

91.—(*a*) For notes on allotment of shares generally: see sec. 112; allotment on incorporation, sec. 5; making of calls, secs. 62 and 112; forfeiture of shares, etc., sec. 62; transfer of shares, secs. 56, 57. It is the directors' duty to regulate the allotment of shares and they cannot delegate this duty: Re Pakenham Pork Packing Co., 12 O. L. R. 100. Where a by-law is passed at a general meeting providing for the allotment of new stock by the shareholders the directors have no power to pass a by-law directing its repeal and providing for allotment by themselves: Stephenson v. Vokes, 27 O. R. 691. As to allotment of increased stock: see also Martin v. Gibson, 10 O. W. R. 66, 15 O. L. R. 623. The power given by this section enables directors to declare with what formalities, how and when stock is to be transferred. The company cannot refuse to transfer fully paid up shares: Re Imperial Starch Co., 10 O. L. R. 22; Re Panton and Cramp Steel Co., 9 O. L. R. 3; see notes to secs. 56, 57, *ante*.

91.—(*b*) Statute limited dividend company: A. G. v. Ashton Gas Co., 1904, 2 Ch. 621. As to cumulative dividends on preferred stock: see note to sec. 80,

ante. And as to dividends generally notes to sec. 95 *post.*

91.—(*c*) See Stephenson v. Vokes, 27 O. R. 691. As to directors generally, their powers, duties and liabilities: see note to sec. 84 *ante,* and sections there referred to.

91.—(*d*) By giving directors powers to pass by-laws regulating proxies the Act impliedly withholds it from the general body of shareholders: Rex v. Westwood, 7 Bing. 1; Kelly v. Electrical Construction Co., 10 O. W. R. 704; and see secs. 50, 51, *ante,* and notes.

91.—(*e*) The expression " may " make by-laws does not prohibit corporations from exercising their jurisdiction otherwise than by by-law: Webster v. Jury Copper Mines, 12 O. W. R. 632. It is in excess of the powers of management for directors to allot increased capital stock to themselves with the result whether intended or not of prejudicially affecting the voting power of the minority shareholders: Martin v. Gibson, 10 O. W. R. 69; and see sec. 112.

General mercantile powers: see secs. 23 (1*l*), (1*d*), 78 (3), etc. Manager of a company has no power to bind it other than in its ordinary mercantile dealings: Bird v. Hussey, etc., Co. Ltd., 25 O. W. R. 13, 5 O. W. N. 60. Authority of general manager to make contract: Skinner v. Crown Life, 1 O. W. N. 921, 2 O. W. N. 647; National Malleable Castings v. Smith's Falls Malleable Castings Co., 13 O. L. R. 22; Russo-Chinese Bank v. Li Yan Sam, 1910, A. C. 174; Dickson Co. of Peterboro' v. Graham, 4 O. W. N. 670. Absence of authority to bind company by contract: Brown v. Security Life, 3 O. W. N. 85. Management of affairs of trading company: authority and duty of president: Thomas v. Standard Bank, 1 O. W .N. 379, 15 O. W. R. 188. Improper action of managing director: Casler v. Grace Mining Co., 1 O. W. N. 499. Misappropriation by management: Strong v. Van Allen, 13 O. W. R. 490, 15 O. W. R. 493, 1 O. W. N. 539, 2 O. W. N. 929, 19 O. W. R. 1. Managing director's fraud: Farah v. Capital Mfg. Co., 23 O. W. R. 918, 24 O. W. R. 808, 4 O. W.

N. 1281. Signature of promissory note by managing director; personal liability of signatory: Chapman v. Smelhurst, 1909, 1 K. B. 927. Money expended *bona fide* on behalf of the company by a manager under the mistaken belief that he was doing so under the authority of the company lawfully given, can be recovered: Benor v. Canadian Mail Order, 10 O. W. R. 899. Contracts and engagements on behalf of the company: Stewart v. Stratford Hotel Co., 12 O. W. R. 157; Allen v. Rainy River Ry., 29 O. R. 510. Pension to managing director: Normandy v. Ind Coope & Co., 1908, 1 Ch. 84. Grant of retrospective remuneration to the treasurer of a charitable organization: Bartram v. Birtwhistle, 15 O. L. R. 634.

Directors of a company were held to have power to sell all its land as a part of their duty and authority to manage its affairs, after honestly coming to the conclusion that a sale was in the interests of the company: Ritchie v. The Vermilion Mining Co., 1 O. L. R. 654, 4 O. L. R. 588. Illegal disposition of assets: Chandler Massey v. Irish, 24 O. L. R. 513, 3 O. W. N. 61, 383. Sale of company's assets to individual: McAlpine v. Fleming, 15 O. W. R. 479; Strong v. Van Allen, 15 O. W. R. 493; and see ante sec. 23 (*m*).

92. A by-law for the remuneration of directors shall first be passed by the Board of Directors, the directors thus taking the responsibility of asserting their claim for payment and fixing the amount so claimed, and then this by-law shall be laid before a general meeting and passed upon by the body of shareholders: Beaudry v. Read, 10 O. W. R. 622. Mackenzie v. Maple Mountain, 20 O. L. R. 170, 615, 1 O. W. N. 284, 14 O. W. R. 1266, 15 O. W. R. 728. *Prima facie*, directors are not entitled to any remuneration: Dunstan v. Imperial Gas Co., 3 B. & Ad. 125; Hulton v. West Cork Ry., 23 Ch. D. 672. The statute prohibits payment unless its terms have been complied with: Re Q. C. Plate Glass, 1 O. W. N. 863, 16 O. W. R. 336. The remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves and

not out of capital: Re George Newman & Co., 1895, 1 Ch. 674, at p. 686; Re Publisher's Syndicate, 5 O. L. R. 392. The remuneration of directors and officers is a matter of internal management of the company: Burland v. Earle, 1902, A. C. 83. Directors appointed receivers in a debenture holder's action may be entitled to remuneration in both capacities: Re South Western of Venezuela Ry., 1902, 1 Ch. 701. A director has no right to be paid his travelling expenses to and from board meetings, unless there under a by-law passed at a properly convened meeting. A resolution of the directors is insufficient: Young v. Naval and Military, etc., Society (1905), 1 K. B. 687. Where directors are to receive a sum by way of remuneration each year, no remuneration can be claimed except for a complete year of service: Re Central de Kaap Gold Mines, 69 L. J. Ch. 18. A board of provisional directors appointed A. to be a director and manager at a salary. The services rendered had not resulted in any benefit to the company which had never gone into operation. As the appointment had not been by by-law confirmed by the shareholders nor was under the corporate seal, he could not recover salary or compensation: Birney v. Toronto Milk Co., 5 O. L. R. 1; see Re Ontario Express, etc., Co., 25 O. R. 587. As to payment of a "'managing director:" see Livingston's Case, 14 O. R. 211, 16 A. R. 397; Re Ontario Express, etc., Co., the Directors' Case, 25 O. R. 587; Benor v. Canadian Mail Order, 10 O. W. R. 899. Compliance with this section; what amounts to confirmation: Bartlett v. Bartlett Mines, 24 O. L. R. 419. Directors' fees: Re Dover Coalfield Extension, 1907, 2 Ch. 76. Payment for services: Kuntz v. Silver Spring, 1 O. W. N. 695. Payment for services as workmen and clerks: Re Matthew Guy, etc., Co., 26 O. L. R. 377. Liquidator demanding repayment of wages paid by directors: Re Matthew Guy Co., 3 O. W. N. 1233, 22 O. W. R. 34, 26 O. L. R. 377. A director employed as a commercial traveller can only enforce payment if there is a by-law: Re Marlock and Cline, 23 O. L. R. 165. Confidential information acquired by employed director during service: Measures Bros. v. Measures, 1910, 1 Ch. 336. Position of solicitor director in regard to

costs: Re Solicitors, 27 O. L. R. 147; and see provisions of R. S. O. 1914, ch. 159, sec. 70.

93. When a director, not acting on behalf of the company, buys a property which he sells again to the company at an enhanced price, he is under no obligation to account to the company for the profit so made: New Sombrero Phosphate Co. v. Erlanger, 3 App. Cas. 1218; Burland v. Earle, 1902, A. C. 83. Where shareholders ask the secretary of a company to find purchasers for their stock, directors are not precluded from buying the shares without disclosing that they are the purchasers: Percival v. Wright, 1902, 2 Ch. 421. Director of company entrusted with negotiations for company taking option in his own name is a trustee for the company: N. A. Exploration Co. v. Green, 4 O. W. N. 1485, 24 O. W. R. 843. Fiduciary relation of directors: see Turnbull v. the West Riding Athletic Club, 70 T. L. Rep. 92. Directors cannot retain secret profits. They are in the strictest sense trustees for the company and as such they assume a position in which their interest conflicts with their duty at the peril of being made accountable to the company at its election for any profit secretly made out of transactions with the company: Madrid Bank v. Polly, L. R. 7 Eq. 442; In re Brighton Brewery, 37 L. J. Ch. 278; In re Olympia, 1898, 2 Ch. 153, affirmed *sub nom.*; Gluckstein v. Barnes, 1900, A. C. 240; Turner's Case, 19 O. R. 113; Ruethel Mining Co. v. Thorpe, 9 O. W. R. 942, 10 O. W. R. 222; Palmer's Company Law, 5th Ed. p. 166. The existence of difficulty in ascertaining the amount of secret profit will not deter the Court from doing as well as may be: Costa Rica Ry. v. Forwood, 1900, 1 Ch. 756. Purchase of director's property by company, secret profits: Bennet v. Havelock Electric, 21 O. L. R. 120, 25 O. L. R. 200, 23 O. W. R. 309, 46 S. C. R. 640. Cancellation of shares representing director's secret profits: *Ib.* Director's secret profits: Hyatt v. Allen, 18 O. W. R. 850, 20 O. W. R. 594, 22 O. W. R. 469, 2 O. W. N. 927, 3 O. W. N. 370, 1401. Sale of company property to president: Kuntz v. Silver Spring, 1 O. W. N. 695. Sale of company's assets to individual: McAlpine v. Fleming, 15 O. W. R.

479; Strong v. Van Allan, 15 O. W. R. 493. A director cannot join in forming a quorum in respect of matters in which he is not entitled to vote: Re Greymouth Point, etc., Co., 1904, 1 Ch. 32. Director voting in pursuance of a mutual arrangement with other directors for payment of each other's accounts: Thorpe v. Tisdale, 13 O. W. R. 1044. "Interested or concerned in a contract:" see City of London Electric Co. v. London Corporation, 1903, A. C. 434. Directors contracting with company: see Annotation, 7 D. L. R. 111.

94. As to sale of company's undertaking for shares: see sec. 23 (*m*), and see sec. 184, notes. As to trafficking in company's shares: see sec. 23 (*e*).

95. Paying dividends out of capital: see article by Frank E. Hodgins, K.C. (Mr. Justice Hodgins), 44 C. L. J. 94. Under the English Act it was held that there was no law prohibiting a limited company from paying dividends unless its paid up capital was kept intact. Directors might declare dividends out of the excess of receipts over expenditures in each year without making provisions for losses in previous years. This might be highly improper in a business sense and may ultimately exhaust the paid up capital, but it was not paying dividends out of capital and the directors could not be held liable on that ground: Re National Bank of Wales, 1899, 2 Ch. 629; Lee v. Neuchatel Asphalte Co., 41 Ch. D. 1; Verner v. General and Commercial Trust Co., 1894, 2 Ch. 239, but now see words "or diminishes the capital thereof." It was also held under the English Act that there was no liability of director for misstatements in report that due provision had been made for bad and doubtful debts before declaration of dividend if he made such statements honestly believing them true and if he took such care to ascertain their truth as seemed reasonable at the time. He would not be liable for relying on the officers of the company if he had no suspicion of wrong, although he might have discovered he was being deceived: Lagunas Nitrate Co. v. Lagunas Syndicate, 1899, 2 Ch. 392; In re Denham & Co., 25 Ch. D. 752; Re National Bank Company's Case, 1899, 2 Ch. 629. There is no rule of law compelling

a company to charge interest on money borrowed for purposes of construction against revenue and prohibiting it from charging it, during construction, to capital account: Hinds v. Buenos Ayres Grand National Tramways, 1906, 2 Ch. 654. A company, if so authorized by its articles, may pay interest out of capital to shareholders who have paid up their shares in advance of calls: Lock v. Queensland Investment Co., 1896, A. C. 461. There is nothing to prevent a liquidator recovering dividends improperly paid out of capital, although it is not shewn that the company is insolvent as regards creditors: Re National Bank, 1899, 2 Ch. 629. Dividends out of capital: Bury v. Famatina Development, 1909, 1 Ch. 754; Towers v. African Tug Co., 1904, 1 Ch. 558. Reduction of capital by repayment to shareholders: Re Artizans' Land and Mortgage Co., 1904, 1 Ch. 796. *Bona fide* distribution of capital sum among shareholders; right of liquidator to recover from directors and from shareholders: Moxham v. Grant, 1900, 1 Q. B. 88. Return of capital in excess of the wants of the company: see Re Calgary and Edmonton Land Co., 1906, 1 Ch. 141; Lee Brook Spinning Co., 1906, 2 Ch. 394. Where there is wasting property, company need not provide a sinking fund (see sub-sec. (2)): Lee v. Neuchatel Asphalte Co., 41 Ch. Div. 1. Contribution from co-directors: Shepherd v. Bray, 1906, 2 Ch. 235. An action against directors and promoters is not a penalty action within R. S. O. 1914, ch. 75, sec. 49 (1*h*): Thomson v. Lord Clanmorris, 1900, 1 Ch. 718. As to duties and liabilities of directors: see notes to sec. 84 *ante*.

97. Loan to servant of company: see Rainford v. James Keith, etc., Co., 1905, 2 Ch. 147. As to trafficking in company's own shares: see sec. 23 (*e*).

98.—(1) Wages of servants; liability of directors: Pukuiski v. Jardine, 3 O. W. N. 1172, 21 O. W. R. 983. Action against directors: "wages:" Olson v. Machin, 4 O. W. N. 287, 23 O. W. R. 531. A person employed as foreman of works and who hires and dismisses men, makes out pay rolls and does no manual labour, is not within this section: Welch v. Ellis, 22 A. R. 255. The manager of

a mining company is not within this section: Herman v. Wilson, 32 O. R. 60. As to wages of mineralogist appointed by directors: see Bartlett v. Bartlett Mines 2 O. W. N. 919, 1509, 18 O. W. R. 865, 19 O. W. R. 893. "One year's wages:" George v. Strong, 1 O. W. N. 350, 15 O. W. R. 99. Liability for wages. Hiring by acting manager and not under seal; knowledge of directors: Milne v. Ontario Marble Quarries, 13 O. W. R. 1137. Right of a number of wage-earners to consolidate their claims and join in one Supreme Court action against directors: Hebert v. Evans, 13 O. W. R. 632, 682. Default judgment against directors not binding to preclude inquiry into *bona fides* of claim: Rogers v. Wood, 3 O. W. N. 1241, 22 O. W. R. 48. Assignee of wages is within the section and can sue without joining the several wage-earners: Lee v. Friedman, 20 O. L. R. 49, 1 O. W. N. 235, 14 O. W. R. 457, 1139.

98.—(2) Compliance with section as to writ and return: Pukulski v. Jardine, 26 O. L. R. 323.

PART VII.

Prospectus and Directors' Liability.

99. Any advertisement designed to accomplish the purpose mentioned in this section is a "prospectus," the meaning of sec. 104, and gives rise to liability under sec. 105 if the requirements of the Act are not strictly met: Rex v. Garvin, 18 O. L. R. 49, 13 O. W. R. 575.

100.—(1) "To the public"; an offer of additional shares to existing shareholders is not an offer "to the public:" Burrows v. Matabele Gold Reefs, 1901, 2 Ch. 23. It is not illegal for a company to agree in consideration of a person's taking or underwriting shares, to issue at par further shares to such person at a future date or within a prescribed period: Hilder v. Dexter, 1902, A. C. 474.

100—(2) Issuing shares at less than nominal value is *ultra vires*: McIntyre v. McCracken, 1 A. R. 1, 1 S. C. R. 479; North West Electric Co. v. Walsh, 29 S.

C. R. 33; Chapman v. Great Central Freehold Mines, 22 T. L. R. 90; Moseley v. Kaffyfontein, 1904, 2 Ch. 108; Lake Ontario Navigation Co., 13 O. W. R. 1032 (and cases collected p. 1034)), 18 O. L. R. 354. Issuing shares at half price: Re Niagara Falls Heating Co., 1 O. W. N. 439, 15 O. W. R. 326. Even before there were definite provisions in the Ontario Act prohibiting the issue of shares at a discount, the English decisions were applied: Re McGill Chair Co., 26 O. L. R. 254. What amounts to the issue of shares at a discount: Chapman v. Great Central Freehold Mines, 22 T. L. R. 90. Issue of shares for consideration other than cash: In re Brutton and Birney, 1901, 1 Ch. 637. The issue of shares at a discount is as much an unauthorized reduction of capital as the purchase by a company of its own shares: Wilton v. Saffery, 1897, A. C. 299. Colourable transaction to enable shares to issue at a discount: Lindsay v. Imperial Steel, 21 O. L. R. 375, 1 O. W. N. 347, 930, 16 O. W. R. 406. Cancellation of shares illegally issued at a discount: Re Matthew Guy Co., 3 O. W. N. 270, 902, 21 O. W. R. 842. An agreement by a company to remunerate underwriters by an option to call for an allotment of shares is prohibited by section 2, notwithstanding that the issue price fixed by the option exceeds the nominal amount of the shares: Burrows v. Matabele Gold Reefs, 1901, 2 Ch. 23. A transaction under which a purchasing company pays part of its capital in substance as underwriting commission to an intermediary company is illegal, notwithstanding that the payment takes the form of a profit on a resale by the intermediary company to the purchasing company: Booth v. New Afrikander G. M. Co., 1903, 1 Ch. 295. Issue of shares at a discount: see also sec. 144, *et seq.* (mining companies) 177 (winding-up), 91, 112 (allotment), 74, and notes.

100.—(3) A limited company may lawfully pay out of its capital reasonable commission to brokers for procuring applications for shares: Metropolitan Coal Consumers v. Scrimgeour, 1895, 2 Q. B. 604. Employment of agent to sell shares: Webster v. Jury Copper Mines, 14 O. W. R. 632. Commission to secretary of company on sale of bonds: recovery of money paid through *ultra vires* act of

directors: Sydney Land Co. v. Rountree, 39 S. C. R. 614.

101.—(1) The office of the prospectus considered: see Peek v. Gurney, L. R. 6 H. L. 377; Pulsford v. Richards, 17 Beav. 87; Derry v. Peek, 1889, 14 App. Cas. 337. Consideration of position of shareholders before and after prospectus: see 45 C. L. J. 145, 220, 338.

101.—(3) A company is bound by the material representations of its agent duly authorized to solicit subscriptions for shares whether those representations are made in good faith and with a belief in their fulfilment or not: Ontario Ladies' College v. Kendry, 10 O. L. R. 324. Action for deceit in making representations inducing plaintiffs to become shareholders in company formed to acquire timber limits: Piper v. Thompson, 11 O. W. R. 690. Solicitation of subscription: Gowganda Mines v. Smith, 1 O. W. N. 1071, 16 O. W. R. 709. See *post*, secs. 112, 113, notes.

104.—(1) " Those who issue a prospectus holding out to the public the great advantages which will accrue to the persons who will take shares in a proposed undertaking and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy and not only to abstain from stating as a fact that which is not so but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares: Per Kindersley, V.C.: New Brunswick Central v. Muggeridge, 1 Drew & Sm. 381; Central Ry. of Venezuela v. Kisch, L. R. 2 H. L. 113. An advertisement merely stating that a company are offering shares for sale and that a prospectus can be obtained on application is a " prospectus " within the meaning of this Act: R. v. Garvin, 18 O. L. R. 49, 13 O. W. R. 575. Statement in prospectus that company manufacturing soap when manufacture never begun: Dixon v. Pritchard, 2 O. W. N. 414, 17 O. W. R. 874. Omission of essential particulars in abridged advertise-

ment: Roussell v. Burnham, 1909, 1 Ch. 127. Omissions from prospectus: Re South of England Natural Gas Co., 1911, 1 Ch. 573; Re Wimbledon Olympia, 1910, 1 Ch. 630, 632.

104.—(1*d*) Minimum subscription: Roussell v. Burnham, 1909, 1 Ch. 127.

104.—(1*g*) Where promoters proposed to acquire property and turn it over to a company to be formed, it was held that there was no fiduciary relationship existing between the parties such as partners or agents and no agreement between the promoters would bind the company to be formed: Garvin v. Edmondson, 14 O. W. R. 435. Where a company is purchaser of a property which is the absolute property of the vendor, this section does not require that the prospectus shall disclose the amount of the purchase money paid by the vendor when he acquired the property: Brooks v. Hansen, 1906, 2 Ch. 129. The whole of the consideration, cash, shares or debentures payable to anyone by the company in respect of the purchase or acquisition must be stated: Brooks v. Hansen, 1906, 2 Ch. 129. Amalgamation of companies; position of promoter-vendor; disclosure: Stratford Fuel, etc., Co. v. Mooney, 14 O. W. R. 489.

104.—(1*i*) A written undertaking that a promoter's claim to a proper remuneration shall be honourably met by the directors is a material contract within sub-sec. (*e*) and must be disclosed: Shepheard v. Broome, 1904, A. C. 342.

104.—(1*j*) A company is under no liability in equity to pay for work done before its formation merely because it has adopted and derived benefit from such work: Re English and Colonial Produce Co., 1906, 2 Ch. 435. As to contracts generally with unformed companies: see notes to sec. 114 (3).

104.—(1*k*) Promoter's services: Nelles v. Hesseltine, 11 O. W. R. 1062. Fiduciary relationship of promoters: Garvin v. Edmonson, 15 O. W. R. 210. Promoters cannot retain secret profits, and if such consist of paid-up shares as part of purchase price, such shares

may be treated as unpaid if held by promoter: Re Cornwall Furniture Co., 14 O. W. R. 352, 18 O. L. R. 101. Promoter's secret profits; president and manager interested as vendors; intention to sell shares to public: Stratford Fuel v. Mooney, 21 O. L. R. 426, 1 O. W. N. 914. Promoter's secret profits: Alexandra Oil Co. v. Cook, 11 O. W. R. 1054. Claim against firm of promoters for secret profit. Liability of partners of firm jointly and severally considered: Re Kent County Gas Co., 1913, 1 Ch. 92. As to secret profits of directors: see sec. 93 notes.

104.—(1*l*) This section covers every contract which would assist a person in determining whether he would become a shareholder: Gover's Case, Re Coal Economizing Co., 1 Ch. D. 200. And applies to parole as well as written contracts: Capel v. Simes, 36 W. R. 689. This section applies to executed as well as executory contracts: Broome v. Speck, 71 L. J. Ch. 716. Not only the existence of the contract must be disclosed, but also its contents as bearing on the statements in the prospectus: Watts v. Bucknall, 1903, 1 Ch. 766. A contract entered into by the promoters of a company ought to be disclosed if knowledge of it would affect the mind of a reasonable person intending to take shares: Sullivan v. Metcalfe, 5 C. P. D. 455, 460, 465; Cackett v. Keswick, 1902, 2 Ch. 456. Agreement between incorporators before formation of company: Berkinshaw v. Henderson, 1 O. W. N. 97. Omission of material contracts; onus of proof: Tait v. McLeay, 1914, 2 Ch. 631; Shepheard v. Broom, 1904, A. C. 343; Broome v. Speck, 1903, 1 Ch. 586. Calthorpe v. Trechman, 1906, A. C. 24; Cackett v. Keswick, 1902, 2 Ch. 456. Greenwood v. Leather Shod Wheel Co., 1900, 1 Ch. 421; Hoole v. Speck, 1904, 2 Ch. 732.

104.—(2) A vendor who sells property to a company towards which he stands in a fiduciary relation at the time of sale is not liable to account in the winding up for any undisclosed profit unless either (1) his conduct is tainted with fraud or (2) he stood in a fiduciary relation to the company not only at the time of sale but also at the time of his acquisition of the property in question: Re Lady Forest Gold Mine, 1901, 1 Ch. 582; Re Cape Breton Co., 29

Ch. D. 795; Ladywell Mining Co. v. Brooks, 35 Ch. D. 400; New Sombrero Phosphate Co. v. Erlanger, 3 App. Cas., 1218, 1234, 1235. Mere suppression by a vendor of the amount of his profit is not fraud within the meaning of the above proposition: Re Lady Forest Gold Mines, 1901, 1 Ch. 582.

104.—(8) See Greenwood v. Leather Shod Wheel Co., 1900, 1 Ch. 421.

106. An action against directors and promoters under the English Directors Liabilities Act, 1890, was held not to be an action for a penalty within such a provision as R. S. O. 1897, ch. 72, sec. 1*g*, R. S. O. 1914, ch. 75, sec. 49 (1*h*): Thomson v. Lord Clanmorris, 1900, 1 Ch. 718. Prosecution of a director at the expense of assets: see Re London and Globe Finance Corporation, 1903, 1 Ch. 728.

107. Where a prospectus is issued not merely for the purpose of inviting persons to subscribe for shares, but to induce persons to buy shares in the open market, the office of the prospectus is not exhausted on allotment and a person who received a prospectus and afterwards, relying on false representations in it, purchases shares in open market, has a cause of action against the promoters: Andrews v. Mockford, 1896, 1 Q. B. 372. The plaintiff seeking to recover from a director on account of the omission of a material contract must shew that if the contract had been disclosed he might not have applied for shares. It is not necessary for him to shew that he certainly would not: Nash v. Calthorpe, 1905, 2 Ch. 237. Where a director knows of the existence of a contract other than those referred to in the prospectus, he cannot escape responsibility by a plea of ignorance of the contents or materiality, or that he left it to legal advisers: Watts v. Bucknall, 1903, 1 Ch. 766. Where a director pleads in respect of alleged false statements in a prospectus that he had reasonable ground for believing the statements true, he may be ordered to give particulars of the ground of such belief: Alman v. Oppert, 1901, 2 K. B. 576. Untrue statement in prospectus; compensation; contribution; death of director; *actio personalis*: see Shepherd v. Bray, 1906, 2 Ch. 235, 1907, 2 Ch. 571.

Fraudulent misrepresentation: Re Leeds and Hanley Theatre, 1902, 2 Ch. 809. Non-disclosure of contracts: see also cases noted *ante*, sec. 104 (1*l*). Misleading statements in prospectus: Brooks v. Hansen, 1906, 2 Ch. 129. A person who has taken shares in a company on the faith of a prospectus containing alleged misrepresentations and suppressions, can join in one action claims against the company to have the allotment cancelled and his money paid and claims against the directors and the executor of a deceased director for damages, the cause of action being all the same thing, namely, the issue of the prospectus: Frankenburg v. Great Horseless Carriage Co., 1900, 1 Q B. 504. Where the objects and purposes of the company as set out in the agreement for its formation became impracticable and all expectation of carrying out the enterprise were abandoned, there was a total failure of consideration for a stock subscription, the subscriber was not liable on his note given therefor and he was entitled to recover what he had paid: Bullion Mining Co. v. Cartwright, 10 O. L. R. 438. Unauthorized issue of prospectus; liability of directors: Hoole v. Speak, 1904, 2 Ch. 732. Liability of directors for misrepresentations in prospectus prepared by broker: Farrell v. Manchester, 40 S. C. R. 339.

110. The right of contribution given by this section applies to an untrue statement fraudulently made which might have been the subject of an action at common law: Gerson v. Simpson, 1903, 2 K. B. 197. See also as to contribution and to what it extends: Shepheard v. Bray, 1906, 2 Ch. 235, 1907, 2 Ch. 571.

PART VIII.

Public Companies.

111. The benefit of these provisions does not attach to the original incorporators. It is to inform and guide those who are asked to become members: Modern Bedstead Co. v. Tobin, 12 O. W. R. 22. "Offer to the public:" Burrows v. Matabele Gold Reefs, 1901, 2 Ch. 23.

112. Comment on this and following sections: see article 45 C. L. J. 145, 220, 338. The intention of sub-sec. 1 is that no allotment should be made until the company has actually received payment of the application money, and if cheques are sent with the applications they should be cleared before the allotment is made. Where this is not done and cheques are dishonoured, the allotment is voidable: Mears v. Western Canada Pulp and Paper Co., 1905, 2 Ch. 353. Allotment made without compliance with these provisions is voidable only: Boeckh v. Gowganda Queen, 24 O. L. R. 293, 46 S. C. R. 645, 23 O. W. R. 313, and see sec. 113. An allotment of shares made by directors before the minimum subscription is obtained is voidable, not void: Finance and Issue v. Canadian Produce, 1905, 1 Ch. 37. An allotment by directors in contravention of the section is not *ultra vires*. It is simply a breach of statutory duty for which the shareholder has his statutory remedy. The Court will not interfere by injunction to restrain directors from proceeding with the allotment: Finance and Issue v. Canadian Produce, 1905, 1 Ch. 37. As to the impossibility of allotting preference stock until it has been validly created, even where the supposed preference shareholder makes payments and attends meetings, etc.: Pakenham Pork Packing Co., 12 O. L. R. 100. Allotment of a half share is *ultra vires*: Re McGill Co., Munro's Case, 3 O. W. N. 1074, 21 O. W. R. 921, 26 O. L. R. 254. Allotment without by-law: Re Canadian McVicker Engine Co., 13 O. W. R. 916. Allotment by unqualified directors: Re Nutter Brewery, 1 O. W. N. 400, 15 O. W. R. 265. Going to allotment: see McDougall v. Jersey Imperial Hotel, 10 Jur. N. S. 1043; Baird v. Ross, 2 Macq. H. L. Cas. 61; Ornamental Pyrographic Woodwork v. Brown, 2 H. & C. 71; Pierce v. Jersey Waterworks, L. R. 5 Ex. 209; North Safford Steel v. Ward, L. R. 3 Ex. 172. Going to allotment on insufficient subscription: Re Madrid Bank, L. R. 2 Eq. 216; Grimwade v. Mutual Society, 1885, 52 L. T. 409; Re Liverpool Household Stores, 29 L. J. Ch. 621. See also Andrews v. Mockford, 1896, 1 Q. B. 372; Frankenburg v. Great Horseless Carriage Co., 1900, 1 Q. B. 504, notes to sec. 107 *ante*.

Directors allotting shares to themselves in payment of services: Thorpe v. Tisdale, 13 O. W. R. 1044. Directors allotting shares to themselves as fully paid: Re Manes Tailoring Co., 18 O. L. R. 572, 11 O. W. R. 498, 13 O. W. R. 829. Rights of minority shareholders when directors propose to allot to themselves at par, shares representing increased capital stock: Martin v. Gibson, 15 O. L. R. 623.

If directors have exercised a *bona fide* discretion in proceeding to allot shares however unwisely, the Court will not treat the allotment as invalid: In re Madrid Bank, L. R. 2 Eq. 216. An allotment made at a Board meeting is bad if due notice has not been sent of the board meeting, but an allotment made at an insufficient board may be ratified by a full board, and the ratification dates back and makes the allotment good though the subscriber has withdrawn his application meanwhile: Re Homer District Gold Mines, 39 Ch. D. 549; Re Portuguese Copper Mines, 42 Ch. D. 161. A subscriber for a share in a company was debited in the stock ledger with one share, was placed on the "shareholders list" and was drawn upon for a first payment of 10 per cent. He paid the draft. Held that what was done must be taken to have been done by authority of the directors and to be a mode of allotment: Hill's Case, 10 O. L. R. 501. Power of trustees to take allotment of shares in new company: see In re Smith, 1902, 2 Ch. 667; In re Morrison, 1901, 1 Ch. 701; In re News Settlement, 1901, 2 Ch. 534.

To constitute a binding contract to take shares in a company, there must be an application by the intending shareholder, an allotment by the directors and a communication by the directors to the applicant of the fact of allotment having been made: Hodgins v. O'Hara, 22 Occ. N. 29, 133. "Where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response from the company or there is no contract:" Pellatt's Case, L. R. 2 Ch. 527, at p. 535; see also Hebbs Case, L. R. 4, Eq. 9; Gunn's Case, L. R. 3 Ch. 40; Nasmith v. Manning, 5 A.

R. 126, 5 S. C. R. 411. An application for shares may be withdrawn any time before the shares are allotted: Rainsgate Victoria Hotel v. Montefiore, L. R. 1 Ex. 109; Ritson's Case, 4 Ch. D. 774; Pentelow's Case, 4 Ch. 178; Nelson Coke Co. v. Pellatt, 2 O. L. R. 390. Effect of subscription under seal: Gowganda Mines v. Smith, 16 O. W. R. 709, 1 O. W. N. 1071, 2 O. W. N. 731, 18 O. W. R. 663; see also Re Manes Tailoring Co., 18 O. L. R. 572, 11 O. W. R. 498, 13 O. W. R. 829. Application for shares: posting of a letter properly stamped is evidence of the fact of its being received: Canadian Druggists v. Thompson, 2 O. W. N. 1213, 19 O. W. R. 401. Allotment of shares: estoppel of shareholder: Re Matthew Guy Co., 3 O. W. N. 270, 902, 21 O. W. R. 842. Application for shares on unusual terms, acceptance on different terms: Re Canadian Mail Orders Limited, 2 O. W. N. 882. Application for shares "on condition that no further call be made:" Re Lake Ontario Navigation Co., 18 O. L. R. 354, 20 O. L. R. 191, 15 O. W. R. 23. Conditional subscription: Re Canadian McVicker Engine Co., 13 O. W. R. 916. Agreement to take shares in company to be formed: Purse v. Gowganda Mines, 16 O. W. R. 596. Allotment of stock as fully paid up: there is liability for unpaid stock if there has been an acceptance of the stock: Cases reviewed: Re Cornwall Furniture Co., 14 O. W. R. 352, 18 O. L. R. 101, 20 O. L. R. 570. See also in regard to allotment: Adam's Case, L. R. 13 Eq. 474; Tucker's Case, 41 L. J. Ch. 157; Bolton Partners v. Lambert, 41 Ch. D. 295; Re Portuguese Consolidated, 45 Ch. D. 16; Re Zoological, etc., Society, 17 O. R. 331; Re Queen City Refining Co., 10 O. R. 264; Re Haggert Brothers, 19 A. R. 582; Re Nipissing Planing Mills, Rankin's Case, 13 O. W. R. 360.

Where shareholders are allotted shares under a contract whereby they are to pay for the shares by transfer of land, which was not done, the shareholders cannot be compelled to pay in cash and their liability in damages for breach of their contract to transfer land, could not be enforced in winding-up: Re Modern House Mfg. Co., 28 O. L. R. 237. Agreement to hold shares to be given to those who subscribe paid-up shares: Lindsay v.

Imperial Steel, 1 O. W. N. 347, 16 O. W. R. 406. Allotment of shares in pursuance of agreement for purchase of property: Bennett v. Havelock, 1 O. W. N. 352, 751, 16 O. W. R. 19, Position in winding up of shares improperly allotted: see sec. 167 notes, and sec. 113.

112.—(4) Return of application money: Finance and Issue v. Canadian Produce, 1905, 1 Ch. 37.

113. Allotment without compliance with provisions of sec. 112, is voidable, not void: Gowganda Queen v. Boeckh, 24 O. L. R. 293, 46 S. C. R. 645, 23 O. W. R. 313. The objection of " no prospectus " is one for the purchaser to raise. The company cannot raise it: Webster v. Jury Copper Mines, 12 O. W. R. 632. Where abridged advertisement omitted essential particulars, the allotment was voidable: Roussell v. Burnham, 1909, 1 Ch. 127. Action to cancel allotment of shares: secret profits: Bennett v. Havelock Electric, 16 O. W. R. 19. Delay in payment of cheques for allotment money; repudiation of allotment; sufficiency, rectification of register: Re National Motor Mail Coach Co., 1908, 2 Ch. 228. Action for relief from subscription got by fraud: absence of prospectus; Purse v. Gowganda Queen, 1 O. W. N. 420, 1033, 15 O. W. R. 287. Rescission of subscription on account of misrepresentation by managing director: Farah v. Capital Mfg. Co., 4 O. W. N. 680, 23 O. W. R. 918. Subscription improperly induced: Re Nutter Brewery, 15 O. W. R. 265, 1 O. W. N. 400.

114.—(3) The word " provisional " in sub-sec. 3 means that the contracts made by a company before the date at which it is entitled to commence business, are to be read as if they contained a provision that they shall not be binding on the company, unless and until it becomes entitled to commence business: Re Otto Electrical Mfg. Co., 75 L. J. Ch. 682, 1906, 2 Ch. 390. A company is under no liability in equity to pay for work done before its formation, merely because it has adopted and derived benefit from such work: Re English and Colonial Produce Co., 1906, 2 Ch. 435. Right of solicitor to recover costs of

work done before formation of company: See Re English and Colonial Produce Co., 1906, 2 Ch. 435. Contract on behalf of intended company cannot be adopted or ratified by the company. To obtain such benefit a new contract must be made: Natal Land Co. v. Pauline Colliery, etc., Syndicate, 1904, A. C. 120. Contract with third person for intended company: Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., 1902, 1 Ch. 146.

117. "Adjourned" meeting: see Shaw v. Taiti, 1913, 1 Ch. 292. As to notice of meeting, see sec. 44. See also notes to Part III., *ante*.

PART IX.

Books, Inspection, Auditors.

119. Books kept out of Canada: Malouf v. Labad, 3 O. W. N. 796.

120. Where two companies have an officer in common, the test to be applied in determining whether notice of irregularities in one is to be imputed to the other is: 1st. Was it within the scope of the officer's duty to give notice to the other company; 2nd. Was it within the scope of the duty of the officer of the other company to receive such notice. In Re Hampshire Land Co., 1896, 2 Ch. 743; see In Re Fenwick Stobart & Co., 1902, 1 Ch. 507.

121. Where rectification of register by omitting the plaintiff's name would have reduced the number of shareholders below five, the Court reduced his holdings to one share: Re J. A. French Co., Ltd., 1 O. W. N. 864, 2 O. W. N. 498, 17 O. W. R. 1063. Action for declaration that defendant not a shareholder: Mackay v. Mason, 23 O. W. R. 872. Action to have name removed from register of shareholders: Purse v. Gowganda Mines, 15 O. W. R. 287, 16 O. W. R. 596. The power of the Court to rectify the register can be exercised after liquidation, and is not then reduced to settling a list of contributories: In Re Sussex Brick Co., 1904, 1 Ch. 598.

122. A request to inspect a register carries with it a request to take copies or make extracts: Nelson v. Anglo-American, 1897, 1 Ch. 130; Muller v. Eastern and Midlands Ry., 38 Ch. D. 92; Boord v. African Consolidated Land Co., 1898, 1 Ch. 596. Unless there is a provision made for the company supplying extracts at a rate per folio: In Re Balaghat, 1901, 2 K. B. 665. Action to enforce right of shareholder to inspect and copy shareholders' address book: Davies v. Gas, Light & Coke Co., 1909, 1 Ch. 248, 708.

123. The companies' books are made evidence of facts therein. They are not negative evidence of the non-existence of facts not therein: Mackenzie v. Monarch Life, 18 O. W. R. 325, 23 O. L. R. 342, 21 O. W. R. 98. How far books other than those named in sec. 118 are in evidence: Lindsay v. Imperial Steel, 1 O. W. N. 930, 16 O. W. R. 406.

127. Powers and duties of auditor: see Annotation, 6 D. L. R. 522.

134. An auditor is an officer of the corporation: In Re Kingston Cotton Mills, 1896, 1 Ch. 6. A person employed to audit on a particular occasion at the request of a director, who audited the accounts and signed the balance sheet provided for in sec. 45, but who was never formally appointed auditor, was held not an "officer:" Re Weston Counties Steam Bakeries, 1897, 1 Ch. 617. The statutory majority of shareholders may resolve that as to particular items of the company's business there shall be secrecy. The auditors should report that they have examined the accounts as to those items, and are satisfied with them, and that the funds are employed in manner authorized by the company's regulations. This complies with the Act if the auditors are *bona fide* satisfied, but it is inconsistent with the Act that the auditors should withhold all information about such a fund when they consider that the true state of the company's affairs is affected, or if the regulations of the company prevent the auditors from availing themselves of all the material which they are entitled to under the Act on which to base their report: Newton v. Birmingham Small Arms Co., 1906, 2 Ch. 378; see notes to sec. 45. Auditors are only bound to exercise reasonable skill and care. They are not bound

to be suspicious, as distinguished from reasonably careful. The principles as to the duties of auditors and on what they rely are laid down in Re London and General Bank, 1895, 2 Ch. 673, 64 L. J. Ch. 866; Re Kingston Cotton Mills, 1896, 2 Ch. 279.

PART X.

MISCELLANEOUS.

135. The intention of the section apparently is that all companies, whether for gain or not, should make returns. This section is directory: Pigeon River Lumber Co. v. Mooring, 13 O. W. R. 190. A list of shareholders transmitted to the Provincial Secretary contained the name of a person as holding certain stock, while the name was inadvertently omitted from the list posted under sub-sec. (3). It was held that the lists were not duplicates within the meaning of the section: Turner v. Hiawatha Gold Mining, etc., Co., 30 O. R. 547. Action for penalties: Company not a private person (sub-sec. 6): Guy Major v. Canadian Flax Mills, 3 O. W. N. 1058.

138. The existing regulations in regard to fees are as follows:

1. Fees must accompany all applications and all documents to be filed. Where the fee does not accompany a document to be filed, such document will be returned to the sender forthwith.
2. No cheque will be accepted unless it is marked.
3. Cash not registered is at the risk of the sender.
4. Post Office Orders, Postal Notes, cheques and drafts should be payable to the order of the Provincial Treasurer.

The following schedule of fees, as amended by an Order-in-Council dated December 2nd, 1909, shall be payable for the various services rendered by the Department under the provisions of The Ontario Companies Act:

INCORPORATION WITH SHARE CAPITAL.

When the proposed capital of an applicant company is $40,000 or less, the fee shall be $100.

When the proposed capital is more than $40,000, but does not exceed $100,000, the fee shall be $100, and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When the proposed capital is more than $100,000, but does not exceed $1,000,000, the fee shall be $160, and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When the proposed capital is more than $1,000,000, the fee shall be $385 for the first $1,000,000, and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

Rural telephone companies, and other rural companies coming within the provisions of Part XIII. of the Companies Act, where the proposed capital does not exceed $25,000, $25.

Where the proposed capital is more than $25,000, the fee shall be on the same scale as that applying to ordinary share capital companies.

Rural cemetery companies, rural cheese and butter companies, and other rural companies of a similar nature, where the proposed capital does not exceed $10,000, $10.

Co-operative companies where the proposed capital does not exceed $10,000, $10.

Where the capital of a company of the classes in the two next preceding paragraphs referred to exceeds $10,000, the fee to be levied on the excess shall be at the rate of $1 per thousand, but in no case shall such fee exceed the sum of $25. To take advantage of this special tariff it must be demonstrated to the satisfaction of the Department that the purposes for which the company is being incorporated bring it within the classes referred to.

SUPPLEMENTARY LETTERS PATENT.

Where the capital of a company is increased, the fee shall be according to the foregoing list, but on the increase only. No fee previously paid is taken into account.

Where the capital is not increased, the fee shall be $100.

Where the fee paid for incorporation is $25 or less, the fee for Supplementary Letters Patent shall be $5.

PART XI.

Mining Companies.

146. General principle of shares at a discount; cases collected: Re Lake Ontario Nav. Co., 13 O. W. R. 1032, 15 O. W. R. 23, 18 O. L. R. 354; see also Article 45 C. L. T. 145, 220, 338, and notes to sec. 100 *ante*. A company subject to the provisions of this part may carry on business ancillary to its powers as a mining company, but when it ceases to be a mining company, it cannot carry on any ancillary business: see Haven Gold Mining Co., 1882, 20 Ch. D. 151; German Date Co., 20 Ch. D. 169; Amalgamated Syndicate, 1897, 2 Ch. 600; Stephens v. Mysore Reef, 1902, 1 Ch. 745; Pedlar v. Road Block Co., 1905, 2 Ch. 427.

PART XII.

Companies Operating Municipal Franchises and Public Utilities.

153. See Public Utilities Act, R. S. O. 1914, ch. 204, and Notes; also the Municipal Franchises Act, R. S. O. 1914, ch. 197. Duty cast on public utility corporation in breaking up a street not to cause escape of gas which may be dangerous: Ballentine v. Ontario Pipe Line Co., 12 O. W. R. 273, 16 O. L. R. 654. Nuisance to adjoining property caused in exercise of powers of public utility corporation: Hopkin v. Hamilton Electric, 2 O. L. R. 240, 4 O. L. R. 258. Liability of corporation and gas company where accident happened through non-repair of street, due to trench dug by gas company: McIntyre v. Lindsay, 4 O. L. R. 448. See R. S. O. 1914, ch. 204, sec. 51, notes.

154. Powers of company to place poles and wires on highway: Bucke v. New Liskeard, 1 O. W. N. 123. Power to erect poles for electric wires in streets under Act of Incorporation; position of municipality: Toronto and N. Power Co. v. North Toronto, 1912, A. C. 834. Consent of electors required for franchises or contracts for supply of electrical power: R. S. O. 1914, c. 205. Franchises to companies operating public utilities: see R. S. O. 1914, c. 197. By-laws regulating electric light, etc., poles and wires: see R. S. O.

1914, c. 192, sec. 399 (50). By-laws for laying pipes or conduits for electric wires: see R. S. O. 1914, c. 192: see 399 (51).

162. There is an absolute duty cast on municipal corporations by 3 Edw. VII., ch. 19, sec. 606, R. S. O. 1914, ch. 192, sec. 460, to keep highways in repair, and they cannot divest themselves of it by requiring public utility corporations to assume it. Such a company may have a right to dig up the highway, but in giving that authority the municipality does not free itself from its statutory liability: McIntyre v. Lindsay, 4 O. L. R. 448; Stilliway v. Toronto, 20 O. R. 98. Liability of company operating a public utility. It must exercise its powers in respect of its works so as not to commit a nuisance: Hopkin v. Hamilton Electric, 2 O. L. R. 240, 4 O. L. R. 258; Gareau v. Montreal St. Ry., 31 S. C. R. 463. As to railways see: London and Brighton Ry. v. Truman, 11 App. Cas. 45; Rapier v. London Tramways, 1893, 2 Ch. 588. See notes to R. S. O. 1914, ch. 192, sec. 460 (7), and ch. 204, sec. 51.

166. Measure of damages where property taken in eminent domain proceeding: 1 D. L. R. 508. Acquisition of land without consent of owner under Railway Act: see R. S. O. 1914, ch. 185, sec. 81 *et seq.*, and Notes to those sections. See also Expropriation Act, R. S. C. 143, and the expropriation sections of Dominion Railway Act, R. S. C. 37, sec. 172 *et seq.* Right of expropriation by timber slide companies, see R. S. O. 1914, ch. 181, and especially secs. 23 and 26. Expropriation under Public Utilities Act, see R. S. O. 1914, ch. 204, and especially secs. 5 (4) (municipal waterworks); sec. 19 (municipal utility works other than waterworks); sec. 54 (conditions precedent to public utility company expropriating). As to expropriation and compensation under the Municipal Act, see R. S. O. 1914, ch. 192, sec. 321 *et seq.*

PART. XIII.

Winding-up of Companies.

167. See R. S. C. 144, sec. 48 *et seq.*; 25-26 Vic., ch. 89, sec. 74 Imp., "Contributory;" cf. R. S. C. 144, sec. 2 (g). A debtor is not a contributory, and where a shareholder is also a debtor, he is not a contributory *quoad*

the debt: Re Central Bank, Yorke's Case, 15 O. R. 625. A collection of English and Canadian cases on the meaning of the term "contributory" will be found in the Annotations to R. S. C. 144, sec. 2(g).

Liability of transferor of bonus shares to be placed in list of contributories: Re Wiarton Beet Sugar Co., Freeman's Case, 12 O. L. R. 149. Liability of person to whom invalid preference shares are allotted: Re Packenham Pork Packing Co., 12 O. L. R. 100. Withdrawal of written subscription which was not accepted because not accompanied by necessary deposit: Re Provincial Grocers, 10 O. L. R. 705. Revoking sealed application for 3 shares, and what amounts to sufficient allotment: Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, where the cases are reviewed and a large number are cited. A subscriber for a share in a company was debited in the stock ledger with a share, was placed in the "shareholders' list," was drawn on for a call of 10%, and paid the draft. This was held to be a form of allotment, and the subscriber was made a contributory: Hill's Case, 10 O. L. R. 501. Liability of subscriber where subscription under seal: Re Manes Tailoring Co., 11 O. W. R. 498, 13 O. W. R. 829, 18 O. L. R. 572. Liability as contributory; action to set aside subscription for shares: Foley v. Barber, 14 O. W. R. 669, aff. 16 O. W. R. 607. Subscription obtained on representation that no further calls would be made: Traders Fire v. Apps, 1 O. W. N. 534, 15 O. W. R. 562. Stock not allotted and subscription induced improperly: Re Nutter Brewery, 15 O. W. R. 265. Allotment of shares previously allotted to another: Re Henderson Roller Bearing, Prout's Case, 11 O. W. R. 526. Repudiation of shareholders in winding-up: Re York County Loan, 11 O. W. R. 507. See also secs. 91 and 112 and cases noted there.

Where the subscription for shares is on condition, and the condition is not performed by the company, an answer may be afforded to an application to place the subscriber on list of contributories: Re Canadian McVicker's Engine Co., Geis's Case, 13 O. W. R. 916, and cases there cited; see also Re Lake Ontario Nav. Co., 13 O. W. R. 1032, at p. 1034, 15 O. W. R. 23, 18 O. L. R. 354. Where shareholder may have been induced to become shareholder by misrepresentation,

and after knowledge of true facts elects to remain, it is fatal to his claim in winding-up to have his subscription set aside: Re National Husker Co., 5 O. W. N. 375.

In winding-up proceedings, holders of shares are liable for the full amount unpaid on shares issued to them, notwithstanding that they may have been issued as paid up, if they were not in fact paid up: Re Lake Ontario Navigation Co., 13 O. W. R. 1032, and cases collected, p. 1034, 15 O. W. R. 23, 18 O. L. R. 354. Shares, if paid for in money or money's worth, must be treated as paid-up shares. There is no authority to enquire into the adequacy of the consideration: Re Cornwall Furniture Co., 14 O. W. R. 352, 15 O. W. R. 614, 20 O. L. R. 570. Liability for shares issued as "paid up;" cases collected and discussed: *Ib.*; see also Re Clinton Thresher Co., 20 O. L. R. 555, 15 O. W. R. 645, 1 O. W. N. 595; Re Niagara Falls Heating Co., 1 O. W. N. 439, 15 O. W. R. 326. Contract to take payment for land in company's shares; effect of new arrangement for payment and liability in winding up: Re Modern House Mfg. Co., 28 O. L. R. 237, 29 O. L. R. 266.

Shares allotted by directors to themselves as fully paid up: Re Manes Tailoring Co., 18 O. L. R. 572, 11 O. W. R. 498, 13 O. W. R. 829. Colourable transaction to issue shares at discount: Lindsay v. Imperial Steel, 21 O. L. R. 375, 1 O. W. N. 347, 930, 14 O. W. R. 105, 16 O. W. R. 406. The doctrine that a *bona fide* holder for value of shares which purport to be fully paid up, without notice that they are not so, is not liable for calls, is not confined to cases where the holder is a transferee of the shares, but extends also to the case of an allottee: Re Building Estates, Parbury's Case, 1896, 1 Ch. 100; Re Veuve Monnier, 1896, 2 Ch. 525. The consideration which must be given for shares that they may be deemed paid up and the holders not liable as contributories, must be a real valid *bona fide* consideration in cash or its equivalent, actually paid or transferred: North West Electric v. Walsh, 29 S. C. R. 33; Ooregum Gold Mining Co. v. Roper, 1892, A. C. 125; Hood v. Eden, 36 S. C. R. 476; Re Wiarton, McNeill's Case, 10 O. L. R. 219. Where directors have issued to themselves shares as a secret profit, such shares may be treated

as unpaid shares in winding-up proceedings: see judgment of Strong, C.J.; Re Hess Mfg. Co., 23 S. C. R., at p. 659; Gluckstein v. Barnes, 1900, A. C. 240. Power of Master to enquire into adequacy of consideration: see Re Hess Mfg. Co., 23 S. C. R. 644; Hood v. Eden, 36 S. C. R. 476; Re Cornwall Furniture Co., 18 O. L. R. 101, 13 O. W. R. 137, 14 O. W. R. 352, 20 O. L. R. 570. Circumstances under which adequacy of reality of consideration for paid-up shares may be considered. Promoters' secret profit: see Re Hess, 23 S C. R. 644; see also notes to secs. 93 and 100 *ante*.

A shareholder cannot set off his debt as against a liquidator's claim: Re Hiram Maxim Lamp Co., 1903, 1 Ch. 70; see also as to set off: Re General Works Co., 12 Ch. D. 755; Re Overend Gurney & Co., L. R. 1 Ch. 528; Re Auriferous Properties, 1898, 2 Ch. 428; Benor v. Canadian Mail Order, 10 O. W. R. 899; Re C. B. C. Corset Co., 12 O. W. R. 185. The position that a contributory is not entitled to set off the company's indebtedness to him against the amount due on his shares is as well settled under the Ontario as under the English cases: Re Wiarton Beet Sugar Co., 10 O. L. R. 219, 5 O. W. R. 637; Re Ottawa Cement Block Co., 9 O. W. R. 305. But where the indebtedness arose out of payments properly made on the company's behalf, and entered in the books before winding-up, the general law of set-off applies. Re Ottawa Cement Block Co., 9 O. W. R. 409. A set-off properly made before winding-up commenced should not be disturbed: Habershon's Case, L. L. 5 Eq. 286; Spargo's Case, L. R. 8 Ch. 407; see Notes to sec. 74.

Position of holder of shares as collateral security for accommodation paper: Re Perrin Plow Co., Allan's Case, 11 O. W. R. 186, 12 O. W. R. 387. Position as contributory where stock is held as security: Re Davies, McNichol's Case, 18 O. L. R. 240, 13 O. W. R. 579; and see sec. 77 *ante*. Liability of holder of unpaid shares upon an acknowledged trust: Re Standard Mutual Fire, 1. O. W. N. 974; and see sec. 76 *ante*.

Right of liquidator to have infants placed on list of contributories; contractual relation: Re National Bank of Wales, 1907, 1 Ch. 582. A contributory must

satisfy his liability as owner of shares not fully paid up before he can share in distribution of surplus assets; position of bankrupt shareholder: Re West Coast Gold Fields, 1905, 1 Ch. 597. Transfer of shares after commencement of voluntary winding-up: Re National Bank of Wales, 1897, 1 Ch. 298; and see sec. 171, note. The costs of successful appellants from an order making them contributories are payable out of the assets of the estate in priority to those incurred by the liquidator: Re Baden Machinery Company, 12 O. L. R. 634.

169. Compare R. S. C. 144, sec. 3. The Dominion Act, so far as it applies to Ontario companies, does so as insolvency legislation, and therefore within the jurisdiction of the Federal Parliament: Re Union Fire Assurance Co., 14 O. R. 618, 16 A. R. 161, 17 S. C. R. 265. And insolvency must be shewn before it can be applied to a company under the Ontario Act. In so far as the Dominion Act purports to deal with voluntary liquidation or winding-up of solvent companies, it must be taken as referring to companies which are subject to federal control or incorporated under the Dominion Companies Act: Re Cramp Steel Co., 11 O. W. R. 133, 16 O. L. R. 230. And under the Dominion Act this insolvency must be alleged in the petition (Re Briton Medical, etc., Association, 11 O. R. 478); and the facts must be shewn—consent (Re Grundy Stove Co., 7 O. L. R. 252); non-appearance (Re Lake Winnipeg Trading Co., 7 M. L. R. 255); or even a return of *nulla bona* (Re Qu'Appelle Valley, 5 M. L. R. 160) are insufficient.

A resolution for voluntary winding-up passed at an extraordinary general meeting convened by the secretary without authority of the directors, on requisition of the shareholders, within twenty-one days of the requisition being deposited, was held invalid. This is not a mere irregularity: Re Wyoming State Syndicate, 70 L. J. Ch. 727, 1901, 2 Ch. 431; Re Haycroft Gold Reduction Co., 69 L. J. Ch. 497, 1900, 2 Ch. 230. The notice of a general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting. Where directors have a personal interest, the notice must disclose it: Tressen v. Henderson, 1899, 1 Ch. 861; Kaye v. Croyden

Tramways, 1898, 1 Ch. 358. The resolution for voluntary winding-up must be in accordance with the resolution of which notice is given when the general meeting is called, otherwise it is invalid: Re Teede and Bishop, 70 L. J. Ch. 409. The consent separately obtained by the secretary of directors sufficient in number to a quorum to the sending out of a notice of general meeting, is not equivalent to a resolution for holding such a meeting passed at a board meeting: D'Arcy v. Tamar, L. R. 2 Ex. 158; Re Haycraft Gold Reduction Co., 1900, 2 Ch. 230. As soon as a resolution for voluntary winding-up has been passed, a resolution for the appointment of a liquidator can be proposed and carried without previous notice: Re Trench Tubeless Tire, 1900, 1 Ch. 408. Where a company passed several resolutions for voluntary winding-up and reorganization, and some of the resolutions were *ultra vires* and invalid, the resolution for voluntary liquidation was not thereby rendered invalid: Thomson v. Henderson's Transvaal Estates, 1908, 1 Ch. 765. It is contempt of Court while a petition for winding-up is pending to obtain by improper means and with a view to mislead the Court, the passing of a resolution for voluntary liquidation: Re Parsonage and Co., 1901, 2 Ch. 424. A corporation cannot validly undertake not to wind up voluntarily: Re St. Neots Water Co., 93 L. T. 788.

As an alternative to winding up whether voluntarily under this Act or under the Dominion Act, a company may make an assignment for the benefit of its creditors under the provisions of R. S. O. 1914, ch. 134. This may be done by the directors without consultation with the shareholders: Whiting v. Hovey, 13 A. R. 7; 14 S. C. R. 511. Where an assignment has been made, and a majority of the creditors approve, and no special circumstances intervene, (e.g., Re Haycroft Gold Reduction Co. (1900), 2 Ch. 230; Re Gold Co., 11 Ch. D. 701), making an order under R. S. C. 1906, ch. 144, desirable, the assignee for benefit of creditors may be permitted to proceed: Re Belding Lumber Co., 23 O. L. R. 255; Re Strathy Wire Fence Co., 2 O. W. R. 834; Re Maple Leaf Dairy Co., 2 O. L. R. 590; Re Lamb Mfg. Co., 32 O. R. 243; Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107; and see *post* sec. 187, 188, notes. If a winding up order is applied for, service on the

assignee under R. S. O. 1914, ch. 134, is not good service: Re Rodney Casket Co., 12 O. L. R. 409. See R. S. O. 1914, ch. 134, notes, also ch. 155, sec. 20 (9) and 38, notes.

170. Compare R. S. C. 144, sec. 5. Commencement of winding-up: Bank of Hamilton v. Kramer Irwin, 20 O. W. R. 999, 3 O. W. N. 603.

171. Compare R. S. C. 144, secs. 20, 21. A voluntary winding-up does not act as a dismissal of the servants of the company, as there is no change in the personality of the employer: Midland Counties District Bank v. Attwood, 1905, 1 Ch. 357. Where directors made invalid transfers of stock, they may be placed on the list of contributories: Re Publishers' Syndicate, Paton's Case, 5 O. L. R. 392. Transfer of shares after commencement of voluntary liquidation proceedings: Re National Bank of Wales, 1897, 1 Ch. 298. A transferee of shares under transfers executed before the date of resolution for voluntary liquidation, is not entitled to insist on registration of the transfers after such resolution, merely because an action has been brought to declare the resolution invalid and an injunction granted to restrain it being acted on: Re Violet Consolidated, 68 L. J. Ch. 535. Validity of transfer of shares after assignment for benefit of creditors: Schantz v. Clarkson, 4 O. W. N. 1303, 24 O. W. R. 596.

173. Compare R. S. C., secs. 22, 23. Where a damage action is pending or is brought against a company in voluntary liquidation, the liquidator should apply to stay the action; when the Court, if allowing it to go on, may make terms that the plaintiff, if successful, should add his costs to the damages recovered. When this is not done, the liquidator must pay the costs in full out of the assets: Re Wenborn and Co., 1905, 1 Ch. 413. Action for breach of contract against company in liquidation: Hamilton Mfg. Co. v. Hamilton Steel Co., 16 O. W. R. 694. Stay of proceedings: Duke v. Ulrey, 14 O. W. R. 932. In view of this section plaintiff was not permitted to bring action against company in process of voluntary liquidation for damages for misrepresentations: Allen v. Hamilton, 1 O. W. N. 659. Position of mortgagee-creditor's action to recover possession: Re Kurtz and McLean,

11 O. W. R. 437. Staying execution pending arrangement with creditors: Booth v. Walkden Spinning Co., 1909, 2 K. B. 368. Procedure; appeals: Re Pittsburg and Robbins, 2 O. W. N. 1295, 19 O. W. R. 535. Where a liquidator enters and carried on the company's business, the Court can give leave to distrain for rent accrued due since the liquidator entered, or to a mortgagee with power of distress in respect of interest since that time; the applicant must shew reasons: Re Higginshaw Mills, 1896, 2 Ch. 544. The Court, it seems, has power to restrain a distress commenced, or execution levied at the time of the winding-up. But the power, if it exists, will not be exercised unless special reasons exist making it inequitable to allow the sale: Re Roundhead Colliery Co., 1897, 1 Ch. 373. Forfeiture of lease on compulsory or voluntary liquidation. Such a condition will give a right of re-entry upon the liquidation of the company for any cause whatever, including liquidation for re-construction: Horsey Estate v. Steiger, 1899, 2 Q. B. 79. See R. S. O. 1914, ch. 155, secs. 20 (9), 38, notes.

174.—(*a*) A judgment creditor of a company is not, by obtaining an order for a receiver in respect of his debt, constituted a secured creditor: Re Great Ship Co., 4 De G. J. & S. 63; Croshaw v. Lyndhurst Ship Co., 1897, 2 Ch. 154; In Re Lough Neagh Ship Co., 1896, 1 Ir. R. 29. Where a company assigned notes to a bank, the bank is entitled, on a winding-up of the company, to an assignment of any collateral given with the notes by the debtor: Re Canadian Gas, Power, etc., Ltd., Ridge's Claim, 5 O. W. N. 43, 25 O. W. R. 51. Preferential claims of holders of mechanics' liens: Re Clinton Thresher Co., 1 O. W. N. 445. Distribution of profits of sale; arrears of dividends; preferred shareholders; sharing surplus: Espuela Land and Cattle Co., 1909, 2 Ch. 187. Assets insufficient to return capital surplus revenue; arrears of dividends, preference shareholders and priority over capital: Accrington Corporation Steam Tramways, 1909, 2 Ch. 40. Capital and profits; disposition; rights of preferential shareholders: Re Hall, 1909, 1 Ch. 521.

174.—(*b*) See R. S. O., 1914, ch. 143, sec. 3, and notes; see also Midland Counties District Bank v. Attwood, 1905, 1 Ch. 357, note to sec. 171 *ante*. Preferential claims for salary; terms of employment considered:

Re Beeton Co., 1913, 2 Ch. 279. A commercial traveller is within this enactment: Re Morloch and Cline, Ltd., 23 O. L. R. 165. An auditor is not: Re Ontario Forge and Bolt Co., 27 O. R. 230.

174.—(*c*) Liquidator's remuneration: see sec. 175, notes.

174.—(*e*) Where the Court has appointed a receiver who has incurred liabilities in the management of the estate, the Court will see that those creditors are satisfied either by the receiver, or, if he is bankrupt, by payment out of the fund in Court direct to the creditors: Re London United Breweries, 1907, 2 Ch. 511. The liquidator seems to be somewhat in the position of receiver or agent appointed by the Court to represent the company for the purposes of the Act, not as assignee, but as statutory representative for the purposes of winding-up: McCarter v. York County Loan, 10 O. W. R. 165, 14 O. L. R. 420. Function of liquidator: Schantz v. Clarkson, 4 O. W. N. 1303, 24 O. W. R. 596.

174.—(*g*) The onus is on the liquidator who seeks to place a person on the list of contributories: Re Port Hope B. & M. Co., 3 D. L. R. 426.

174.—(*h*) Contributories: see notes to sec. 167 *ante*. Contract with company to take payment for land in company shares; effect of new arrangement for payment and liability in winding-up: Re Modern House Mfg. Co., 28 O. L. R. 237. In appeal 29 O. L. R. 266, the Court was evenly divided. Liquidator making calls: see Re Cudova Union Gold Co., 1891, 2 Ch. 580.

174.—(*i*) Where there is a guaranty and payment by guarantors to secured creditor; method of considering claim in winding-up : Re Stratford Fuel Co., 28 O. L. R. 481. Moneys paid to creditor after commencement of winding-up: Trusts and Guarantee v. Munro, 1 O. W. N. 52.

175. See R. S. C. 144, sec. 92. Liquidator's remuneration is usually on a percentage basis, having in view the responsibility imposed, the time occupied and work done: Re Central Bank, 15 O. R. 309. The remuneration of a voluntary liquidator must be considered in

regard to its own particular circumstances. No uniform scale can be adopted: Re Amalgamated Syndicates, 1901, 2 Ch. 181. Distribution of remuneration among liquidators: Re Central Bank, 15 O. R. 309; Re Langham Hotel Co., 17 W. R. 463. Where resolutions for voluntary winding-up have been set aside and compulsory proceedings gone on with, the voluntary liquidator cannot prove a claim nor recover on an implied contract for services. He is entitled to claim payment for services beneficial to the company and accepted by them for business purposes outside the liquidation on the basis of a *quantum meruit*: Re Allison, etc., *Ex parte* Carhill, 1904, 2 K. B. 327. Costs of unsuccessful litigation are paid in priority to the costs of the liquidator's own solicitors, whether in compulsory or voluntary litigation: Re Pacific Coast Syndicate, 1913, 2 Ch. 26. The taxed costs of the solicitor for the liquidator must be paid out of the assets before any remuneration due to the liquidator: Re Sanitary Burial Association, 1900, 2 Ch. 289. Costs of liquidator's solicitor in voluntary liquidation proceedings: see Re National Bank of Wales, 1902, 2 Ch. 412. Liquidator's compensation and costs and their priority: Re Baden Machinery Co., 15 O. L. R. 634; see also Re Central Bank, Lye's Claim, 22 O. R. 247.

176. Compare R. S. C. 144, sec. 34.

176.—(1) (*a*) Action on executory contract: Hamilton Mfg. Co. v. Hamilton Steel and Iron Co., 23 O. L. R. 270. Proceedings to set aside consent judgment obtained prior to winding-up; leave of Court necessary: Bank of Hamilton v. Kraemer Irwin Co., 1 D. L. R. 475. In a suit by assignees of receivers of a company not in liquidation, see as to debtor's right to set-off in respect of damages for breach of contracts between the debtors and the company: Parsons v. Sovereign Bank, (1913) A. C. 160.

176.—(1) (*b*) The only effect of the winding-up order is to prevent the company from carrying on its business except in so far as is in the opinion of the liquidators required for the beneficial winding-up. The corporate state and all the corporate powers continue until the company is wound up: McCarter v. York County Loan, 10 O. W. R. 165, 14 O. L. R. 420. To preserve

the good-will as well as the company's assets the liquidator should not disregard contracts of the company antedating his appointment: Re Newdigate Colliery, 1912, 1 Ch. 468.

176.—(1) (*c*) As upon appointment of liquidator the powers of directors cease (sec. 174 (e)), their fiduciary relations are at an end, and a sale to them by the liquidator may be valid: Chatham National Bank v. McKeen, 24 S. C. R. 348. A liquidator is in a fiduciary position and cannot under any disguise make a sale to himself. If he does he must account for the rents and profits that accrue: Silkstone and Haigh Moor Co. v. Edey, 1900, 1 Ch. 167. Sale of assets of liquidator as going concern "free from incumbrances:" Dominion Linen Mfg. Co. v. Langley, 14 O. W. R. 1163, 1 O. W. N. 262, 19 O. W. R. 648, 2 O. W. N. 1255, 46 S. C. R. 633, 23 O. W. R. 318. A winding-up order does not cut down the rights of a lessee with option to purchase: McCarter v. York County Loan, 10 O. W. R. 165, 14 O. L. R. 420. The power to sell the assets is in the liquidator, not with the Court, even where the liquidator must obtain the approval of the Court as a condition to exercising the power of sale: Re Canada Woollen Mills, Long's Case, 8 O. L. R. 581, 9 O. L. R. 367. See under former provisions of voluntary winding-up sale of assets by liquidator: Re D. A. Jones Co., 19 A. R. 63. See notes to R. S. O. 1914, ch. 134.

177. An inspector is in a fiduciary position as regards the disposal of the assets, and cannot, without the consent of all parties interested, become the purchaser: Re Canada Woollen Mills, Long's Case, 8 O. L. R. 581, 9 O. L. R. 367. Constitution of committee of inspection; power of court to alter and order a fresh meeting: Re Radford and Bright, 1901, 1 Ch. 735. See notes to R. S. O. 1914, ch. 134, sec. 21.

178. See R. S. C. 144, secs. 42, 43, 67. Money standing at companies' liquidation account is not garnishable: Spence v. Coleman, 1901, 2 K. B. 199.

181. Compare R. S. C. 144, sec. 72; see R. S. O. 1914, ch. 121, sec. 56 and notes. It is the duty of the liquidator before distributing the assets of the company not only

to advertise for creditors, but also to write to those creditors whose names he knows, and ask them if they have any claims against the company: Pulsford v. Devenish, 73 L. J. Ch. 35, 1903, 2 Ch. 625.

182. See R. S. C. 144, sec. 69; and see notes to sec. 174.

183. See Companies' Act (Imp.), 1862, sec. 160; see also R. S. C. 144, secs. 37, 56, 58, 64. A compromise by the voluntary liquidator of a claim by the company against a third party is binding on the company, notwithstanding that it has not been sanctioned by resolution: Cycle Makers' Co-operative Supply v. Sims, 1903, 1 K. B. 477.

184.—(1) Cf. Imperial Companies Act, 1862, sec. 161. Where directors have a personal interest in a reconstruction scheme, the notice calling the special general meeting must disclose it: Tressen v Henderson, 1899, 1 Ch. 861; Kaye v. Croyden Tramways, 1898, 1 Ch. 358. It was seen that there were many cases in which a company may wind itself up voluntarily or the like merely for purposes of reconstruction, and it would be very advantageous that there should be a power for the company to reconstruct itself. That is one of the objects sought to be accomplished by this section; but the gist of the section is that the liquidators, instead of selling for money, may sell for shares; but as a safeguard against imposing a possible liability on a member, the Legislature has said in substance that if he dissents he may receive his share in money. Per Chitty, L.J.: Colton v. Imperial and Foreign Agency Co., 1892, 3 Ch. 454, 460. A power to sell for shares includes a power to sell for partly paid shares: Mason v. Motor Traction Co., 1905, 1 Ch. 419. A company cannot effect a sale of its assets under this section to a foreign company: Thomas v. United Butter Companies, 1909, 2 Ch. 484. An agreement under this section by a company about to be wound up voluntarily for the sale and transfer of its business to another company, is binding on the creditors of the transferring company: Re City and County Investment, 13 Ch. D. 475. Jurisdiction of Court in case of breach of duty by liquidator in a reconstruction, in causing loss to a contributory in not procuring him an allotment of shares in new company: Re Hill's Waterfall Estate, 1896, 1 Ch. 947. A

reconstruction scheme is not *ultra vires* because it provides that the shares which dissentient members could have claimed but for their dissent, and other members could have claimed had they applied in time, should be at the disposal of the new company: Burdett Coutts v. True Blue Mine, 1899, 2 Ch. 616. "Reconstruction" is a commercial, not a legal term. It means carrying on the same business by practically the same persons, but in an altered form. A mere sale is not a reconstruction. "Amalgamation" means a blending of two undertakings, for instance by a transfer of the undertakings of two companies to a third company: Re South African Supply, etc., Co., 1904, 2 Ch. 268. The Court can sanction a scheme for reconstruction and rearrangement involving a transfer of assets of the old company to a new company before the new company is actually incorporated: Re Canning Jarrah Timber Co., 1900, 1 Ch. 708. But the Court will be slow to sanction reconstruction which involves payment of an underwriting commission out of the assets of the old company: *Ib.* Example of a scheme for reorganization; underwriting shares in new company; paying unsecured creditors and dealing with dissentients: see Re Canning Jarrah Timber Co., 1900, 1 Ch. 708. In reconstruction, the right of a bare majority of creditors to destroy the securities of the minority can only be obtained by the clearest of agreements, and the Court will not refuse leave to try a right which is claimed, unless it is perfectly clear there is no foundation for the claim: Re Diehl and Carrett, 10 O. W. R. 403. Reconstruction; sale to new company: Bisgood v. Nile Valley Co., 1906, 1 Ch. 747; Fuller v. White Feather, 1906, 1 Ch. 823. The articles of association provided that subject to the difference in dividing the profits, preferred and deferred shares should rank equally in the company. Held in a voluntary winding-up that the two classes were entitled to capital *pro rata*: Griffith v. Paget, 6 Ch. D. 511. Amalgamation schemes: Re Consolidated South Rand Mines, 1909, 1 Ch. 491; Re British Building Stone Co., 1908, 2 Ch. 450.

184.—(2) A scheme involving the practical forfeiture of the shares of dissentient members is *ultra vires*: Bisgood v. Nile Valley Co., 1906, 1 Ch. 747. Scheme to sell assets for partly paid shares with option to

shareholders to accept, and shares not accepted to be sold and proceeds distributed, held not *ultra vires*: Fuller v. White Feather, 1906, 1 Ch. 823. A company cannot by its articles of association deprive members of the protection afforded them by sec. 161 of the Companies' Act of 1862 in the event of their dissenting from a sale of the company's assets in a winding-up, in consideration of shares in a new company: Payne v. The Cork Company, Ltd., 1900, 1 Ch. 308; but it is otherwise where the sale is not made in a winding-up: Cotton v. Imperial, 1892, 3 Ch. 454. Right of minority shareholder to object to unfair scheme for voluntary liquidation: Re Consolidated South Rand Mines, 1909, 1 Ch. 491. Rights of non-assenting shareholders: Bisgood v. Henderson's Transvaal Estates, 1908, 1 Ch. 743. Right of dissent: *Ex parte* Los, 34 L. J. Ch. 609. Duty of dissentient member to express his dissent: *Ex parte* Higgs, 2 Hern & M. 657, 13 W. R. 937. Form of notice of dissent: Re Union Bank of Kingston upon Hull, 13 Ch. D. 808. Late notice not objected to: Re London and Westminster Bread Co., 59 L. J. Ch. 155. Rights of dissentient members: Re Imperial Mercantile Credit Co., L. R. 12 Eq. 504. Continuing liability: Re Imperial Land Co., Vining's Case, L. R. 6 Ch. 96. *Ex parte* Poole: Re Marine Investment, L. R. 8 Ch. 702.

184.—(4) A clause in the articles of association settling the method of valuing a dissentient member's share is not an "agreement" within this sub-section which will deprive him of his right to have the value settled by arbitration: Baring Gould v. Sharpington, 1899, 2 Ch. 80. An action will lie against the company for the amount of the award: De Rosaz v. Anglo-Italian Bank, L. R. 4 Q. B. 462. Right of dissentient member to inspection before arbitration: Morgan's Case, 28 Ch. D. 620. Commission to examine witnesses abroad: Re Mysore West Gold Mining Co., 42 Ch. D. 535. No interest payable except from date when award demanded: Re United States Direct Cable Co., 48 L. J. Ch. 665. Action by dissentient member: De Rosaz v. Anglo-Italian Bank, L. R. 4 Q. B. 462. The remedy of a dissentient shareholder whose rights are disregarded on a reconstruction is by action and not by petition for compulsory winding-up: Re Hester and Co., 44 L. J. Ch. 757.

186. The Companies Act (Imp.) 1862, sec. 161 (sec. 184 supra), does not relate to a purely voluntary winding-up only, but includes a voluntary winding-up under supervision of the Court: Re Imperial Mercantile Credit, L. R. 12 Eq. 504.

187. Compare R. S. C. 144, sec. 11. The Court has discretion to withhold a winding-up order under R. S. C. 144, sec. 11. Where the assets were small and the creditors had almost unanimously entered on a voluntary liquidation a petition for a compulsory order was refused: Re Maple Leaf Dairy Co., 2 O. L. R. 590: see also Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 106; but see Re William Lamb Mfg. Co., 32 O. R. 243. See *ante* sec. 169 notes. It is not the effect of a compulsory winding-up order to nullify proceedings which have been taken under a previous voluntary winding-up: Cleve v. Financial Corporation, L. R. 16 Eq. 363; Thomas v. Patent Lionite, 17 Ch. D. 250. When a company is in voluntary liquidation, an unpaid creditor is not entitled to an order for compulsory winding-up of *ex debito justitiae*, if it appears that he will be paid in full and a majority of other creditors oppose the application: Re Universal Drug Supply Co., 22 W. R. 675; Re London Flour Co., 18 L. T. 136; see Re Electric and Magnetic Co., 50 L. J. Ch. 491. Though the applying creditor may be entitled, *ex debito justitiae*, to a compulsory winding-up order, he is not so entitled as against the wishes and opposition of all other creditors: Re West Hartlepool Iron Works, 1875, L. R. 10 Ch. 618. The petitioner must at least shew that he will be prejudiced by the voluntary winding-up: Re Bishop and Sons, Ltd., 1900, 2 Ch. 254. The existence of a voluntary winding-up is a strong reason why the Court should decline to interfere by granting a compulsory order, but circumstances may justify interference: Re Haycroft Gold Reduction Co., 1900, 2 Ch. 230; Re Gold Co., 11 Ch. D. 701. The fact that the substratum of a company is gone is not ground for a compulsory winding-up order on a shareholders' petition, that being a matter for the domestic forum: Ex parte Fox, L. R. 6 Ch. 176; Re Amalgamated Syndicates, 1897, 2 Ch. 600. Consideration of the circumstances which will induce the Court to prefer a compulsory winding-up of a company to a voluntary winding-up: Re Northumberland,

etc., Banking Co., 2 De G. & J. 357. The Court ought to consider not only the number of opposing creditors, but the reasons they adduce: Re Great Western Forest of Dean, 51 L. J. Ch. 743, 21 Ch. Div. 769. "Just and equitable," sec. (c): Suspicion of mismanagement is insufficient: Re Harris Maxwell Larder Lake, 1 O. W. N. 984. The Ontario Winding-up Act does not apply to a company incorporated in Ontario where application is made to wind-up on ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy and insolvency: Re Iron Clay Brick Co., 19 O. R. 113, and see notes to secs. 167-9. Where a winding-up order under the Ontario Act is made in violation of the provisions of the Statute, or is obtained by fraud or misrepresentation, any shareholder prejudicially affected may obtain redress: Deacon v. Kemp Manure Spreader, 15 O. L. R. 149. Objections to winding-up order made where voluntary proceedings have been taken. Action to set aside proceedings for informality of procedure, concealment of facts and lack of jurisdiction to make the order: see Deacon v. Kemp Manure Spreader Co., 9 O. W. R. 965, 10 O. W. R. 577, 15 O. L. R. 149. Procedure when an order under section 187 is alleged to have been made without jurisdiction or obtained by fraud, collusion or concealment: see also Equitable Savings Loan, 6 O. L. R. 26, 2 O. W. R. 366; see note to sec. 199. Article on Cases under Winding-up orders: see 40 C. L. J. 726.

188. Where there are several petitions the Court may exercise its choice: Re Estates, Limited, 8 O. L. R. 564, or may refuse the petition. Where the assets are small and the creditors desire voluntary liquidation: see Re Maple Leaf Dairy Co., 2 O. L. R. 590. Where the company has made an assignment under R. S. O. 1914, Ch. 134, and its assets sold: Re Strathy, 8 O. L. R. 186. Service of a petition for a winding-up order on an assignee for creditors is not service on the company; such assignee not being agent of the company within Con. Rule, 159 (1913, Rule 23), at any rate where the president and directors are available and have given the assignee no express authority: Re Rodney Casket Co., 12 O. L. R. 409. Status of a paid-up shareholder: Macdonald v. Noxon, 16 O. R. 368. Power of Court under this sec-

tion: Allen v. Hamilton, 1 O. W. N. 659; see also Re Cosmopolitan Life Association, 15 P. R. 185.

190. The Court cannot delegate the power of appointment of a liquidator: Re Union Fire Ins. Co., 13 A. R. 268, 14 S. C. R. 624. Where parties are numerous in the same interest, one or more may be authorized by the Court to sue or be sued or defend for the benefit of all so interested: see Con. Rules 200, 201, H. & L. notes, 6, 356 *et seq.*; 1913 Rules 75, 76; see also International Wrecking Co. v. Murphy, 12 P. R. 423.

191. In appointing a liquidator the Court will consider the condition of affairs and endeavour to ascertain the parties most interested, and other things being equal, will act on their recommendation: Re Alpha Oil Co., 12 P. R. 298. The choice of creditors, they being most intimately concerned, should be adopted, but neither a creditor nor a shareholder should, as a general rule, be chosen: Re Central Bank, 15 O. R. 309. Conduct of proceedings may be given to a later petitioner when he is shewn to be a creditor for money paid and in close touch with the company: Re Estates, Limited, 8 O. L. R. 564.

194. An order appointing a liquidator without the prescribed notice will be set aside and the petition referred back: Re Union Fire Ins. Co., 13 A. R. 268, 14 S. C. R. 634. Liquidators, officers of the Court: see Re Central Bank, Henderson's Case, 17 O. R. 110.

192. "Due cause" does not confine the Court to grounds of personal unfitness. Whenever the Court is satisfied that it is for the general advantage of those interested in the assets the liquidator may be removed: Ex parte Charlsworth, 36 Ch. D. 299. The desire of the majority (Re Association of Land Financiers, 10 Ch. D. 269), or the fact that disputes have arisen (Re Montrotier Asphalte, 22 W. R. 295), or the fact that he insists on prosecuting an action contrary to the wishes of a majority of creditors (Re Tavistock Iron Works, 25 L. T. 605), may be sufficient to induce the Court to remove the liquidator. An appeal lies by the liquidator against the order removing him: Re North Molton Mining Co., 54 L. T. 602. The discretion to remove "for due cause" "is not to be exercised in the same way as if the power had been

"of the Court shall think fit." Some unfitness must be shewn. It is not a matter of pure judicial discretion: Re Sir John More Gold Mining Co., 12 Ch. D. 325. The Court can remove the liquidator where no personal unfitness has been shewn if it is of opinion that it is for the general benefit of the company, but will be cautious in exercising such jurisdiction where the shareholders only are interested, and they support the liquidator whom they have appointed: Re British Nation Life, L. R. 14 Eq. 492. "For due cause" the Court may appoint an additional liquidator in voluntary winding-up on the application of the existing liquidator: Re Sunlight Incandescent Gas Lamp, 1900, 2 Ch. 728. The Court will not refuse liberty to try a right which is claimed against its receiver unless it is clear that there is no foundation for the claim: Ranfield v. Ranfield, 3 De G. F. & J. 766. Where shareholders are applying to remove a voluntary liquidator, the Court will not restrain them from sending out a circular to shareholders asking their support, although it contains *ex parte* charges against the liquidator. Re New Gold Coast Exploration Co., 1901, 1 Ch. 860.

194. See R. S. C. 144, secs. 61, 55 and 122. The Court will not direct meetings of creditors or contributories to be called except where the company is a going concern: Re Tumacacori, L. R. 17, Eq. 534. "Contributories:" see notes to secs. 167 *et seq. ante.* When inspection ordered: see Re North Brazilian Sugar Factories, 37 Ch. D. 83. Right of dissentient shareholder to inspection: Re Glamorganshire Banking Co., 28 Ch. D. 620; Ex parte Davis, 16 W. R. 668. Solicitors' lien: Re Potter's Case, 1 De G. & Sm. 728. A liquidator is entitled to the custody of all books and documents, subject to the debenture holder's right to custody of title deeds: Engel v. South Metropolitan Brewery, 1892, 1 Ch. 442.

195.—(1) As a general rule the examination should be before the liquidator, but this is discretionary with the Judge: Re Whitworth's Case, 19 Ch. D. 118. Production notwithstanding solicitor's lien: Ex parte Payne, 38 L. J. Ch. 305. In voluntary winding-up a contributory is entitled on making out a *prima facie* case and without instituting any proceedings to sum-

mon the liquidator before the Court to give information touching the company's affairs: Re Sir John Moore Mining Co., 37 L. T. 242. The contributory should give notice to the liquidator as he is *dominus litis*: Re Gold Co., 48 L. J. Ch. 650, L. R. 12 Ch. D. 77; Ex parte Nicholson, 14 Ch. D. 243. A contributory is entitled to attend and to cross-examine: Re Brampton and Longtown Ry., L. R. 11 Eq. 428. The Judge has discretion as to the occasion and extent of the examination and who shall conduct it: Re Whitworth's Case, 19 Ch. D. 118. A confidential clerk is not entitled to be present at the examination: Re Western of Canada Oil Co., 6 Ch. D. 109. The pendency of an action against an officer will not justify him in refusing to be examined: Ex parte Leaver, 51 L. T. 817. It is contempt of Court to publish prematurely the proceedings on examinations: American Exchange v. Gillig, 58 L. J. Ch. 706. Examinee entitled to counsel: Ex parte Bunn, 3 Jur. N .S. 1013. A stockbroker, (*ex parte* Clement, 18 L. T. 596; Re Aston, 27 Beav. 474; *Ex parte* Carter, 40 L. J. Ch. 15); a relation of a contributory, (Fricker's Case, L. R. 13 Eq. 178; Swan's Case, L. R. 10 Eq. 675); a bank manager, (Forbe's Case, 41 L. J. Ch. 467); a solicitor, (*Ex parte* Paine, L. R. 4 Ch. 215), and a liquidator, (Re Sir John More Mining Co., 37 L. T. 242), have all been held examinable as "capable of giving information."

195.—(2) When a liquidator brings action against directors for alleged illegal acts, e.g., payment of dividends out of capital, and the directors claim indemnity over against the shareholders it is not a proper case for a third party order under Con. Rule 209 (1913, Rule 165): London and Western v. Loscombe, 13 O. L. R. 34. This provision will not authorize the setting aside as a breach of trust, on the summary proceeding of the liquidator, of a sale of lands by the company to a director: scope of section considered: see Re Essex Centre, 19 A. R. 125. The bankers of a company are not "officers" of the company: Re General Provident Assurance Co., L. R. 14 Eq. 507. Liability of directors: see secs. 57, 84, 93, 95, 98, 105, 107, 109, 112-116, 120, 122, 126, 134, etc., and see notes to these sections.

199. If a liquidator in voluntary winding-up desires to appeal from the decision of a Judge, he ought first to

obtain leave from the Judge, otherwise, if his appeal fails he may be refused costs out of the estate: Re City and County Inv. Co., 13 Ch. D. 475. Order approving of a sale by liquidator of assets *en bloc* and making provision for distributing purchase money appealable: see D. A. Jones Co., 19 A. R. 63; see also as to appeal Re Can. Mail Order Co., 2 O. W. N. 1055, 19 O. W. R. 111.

200. Compare R. S. C. 144, sec. 101 *et seq.* Policy of section considered and defined. What is sought is a speedy distribution of the estate: see judgment of Middleton, J., Re McGill Chair Co., 22 O. W. R. 222, 26 O. L. R. 254. Where contest was simply as to which solicitors should have carriage of order made on conflicting petitions, leave to appeal was refused: Re Belding Lumber Co., 23 O. L. R. 255. An appeal will lie from the original winding-up order: Re Union Fire Ins. Co., 13 A. R. 268. Appeal from order rescinding winding-up order: Re Equitable Savings Loan, 6 O. L. R. 26. Course to be followed where it is contended that the Judge has been misled or has made a void order: see Re Equitable Savings Loan, 6 O. L. R. 26, 2 O. W. R. 366. Who may appeal: see Deacon v. Kemp Manure Spreader Co., 10 O. W. R. 577, 15 O. L. R. 149. If an order to wind-up is made in violation of the statute or is obtained by fraud or misrepresentation or is otherwise open to attack, any shareholder can obtain redress on direct application to the Judge when the order was made *ex parte* as far as he was concerned, or if made on notice to him, then by way of appeal under the Statute: Deacon v. Kemp Manure Spreader Co., 9 O. W. R. 965, 10 O. W. R. 577, 15 O. L. R. 149. Appeal: see R. S. O. 1914, ch. 56, sec. 26 (2e).

201. Procedure under R. S. C. 144: see secs. 107-135.

202. On the expiration of the three months the company is dissolved from that date, and the Court has no jurisdiction to admit the claim of a creditor who had notice of the winding-up proceedings: Re Westbourne Grove, 39 L. T. 30.

203. Where a company's assets were sold but no assignment of certain letters patent executed and the company was dissolved, the legal estate under patents

became vested in the Crown and the Court had no jurisdiction to make a vesting order under the statutory equivalent of R. S. O. 1897, ch. 336, sec. 15: Re Taylor, 1904, 2 Ch. 737. Dissolution of company; vesting of legal estate: Re General Accident Assurance Corporation, 1904, 1 Ch. 147. A Judge made an order declaring the company dissolved. Subsequently on motion of a dissatisfied shareholder this order was revoked. This latter order was appealable: Re Equitable Savings Loan, 4 O. L. R. 479, 6 O. L. R. 26. There is no jurisdiction to wind-up a dissolved company unless the dissolution is impeachable for fraud: Re Pinto Silver Mining Co., 8 Ch. D. 273. See Re Crookhaven Mining Co., 36 L. J. Ch. 226, L. R. 3 Eq. 69; Whitley Exerciser v. Gamage, 1898, 2 Ch. 405.

204. Cesser of objects of friendly society; claimants to surplus funds; *bona vacantia*: Braithwaite v. A. G. 1909, 1 Ch. 510. As to lands of dissolved corporation: see note to sec. 26 *ante*. Goods of dissolved corporation as *bona vacantia*: Re No. 9 Bomore Road, 1906, 1 Ch. 359; Re Taylor's Agreement, 1904, 2 Ch. 737.

CHAPTER 179.

The Extra-Provincial Corporations Act.

In addition to text books referred to at Chapter 178, see Wegenast, Extra Provincial Companies.

1. This Act is based on B. N. A. Act, sec. 92, cls. 2, 9 and 13, under which the Provinces have cognisance over direct taxation for provincial purposes, licenses for revenue and property and civil rights. As to the right of Ontario to apply the provisions of this Act to Dominion incorporations see R. v. Massey-Harris Co., 6 Terr. L. R. 126; and see also stated case in Supreme Court in which questions covering jurisdiction are specifically referred: In re Companies, 48 S. C. R. 331; see also John Deere Plow Co. v. Agnew, 48 S. C. R. 208, from which it would appear that in any event such legislation could not be considered as

having any application to rights arising under promissory notes (B. N. A. Act, sec. 91, cl. 18). See also International Text Book Co. v. Brown, 8 O. W. R. 835, 13 O. L. R. 644, where the constitutionality of the Act was upheld as against a Pennsylvania company. The legislatures, apparently, have no power to prohibit Dominion incorporations from carrying on business within the Province, but such companies must conform to the enacted laws of the Province where they seek to do business, including payment of license fees imposed in exercise of provincial taxing powers: see In re Companies, 48 S. C. R. 331. Article on licensing extra-provincial companies: see 46 C. L. J. 513.

7.—(1) What amounts to "carrying on business." Taking promissory notes: John Deere Plow Co. v. Agnew, 8 D. L. R. 65, 48 S. C. R. 208. "Carrying on business:" National Malleable Castings v. Smith's Falls Malleable Castings, 14 O. L. R. 22; Securities Co. v. Brethour, 3 O. W. N. 250, 20 O. W. R. 562; Humphries v. Ottawa Fireproof Supply, 12 O. W. R. 501; International Text Book Co. v. Brown, 8 O. W. R. 835, 13 O. L. R. 644. A foreign corporation taking a mortgage in Ontario for a debt contracted outside of the Province is not doing business in Ontario: Euclid Ave. Trusts v. Hohs, 13 O. W. R. 1050, 18 O. W. R. 787, 19 O. W. R. 991, 2 O. W. N. 825, 3 O. W. N. 3, 23 O. L. R. 377, 24 O. L. R. 447. Contract not entered into in Ontario: Kerlin Brothers v. Ontario Pipe Line Co., 11 O. W. R. 797. Effect of absence of license on capacity to indorse notes: C. B. of Commerce v. Rogers, 2 O. W. N. 45, 627, 769, 16 O. W. R. 968, 18 O. W. R. 401, 23 O. L. R. 159. "Representative or agent:" Humphries v. Ottawa Fireproof Supply, 12 O. W. R. 501. "Resident Agent or representative:" Bessemer Gas Engine Co. v Mills, 8 O. L. R. 647. When does constructive "residence" of a foreign corporation by agents acting in its business interests amount to "residence" as contemplated by the practice of security for costs: Ashland Company v. Armstrong, 11 O. L. R. 414. What amounts to "carrying on business" within the meaning of income tax legislation: see e.g., England v. Webb, 1898, A. C. 758; Halifax v. McLaughlin Carriage Co., 39 S. C. R. 174; London v. Watt and Son, 22 S. C. R. 300.

7.—(2) This exception seems declaratory of the law: Standard Ideal v. Standard Sanitary Mfg. Co., 1911, A. C. 78.

10.—(*b*) An order will not be made for the examination of a director or officer residing in a foreign country of a foreign corporation, although such corporation has attorned to the jurisdiction of the Courts of this Province: Perrins' Limited v. Algoma Tube Works, 8 O. L. R. 634. Representative of company in Ontario is an officer of the company and may be examined for discovery under Con. Rule 439a (1913, Rule 327): McNeill v. Lewis Brothers, Ltd., 12 O. W. R. 284, 16 O. L. R. 652.

10.—(*c*) No departmental forms are issued in connection with applications for licenses to carry on business in Ontario. The departmental memorandum outlining procedure is as follows:

Under the provisions of the Act respecting the Licensing of Extra-Provincial Corporations nearly every corporation other than an insurance or a loan company created otherwise than by or under the authority of an Act of the Legislature of Ontario and having gain for one of its objects, must take out a license, before it can legally do business in the Province.

The application must be by petition of the corporation addressed to the Lieutenant-Governor-in-Council, and executed by the proper officers of the corporation under the corporate seal.

This petition must state material facts, such as:

1. The name of the Kingdom, Dominion, State, Province or other jurisdiction under the laws of which the applicant corporation was incorporated and is working.

2. Its corporate name, which must not contain the words "Loan," "Mortgage," "Trust," "Trusts," "Investment" or "Guarantee."

3. That the corporate name of the corporation is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any

known business is being carried on in Ontario, or so nearly resembling the same as to deceive.
4. The date and manner of its incorporation.
5. The place where its head office is situated.
6. Whether its existence is limited by Statute or otherwise, and if so, the period of its existence yet to elapse, and whether its existence may be lawfully extended.
7. Whether it is a valid and subsisting corporation.
8. Whether it has capacity to carry on its business in Ontario.
9. Whether it has capacity to hold land, and, if so, the conditions, if any, under which such land is to be held.
10. Its authorized powers set out in full.
11. The powers which it desires to exercise in Ontario.
12. The amount of its authorized capital, and whether such capital is divided into shares, and, if so, how.
13. The amount of its subscribed capital.
14. The amount of its paid-up capital.
15. The amount of capital which the corporation desires authority to use in Ontario.
16. Its head office, or other chief place of business, in Ontario.
17. The name, description and place of residence of its chief agent or representative in Ontario.
18. That the corporation has authorized the making of the application and has duly appointed an attorney for service of process.
19. The name in full, description and place of residence of such attorney, and
20. Such further and other information as the Provincial Secretary may require.

The contents of, the signatures to, and the impression of the corporate seal upon the petition, must be verified by affidavit or statutory declaration.

If the application be on behalf of a corporation incorporated under the laws of the Dominion of Canada, a copy of its Letters Patent, or of the Act incorporating it, certified by the Deputy Registrar-General, or by the Clerk of the Parliaments, respectively, must be produced with the application. A similar observation will apply to a corporation incorporated

under the laws of any of the Provinces of the Dominion of Canada, regard being had to the proper officers in that behalf for the purposes of certification.

If the application be on behalf of a corporation incorporated under the laws of Great Britain and Ireland, the copy of the Memorandum and Articles of Association produced must be certified to be a true copy by the Registrar of Joint Stock Companies at London, Edinburgh or Dublin, as the case may be.

If the application be on behalf of a corporation incorporated under the laws of the United States of America, the evidence of incorporation must consist of a duly certified copy of the papers originally, and, if any, subsequently, filed in the Department of the Secretary of State, or other proper officer having the custody of the papers, and duly verified by such officer.

A person resident in Ontario, or a company having its head office in the Province, must be appointed by the applicant corporation to be its Attorney and representative in Ontario, and a Power of Attorney duly executed, for the purpose, under the seal of the corporation, must be transmitted with the papers. This is required even when the corporation is incorporated under the laws of the Dominion and has its head office in Ontario. The power itself may contain any provision not inconsistent with the duties of the Attorney to be exercised under the laws of the Province, but it must include words expressly authorizing the Attorney:

"To act as such, and to sue and be sued, plead or be impleaded in any Court in Ontario, and generally on behalf of the corporation and within Ontario to accept service of process, and to receive all lawful notices, and, for the purposes of the corporation, to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the Power of Attorney."

The power must also provide that until due lawful notice of the appointment of another and subsequent Attorney has been given to *and accepted* by the Provincial Secretary, service of process, or of papers and notices upon the person or company mentioned in the original or other power last fyled with the Provincial Secretary shall be accepted by the applicant corporation as sufficient service in the premises.

The consent of the Attorney to act as such, with an affidavit or declaration verifying the execution of the same, must be fyled.

The fee is based on the amount of capital to be used in Ontario in accordance with the scale of fees under The Ontario Companies Act. See R. S. O. 1914, ch. 178, sec. 138 notes.

16. Where foreign company's engines were sold in Ontario, on commission, by a resident of Ontario, the company was carrying on business and the foreign company, if unlicensed, could not maintain action for price: Bessemer Gas Engine Works v. Mills, 8 O. L. R. 647. Status to maintain action: Semi-Ready v. Tew, 19 O. L. R. 227. The locus of the forum determines whether or not in a particular action the company is foreign: Clarke v. Union Fire Ins. Co., 10 P. R. 313. A license issued after making of notes sued on and before action will operate retroactively to remove illegality: Can. Bk. of Commerce v. Rogers, 23 O. L. R. 159. License taken out after action brought: Euclid Ave. Trusts v. Hohs, 23 O. L. R. 377, 24 O. L. R. 447.

18. It is improper in an action to recover penalties under this Act to issue the usual *praecipe* order for production of documents by the defendants: Johnston v. London and Paris Exchange, 6 O. L. R. 49.

CHAPTER 180.

THE ONTARIO TELEGRAPH ACT.

CHAPTER 181.

THE TIMBER SLIDE COMPANIES ACT.

27. Injury to land by flooding: see Neely v. Peter, 4 O. L. R. 293, 5 O. L. R. 381; see R. S. O., 1914, ch. 130, sec. 26.

30. Compliance with secs. 30, 31, 32 (formerly R. S. O. 1897, ch. 194, secs. 40-43), as a condition precedent to the collection of tolls: see Beck v. Ont. Lumber Co., 10 O. L. R. 192, 12 O. L. R. 163, 16 O. L. R. 21, 9 O. W. R. 99, 193, 10 O. W. R. 711; Pigeon River Lumber Co. v. Mooring, 13 O. W. R. 190, 14 O. W. R. 639; and see provisions of R. S. O. 1914, ch. 130, sec. 11.

34. Use of works and river improvements: liability for tolls: Pigeon River v. Mooring, 13 O. W. R. 190, 14 O. W. R. 639.

44. The non-completion of the works within 2 years does not *ipso facto* forfeit the charter, but only affords grounds for proceedings by the A.-G. to have a forfeiture declared: Hardy Lumber Co. v. Pickerd River, 29 S. C. R. 211.

CHAPTER 182.

THE WHARFS AND HARBOURS ACT.

CHAPTER 183.

The Ontario Insurance Act.

Hunter, Insurance Law in Ontario; Holt, Insurance Law of Canada; Hodgins, Life Insurance Contract in Canada; Cameron, Fire Insurance in Canada; Cameron, Life, Accident and Guarantee Insurance in Canada; May, Law of Insurance; Porter, The Laws of Insurance; Joyce on Insurance; Bacon, Benefit Societies; Fuller, Friendly Societies; Bigelow, Life, Accident Insurance Cases.

2.—(2) Valuation of unmatured policies and construction of legislation affecting them: Re Merchants Life, 2 O. L. R. 682; and see notes to sec. 219.

2.—(6) Beneficiary: see Thompson v. Macdonnell, 13 O. L. R. 653.

2.—(14) What is a "contract of insurance?" see R. v. Stapleton, 21 O. R. 679. Valid parol contract of insurance: Interim receipt does not modify or impair same: See Coulter v. Equity Fire, 9 O. L. R. 35. Under a parol contract an implication is raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as are just and reasonable: Coulter v. Equity Fire, 9 O. L. R. 35. "Policy" includes "interim receipt:" Coulter v. Equity Fire, 7 O. L. R. 180, 9 O. L. R. 35. Effect of renewal of accident policy: Youlden v. London Guarantee, 3 O. W. N. 832, 21 O. W. R. 674, 28 O. L. R. 161; and see notes to sec. 156. An order incorporated in Illinois had branches in Ontario, became registered as a friendly society under the Act of 1892, but never registered as an insurance company. A certificate for $1,000 on proof of death was issued on application made in Ontario and was delivered in Ontario. It was held that the order were legally entitled to do business in Ontario and the certificate in question was a "contract of insurance:" Gillie v. Young, 1 O. L. R. 368.

2.—(25) As to powers and status of foreign insurance company doing business in Canada: see In re Insurance Act, 1910, 48 S. C. R. 260.

2.—(36) Insurance moneys: see Re Lloyd and A. O. U. W., 29 O. L. R. 312.

2.—(45) "Policy" includes "interim receipt:" Coulter v. Equity Fire, 7 O. L. R. 180, 9 O. L. R. 35.

2.—(51) A benevolent society undertook to pay a sum out of the total disability fund on the insured attaining the age of 70. The society subsequently diminished the amount coming to the insured by a change in their rules. Insured was held bound by the change and only able to recover in accordance with it: Doidge v. Royal Templars, 4 O. L. R. 423; see also Hargrove v. Royal Templars, 2 O. L. R. 79. Policy made payable to a class under the societies' rules. Subsequent change in rules omitting this class: Yelland v. Yelland, 25 A. R. 91. Effect of new rules on policies existing at time of change: Fawcett v. Fawcett, 26 A. R. 335. Effect of rules of benefit society where insured made policy payable to his executors contrary thereto: Johnston v. C. M. B. A., 24 A. R. 88. Rules considered, effect of re-instatement: Long v. A. O. U. W., 25 A. R. 147. See *post* notes to sec. 184, and sections there referred to.

9. As to powers of provincially incorporated insurance companies to do business throughout Canada: see In re Companies, 48 S. C. R. 331. Formation of corporation under R. S. O. 1897, ch. 211: Delaronde v. Ottawa Police, 3 O. W. N. 1188, 21 O. W. R. 997.

47.—(1) Canadian policyholders petitioned for distribution of the deposit of a company, a foreign corporation, the company being insolvent. Held they were entitled to the relief asked notwithstanding that proceedings to wind up the company were pending before the English Courts. For any balance of their claims, Canadian policyholders would be entitled to rank upon the general assets of the company: Re Briton Medical and General Life Association, 12 O. R. 441. Pending administration of deposit, right of company taking over the business and risks of another company to be subrogated to the position of the policyholders of the second company: Clark v. Union Fire —Claim of the Agricultural Fire Ins. Co., 6 O. R. 640. What is insurance contract discussed: R. v. Stapleton, 21 O. R. 679.

47.—(5*h*) Registration of a foreign corporation as a friendly society: Gillie v. Young, 1 O. L. R. 368. See sec. 66, note.

66. Registration of company: a friendly society not incorporated in Ontario, but of foreign incorporation, engaging in the business of insurance in Ontario may be registered as a corporation though not actually incorporated, by the joint effect of sec. 66 and sec 49: that is to say a friendly society doing such a business is comprehended in the statutable phrase "an Insurance Company:" Gillie v. Young, 1 O. L. R. 368, at p. 374.

69. Powers of provincial insurance companies to make contracts and insure property throughout Canada: see In re Companies, 48 S. C. R. 331. Foreign insurance companies doing business in Canada: see In re Insurance Act, 1910, 48 S. C. R. 260.

72. See notes regarding the constitution of charitable and benevolent societies, R. S. O. 1914, ch. 178, sec. 6, notes. See also Gillie v. Young, 1 O. L. R. 368.

81. An English insurance company which had carried on business in Canada with head office at Toronto, had appointed its general agent at Toronto by two powers of attorney to receive process under the Dominion and Provincial Insurance Acts. Afterwards it transferred its Canadian business to another company and closed its office, but its deposit under the Dominion Act had not been released nor the powers of attorney cancelled. A writ of summons upon a policy issued in Quebec in respect of a loss on property there was properly served on the agent named as attorney in Toronto under Con. Rule 159 (1913, Rule 23), and the Court in Ontario had jurisdiction to entertain the action: Armstrong v. The Lancashire Fire, 3 O. L. R. 395.

85. Where local agent went beyond his authority and consented to alterations in a policy which the company were held not bound by, it was held that this section did not apply to notice of that nature: Pigott v. Employer's Liability, 31 O. R. 666.

89. A condition in a policy that every difference shall be referred to arbitration and that a compliance with the stipulations is a condition precedent to the right to recover is not in contravention of this section, and an action on the policy does not lie nor the amount payable under it become due until the determination of the arbitrator: Nolan v. Ocean Accident and Guarantee Corporation, 39 C. L. J. 367, 5 O. L. R. 544. A plaintiff is not bound to exhaust before action the appeals which a society provides within itself by its rules: Doidge v. Royal Templars, 4 O. L. R. 423. Where a right of action vested under this section before any subsequent call was made, it was not essential for the claimant to continue his membership after default arose on the part of the company to pay his claim: Re Massachusetts Benefit Life—Babcock's Claim, 30 O. R. 309 at p. 315. Effect of condition allowing company 60 days for payment after receipt of proof of death: Gill v. Great West Life, 2 O. W. N. 777, 18 O. W. R. 733. After "reasonably sufficient proof:" Somerville v. Aetna Life, 21 O. L. R. 276; Argles v. S. Eastern Ry. Co., L. R. 3 Ex. 149; Johnston v. Dominion of Canada G. and A. I. Co., 11 O. W. R. 363, at 367, 371, 17 O. L. R. 462. Right to sue where one of two designated preferred beneficiaries dies in lifetime of assured: Re Lloyd and A. O. U. W., 29 O. L. R. 312. Renewal receipt "according to tenor of the policy" imports into the renewal receipt the policy and all the conditions contained in it; status of beneficiary to bring action: Youlden v. London Guarantee, 28 O. L. R. 161. Where there was a change of beneficiary and an agreement not to change: Clark v. Loftus, 24 O. L. R. 174, 26 O. L. R. 204.

98. Section 4 of the Canadian Insurance Act, 9-10 Edw. VII., ch. 32 (D.), was submitted to the Supreme Court of Canada for opinion on its constitutional validity. The section operates to prohibit an insurance company incorporated by a foreign state from carrying on business in Canada if it does not hold a license from the Minister, and if such carrying on of business is confined to a single Province. Fitzpatrick, C.J., and Davies, J., considered the section not *ultra vires* of the Parliament of Canada. Idington, Duff, Anglin and Brodeur, JJ., *contra*: In re Insurance Act, 1910,

48 S. C. R. 260. Carrying on insurance business without a license: R. v. Stapleton, 21 O. R. 679. Company not having complied with the provisions of the Act in regard to registration precluded from entering into a contract with anyone in Ontario: Burson v. German Union, 10 O. L. R. 238.

119. Trustees being indebted to the plaintiffs and holding stock in the defendant company, assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debenture to the plaintiffs. This transaction did not constitute a loan of money within the meaning of the statute, and the debenture was *ultra vires*: Bank of Toronto v. Beaver and Toronto Mutual, 28 Gr. 87. The directors of a mutual insurance company may borrow money on promissory notes or debentures without passing a by-law under seal: Victoria Mutual Fire v. Thompson, 32 C. P. 476, 9 A. R. 620.

125. Outstanding claims: Re Standard Mutual Fire, 2 O. W. N. 235, 17 O. W. R. 407.

139. This section (passed 53 Vic. ch. 44, sec. 4) applies to premium notes given before its passing as well as to those given afterwards: Re Saugeen Mutual, Knechtel's Case, 19 O. R. 417. A mutual insurance company was held not entitled, as against a mortgagee, to retain the amount of a premium note given by a mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon: Anderson v. Saugeen Mutual, 18 O. R. 355. An assessment for the purpose of paying promissory notes given by a mutual insurance company, must be confined to the premium notes or undertakings current at the time the loss occurred in respect of which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company: Victoria Mutual v. Thompson, 32 C. P. 476, 9 A. R. 620. *Quaere* as to effect of misnomer of company on negotiability of note: Sears v. Agricultural, 32 C. P. 585.

141. Default in payment of one of the deferred payments of the first instalment of a premium note given by an

insurer in a mutual fire insurance company given under this section does not *ipso facto* work a forfeiture: Woolley v. Victoria Mutual, 26 A. R. 321 (see now sub-sec. 4).

142. Liability of policyholders of solvent branches to be assessed on their premium notes to pay off liability to guarantee stockholders to discharge losses paid from the guarantee fund. Power of directors to make assessment. No jurisdiction in Court to do so: Duff v. Canadian Mutual, 6 A. R. 238. A notice by a company to the insurer, treating a payment on a premium note as an assessment, and notifying him that in the event of non-payment the policy would be suspended, is not an assessment under this section, and non-payment pursuant to the notice does not suspend the operation of the policy: Woolley v. Victoria Mutual, 26 A. R. 321. On an application to the Court to add the persons who had signed premium notes parties in the Master's office, and to direct the master to assess the amounts due upon the notes and to order the same to be paid to the receiver from time to time, it was shewn that the directors had not made any assessment upon the notes; Held, as liability attached only on such assessment by the directors, the Court could not add to or alter the liability of the parties by referring it to a receiver to do what by statute the directors alone could do: Hill v. Merchants and Manufacturers, 28 Gr. 560.

143. See Long v. A. O. U. W., 25 A. R. 147, etc.

149. See Re Saugeen, 19 O. R. 417.

150. These provisions are not affected by 6 Edw. VII., ch. 19, sec. 22: Waterloo Mutual v. Bindner, 16 O. W. R. 299; and see R. S. O. 1914, ch. 63, sec. 74; Bicknell and Seager, D. C. Act, p. 137.

153. Formerly did not apply where the judgment was recovered on a policy issued by the company on the cash principle: Lowson v. Canada Farmers' Mutual, 8 A. R. 613. But now applies to mutual or cash mutual: see Lowson v. Canada Farmers' Mutual, 9 P. R. 185; Lount v. Canada Farmers' Mutual, 8 P. R. 443; see also Con. Rule 843 (1913, Rule 538), which yields to the provisions of this section.

155. A society, incorporated in Illinois, registered in Ontario as a friendly society and kept its registry in force as such, but did not at any time become registered as an insurance company; the society was legally entitled to do business in Ontario: Gillie v. Young, 1 O. L. R. 368. A Canadian benefit association transferred its assets to an American society, which issued new certificates signed in the United States and sent to Canada, but not operative there until countersigned by the Canadian agent and premium paid: Held, that there was a novation and the society was validly doing business in Canada, and that the contract being completed in Canada was subject to statutory conditions imposed for the benefit of the public: Mason v. Massachusetts Benefit, 30 O. R. 716. In the provision as to committing a policy to the post office, the words "to be delivered or handed over to the assured, his assign or agent in Ontario," contemplates a committing of the policy to the post office by the insurer, addressed to the insured, his assign or agent in Ontario, and the provision therein that in such event the money should be payable at the office in Ontario, shows that the section was intended to apply to companies having an office or agent in Ontario, and not to a company which has in no way brought itself or its business within the limits of the province: Burson v. German Union, 10 O. L. R. 238. Place of contract in New York by agreement; change of beneficiary: see Bunnell v Shilling, 28 O. R. 336.

156.—(1) Beneficiary certificates issued to members of an unincorporated union having their head office in a foreign country and unincorporated branches here, entitling them to pecuniary benefits on payment of assessments, are not subject to the provisions of this section: Wintemute v. Brotherhood of Railway Trainmen, 27 A. R. 524. See also in regard to certificate of Brotherhood of Railway Trainmen, Morgan v. Hunt, 26 O. R. 568. Such a policy is capable of being controlled by conditions not set out on its face; effect of rules of the society considered. Right of member who is reinstated pursuant to rules of a society: Long v. A. O. U. W., 25 A. R. 147.

156.—(2) Effect of the words "all the terms and conditions of the contract must be set out in full on . . .

the instrument, etc." Where policy has been renewed by renewal receipt "according to the tenor of the policy": Youlden v. London Guarantee, 26 O. L. R. 75, 28 O. L. R. 161; and see also as to renewal receipts: Venner v. Sun Life, 17 S. C. R. 394; Jordan v. Provincial Provident, 28 S. C. R. 554; Hay v. Employers' Liability, 6 O. W. R. 459; Elgin Loan v. London Guarantee, 8 O. L. R. 117, 9 O. L. R. 569, 11 O. L. R. 330.

156.—(3) A contract of fidelity guarantee recited the delivery to the insurer of certain statements as to the duties of the employee and the checks kept on his accounts, and that the statements should be the basis of the contract "limited to such of the statements as are material to the contract." This was held to have the effect of embodying the preliminary application and declaration into the face of the contract: Elgin Loan v. London Guarantee, 8 O. L. R. 117, 9 O. L. R. 569. Unintentional misstatements in answer to questions on application for insurance: Pearce v. National Life, 12 O. W. R. 359. Effect of misstatement: Arnprior v. U. S. Fidelity Co., 4 O. W. N. 1426.

156.—(4) Where a policy of life insurance is expressed to be issued subject to by-laws, and by the constitution of the company power is given to alter the by-laws from time to time, and no reference is made in the policy to prospectuses issued by the company, the policy constitutes the whole contract and the Court cannot refer to the prospectuses for the purpose of construing the contract: British Equitable v. Baily, 75 L. J. Ch. 73, 1906, A. C. 35.

156.—(5) Change of occupation of insured; employment on railway; notice; Smith v. Excelsior Life. 3 O.W.N. 1521, 22 O. W. R. 863. Where A was induced to continue paying premiums on a policy which she had taken out on the life of her brother by unauthorized misrepresentations of the company's agent, the company were ordered to return the premiums because the misrepresentations avoided the policy, and because they could not be allowed to retain the benefit of a contract induced by their agent's misrepresentations, even when unauthorized: Kettlewell v. Refuge Assurance Co., 1907, 2 K. B. 242. Repayment by

company of premiums obtained by misrepresentations of agents: Refuge Assurance Co. v. Kettlewell, 1908, 1 K. B. 545; 1909, A. C. 243. Note given for first premium; policy not what applied for; failure of consideration: Pearlman v. Sutcliffe, 1 O. W. N. 376, 15 O. W. R. 140.

156.—(6) The provisions of the section do not require the materiality of the statements to appear by the indorsements; but the contract will be avoided only when such statements may subsequently be judicially found to be material. Misrepresentations upon an application for life insurance so found to be material, will avoid the policy, notwithstanding that they have been made in good faith and in the conscientious belief that they were true: Jordan v. Provincial Provident, 28 S. C. R. 554. In spite of a condition that a mortgage or lien should be deemed material to the risk, it still remains for the Judge or jury to determine its materiality: Fritzley v. Germania Mutual, 19 O. L. R. 49, 14 O. W. R. 18. In an application for fidelity insurance, statements as to the manner of drawing cheques and as to audits are material: Elgin Loan v. London Guarantee, 8 O. L. R. 117, 9 O. L. R. 569. Where a man was older than the age limit under the rules of a benevolent society, but owing to his innocent misrepresentations was admitted, the beneficiary named in his endowment certificate could not recover: Cerri v. A. O. F., 28 O. R. 111, 25 A. R. 22. Misrepresentations as to age in foreign policy completed in Canada; policy held to be subject to statutory conditions imposed for public benefit: Mason v. Massachusetts Benefit, 30 O. R. 716. In an application on which a benevolent society's certificate was issued, the insured gave his age as 54, when it was in fact 55, the latter age being within the age limit of the society, and the premium being the same for both ages. The insured sued for permanent disability on reaching the age of 70. The jury found his misstatement as to age not material, and that the statement as to age was made in good faith. The certificate was held binding and the insured entitled to his money on, in fact, attaining the age of 70: Hargrove v. Royal Templars, 2 O. L. R. 79. (See *post* sec. 166). Where stipulation on face of contract was not limited to such misstatements as were material

to the contract: London West v. London Guarantee, 26 O. R. 520. Where in the application the insured was asked whether any incendiary danger to the property was threatened or apprehended and untruly answered "no," the policy was avoided: Findley v. Fire Ins. Co. of North America, 25 O. R. 515. Question: "Have you ever had any property destroyed or damaged by fire?" Held, immaterial: Stott v. London & Lancashire, 21 O. R. 312. Question: "Has the risk been refused by any other company?" The answer to this was held a warranty having reference to the property to be insured. The only question for the jury was as to the truth of the answer: Stott v. London & Lancashire, 21 O. R. 312. Production will be ordered of all applications and medical examinations which contain answers to any question the materiality of which is at stake: Ferguson v. Provincial Provident, 15 P. R. 366. Where an application untruly stated that no incendiary danger was threatened or apprehended, the applicant, although he did not read over the application, and was not told that the question had been answered in the negative, was bound by the answer, and that it was material. The meaning of the question in the application considered: Kniseley v. British America, 31 O. R. 376. As to misrepresentations in applications for fire insurance policies, see sec. 194 (1). As to misstatements of age in life insurance policies, see sec. 166, Notes.

163. A testator had three policies of insurance, the first payable to his wife, the second "for the benefit of his wife . . . the beneficiary," and the third to "his legal heirs." The widow was the legal heir. The will bequeathed to the wife one-half the estate, "including policies of 'insurance' made payable to her at my death." Held, that the third policy was part of the testator's estate, but not the first two, for by these a trust was created in favour of the wife as preferred beneficiary. The word "including" imported addition, that is, something in addition to and not included in the half of the estate: Re Duncombe, 3. O. L. R. 510; see also Re Harkness, 8 O. L. R. 720, 4 O. W. R. 533. A designation of "legal heirs" as beneficiaries, although these legal heirs may in fact be members of the preferred class of beneficiaries, does not come within sec. 178 (2), and is revoc-

able: Re Farley, 9 O. L. R. 517, 10 O. L. R. 540. Certificate for benefit of "legal heirs"; effect of as between children of first marriage and second wife: Mearns v. A. O. U. W., 22 O. R. 34. "Legal heirs": see Re Duncombe, 3 O. L. R. 510; Re Hamilton and C. O. F., 13 O. W. R. 410, 18 O. L. R. 121, where Re Duncombe (*ante*) not followed and section interpreted. See also as to " legal heirs ": Re Beam, 3 O. W. N. 138, 20 O. W. R. 183. "Legal heirs designated by will"; construction of such designation: Griffith v. Howes, 5 O. L. R. 439, and see Re Edwards, 22 O. L. R. 367. " Heirs," " heirs according to will:" Re Sawdon, 3 O. W. N. 136.

164. The company may by their conduct become estopped from setting up non-payment of premium after the 30 days: Tattersall v. People's Life, 9 O. L. R. 611, 11 O. L. R. 326. Construction of policy providing that after lapse through non-payment for 30 days, company will within 3 months issue paid-up non-participating policy: Pense v. Northern Life, 10 O. W. R. 826.

165.—(1) The words of the section have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling enactment: Styles v. Royal Arcanum, 29 O. R. 38. Validity of clause invalidating claim under policy one year from date of insured's death: Gill v. Great West Life, 2 O. W. N. 777, 18 O. W. R. 733. " Happening of the event insured against," under former wording, referred in case of an accident policy to the death of the insured, not to the accident which caused his death: Atkinson v. Dom. Can. G. & A. Ins. Co., 16 O. L. R. 619, 11 O. W. R. 449. The insurers are not bound to plead failure of plaintiff to comply with condition in policy requiring action to be brought within three months from the time when the right accrued, when this is by the policy itself a condition precedent to the right of the insured to recover: Atkinson v. Dom. Can. G. & A. Ins. Co., 16 O. L. R. 619. Effect of this limitation as against foreign administrator: Johnson v. Dominion of Canada G. and A. Ins. Co., 11 O. W. R. 363, at p. 371. Section considered and practice as to giving leave to bring action; order extending time; renewal of writ; juris-

diction: see Atkinson v. Dominion of Canada Guarantee and Accident, 11 O. W. R. 449, 16 O. L. R. 619.

165.—(2) Action not commenced within 18 months where no direct evidence of death: Somerville v. Aetna Life, 1 O. W. N. 852, 16 O. W. R. 301, 21 O. L. R. 276.

165.—(5) What evidence should be forthcoming to establish presumption of death; issue may be directed to try whether the insured is dead: Re Dancey and A. O. U. W., 11 O. W. R. 833, 12 O. W. R. 417; Re Marshall and A. O. U. W., 11 O. W. R. 1078, 12 O. W. R. 153, 13 O. W. R. 306, 18 O. L. R. 129; Re Pilgrim, 12 O. W. R. 1086. Evidence on application for declaration of death: Re Goble, 1 O. W. N. 624; Re Coots, 1 O. W. N. 807; Somerville v Aetna Life, 1 O. W. N. 852, 16 O. W. R. 301, 21 O. L. R. 276; Re Oag and C. O. H. C., 4 O. W. N. 643. Application of section: Wright v. A. O. U. W., 5 O. W. N. 445. See R. S. O. 1914, ch. 62, sec 38, notes.

166. As to materiality of misrepresentations as to age: see Hargrove v. Royal Templars, 2 O. L. R. 79; notes to sec. 156 (6) *ante*. Misrepresentations as to age in foreign policy completed in Canada; policy held to be subject to statutory conditions imposed for public benefit: Mason v. Massachusetts Benefit, 30 O. R. 716. This section does not apply to benevolent societies having an age limit, when the effect of the applicant's misstatement as to age, though *bona fide*, is to bring the applicant within the limit: Cerri v. A. O. F., 28 O. R. 111, 25 A. R. 22. The insured stated in his application in 1891 that he was 41, when in fact he was 44. Evidence of statements made many years before by the insured that he was born in 1850, for the purpose of showing *bona fides*, were improperly rejected: Dillon v. Mutual Reserve, 5 O. L. R. 434. The onus is on the persons seeking to uphold the contract to prove that the statements as to age are made *bona fide*: Dillon v. Mutual Reserve, 5 O. L. R. 434.

After an application for membership in a benevolent association was accepted, a dispute arose as to the age of the insured, and an action was brought to

cancel his certificate. This was settled, an affidavit being accepted as proof of age. Subsequently another action was brought to cancel the certificate on the ground that the affidavit was wrong: Held, that only clear proof as to age and fraud in procuring and making the affidavit would undo the settlement: Sons of Scotland v. Faulkner, 26 A. R. 253. A company receiving premiums after knowledge of misstatement of age of insured must be treated as affirming the policy as it stands: Hemmings v. Sceptre Life, 1905, 1 Ch. 365.

169.—(1) A condition in a policy of insurance that provided the premiums have been regularly paid, it shall after a year be "incontestible" does not override an enactment of the Legislature that the insurer must have an insurable interest in the life upon which the insurance is effected: Anctil v. Manufacturers Life, 1899, A. C. 604. Policy effected by a wife under husband's name without his knowledge or consent contrary to the rule of the insurance company; subsequent ratification by husband: Wakeman v. Metropolitan Life, 30 O. R. 705. Where the name of the person interested in the policy is not inserted therein, but is set out in the application which is made part of the policy, it is sufficient under sub-section (1): Wakeman v. Metropolitan Life, 30 O. R. 705. If the beneficiary of a life insurance policy having no interest in the life of the insured, has effected the insurance for his own benefit and pays all premiums himself, the policy is a wagering policy and void under this provision: North American Life v. Brophy, 2 O. L. R. 559, 32 S. C. R. 261. The rule of law that where one of two parties pays money to the other in pursuance of an illegal contract he cannot recover it back, is not displaced by the fact that the contract was entered into as a result of an innocent misrepresentation of law made by the other party in the absence of fraud, duress or fiduciary relationship: Harse v. Pearl Life (1904), 1 K. B. 558. See as to policy held illegal as contrary to this provision, and as to repayment of premiums: Dowker v. Canada Life, 24 U. C. R. 591. Insurable interest of husband and wife in each other's lives: Griffiths v. Fleming (1909), 1 K. B. 805. A policy of insurance effected by a husband on the life of his wife may be enforced by

him without affirmative evidence of insurable interest: Griffiths v. Fleming (1909), 1 K. B. 805.

169.—(2) An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited, if when he effected the insurance he intended to protect the interest of the vendee as well as his own: Keefer v. The Phœnix Insurance Co., 29 O. R. 394, 26 A. R. 277, 31 S. C. R. 144.

169.—(3) Insurable interest of mother in life of child: Wakeman v. Metropolitan Life, 30 O. R. 705.

169.—(5) An insurance in a New York company effected by a mother on the life of her child under age is valid in Ontario under sub-sec. 5, and in New York according to decisions referred to in the report of this case: Wakeman v. Metropolitan Life, 30 O. R. 705.

169.—(9) This section will not assist an insurance company suing on a promissory note made by an infant given for a first premium on a policy on his own life: Federal Life Asurance Co. v. Hewitt, 9 O. W. R. 857; Re Soltykoff, Ex parte Margrett, 1891, 1 Q. B. 413.

170. Sections 170-171 came into force Aug. 1st, 1912. They had no retroactive effect and did not apply where testator died in May, 1912: Re Stewart, 4 O. W. N. 293, 23 O. W. R. 343. This section, referred to in 2 George V. ch. 33, sec. 170, as "new," is apparently an enlargement of the provisions of R. S. O. 1897, ch. 203, sec. 160 (5), which was derived from 59 Vic. ch. 45, sec. 2, superseding the effect of Mingeaud v. Packer, 21 O. R. 267; Neilson v. Trusts Corporation of Ontario, 24 O. R. 517; Re Harrison, 31 O. R. 317. These cases establish the practice under the preceding statute 47 Vic. ch. 20. Before the amendment of 59 Vic. ch. 45, there was not, without the consent of the wife, any power "wholly to divert" the right acquired by her. The proper construction now is that the powers given by sec. 179, sub-secs. 1 and 2, may be exercised with reference to any contract heretofore issued or declaration made, and that any such contract or declaration shall be valid notwithstanding that at the time it was issued or made it was

not in accordance with existing law: Cartwright v. Cartwright, 8 O. W. R. 109, 12 O. L. R. 272.

171.—(1) The statute was never intended to prevent a person effecting a *bona fide* insurance on his own life making the sum insured payable to whom he pleases: North American Life v. Craiger, 13 S. C. R. 278. If the policy is valid at its inception, the fact that a second person, without collusion, paid the premium and obtained an assignment does not make it a wagering contract: Vezina v. New York Life, 6 S. C. R. 30.

171.—(3) The designation of a beneficiary in an Ontario contract of insurance can be revoked and the benefit diverted to another only within the limits laid down by the Act, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reserved and to the by-laws of the insurers, which permit the desired change: Lints v. Lints, 6 O. L. R. 100. The by-laws and rules of a benefit society, in so far as they are inconsistent with the provisions of the Act, are to be regarded as controlled and modified by them: Re Harrison, 31 O. R. 314; Mingeaud v. Packer, 21 O. R. 267; even where the rules of the Society provide that no will shall be permitted to control: Gillie v. Young, 1 O. L. R. 368. Paramount authority of section over benefit society's rule: Fidelity Trust v. Buchner, 22 O. W. R. 72, 3 O. W. N. 1208, O. L. R. See further as to rules of benefit societies, notes to secs. 2 (51) and 184.

A policy in favor of a daughter was set up in satisfaction of a claim made by the daughter against the estate and certain oral declarations of the deceased made before effecting the insurance were proved to shew such to have been the intention of the insured. It was held doubtful if such evidence were admissible at all, but even if it were, there should at least be something in writing evidencing the obligation to accept the amount in satisfaction of the claim, as formal as the Act requires in the case of changes in the description or apportionment among the beneficiaries: Re Mills, Newcombe v. Mills, 28 O. R. 563. Where the assured changes the designation of his policy payable to members of the preferred class and makes it payable to one member of that class who is also a creditor,

with the intention of exonerating his estate from the debt: see Re Kemp, Johnson v. A. O. U. W., 14 O. L. R. 424, 15 O. L. R. 339, and see *post* sec. 179, note. By a contract between the insured and her husband she agreed that a policy to be issued on her life should be made payable to him as beneficiary. The agreement was carried out and for five years the husband paid the premiums. It was held that a vested interest passed to him and the beneficiary could not be changed without his consent, even when the policy had lapsed and a new one had issued in lieu of it: Bunnell v. Schilling, 28 O. R. 336. In Videan v. Westover, 29 O. R. 1, a re-apportionment made by will of the assured, whereby the defendant, who was an "ordinary" beneficiary only, was deprived of her benefits, was held to be valid, the certificate having been issued, and the will made, and the death of the insured having occurred before the passing of 60 Vic. ch. 36: see also McIntyre v. Silcox, 29 O. R. 593, 30 O. R. 488, where Videan v. Westover is distinguished. Where a wife was beneficiary and she died, and a direction was made to children "as directed by will," and the will directed a division of his estate equally among all children, no reference being made in the will to the benefit certificate, the effect of the amendment of 1901 was to give all insurance money to infant children to exclusion of adults: Re Snyder, 4 O. L. R. 320, but see amendment of 1903. A devise of a testator of all his life insurance in favour of "preferred beneficiaries," as defined by the Act, is sufficient to vary a policy or declaration of apportionment previously made without specifically identifying the policies by number, name, date or amount insured. *Semble*, such a devise does not affect a policy issued after the date of the will: Re Cheeseborough, 30 O. R. 639. Manner of identifying policy: effect of the word "otherwise:" Re Cheesborough, 30 O. R. 639; Re Harkness, 8 O. L. R. 720, 4 O. W. R. 533; Re Cochrane, 9 O. W. R. 956, 16 O. L. R. 328. The decision (Re Cheeseborough) was specially discussed in Re Cochrane, 16 O. L. R. 328, where it was held that a devise of "all the rest and residue of my insurance funds" did not sufficiently identify the insurance, and that extrinsic evidence was inadmissible. Re Cochrane, 16 O. L. R. 328, was generally followed (*e.g.*, Re Earl, 16 O. W. R. 901, 1

O. W. N. 1141), and finally the statute was changed. See now sub-sec. 5 as to operation of general declaration; and see Re Stewart, 4 O. W. N. 293. Reapportionment by will of benefit society insurance; Racher v. Pew, 30 O. R. 483; see also Re Harrison, 31 O. R. 316; Potts v. Potts, 31 O. R. 452; Gillie v. Young, 1 O. L. R. 368; Book v. Book, 1 O. L. R. 86. A bequest of a policy of life insurance was a valid declaration of trust within R. S. O. 1887, ch. 136, sec. 5: McKibbon v. Feegan, 21 A. R. 87; R. S. O. 1887, ch. 136. Voluntary settlement on sisters: see Re Roddick, 27 O. R. 537. Apportionment by will: Re Grant, 26 O. R. 120, 485. Power to bequeath to executors, money limited by society to certain classes: Morgan v. Hunt, 26 O. R. 568. Moneys payable to infants where no trustee or guardian is appointed: Dodds v. A. O. U. W., 25 O. R. 570 (and see new sec. 175 *infra*). Policies devised to executors to be invested for benefit of wife and children within the provisions of R. S. O. 1887, ch. 136: Beam v. Beam, 24 A. R. 189.

What is sufficient evidence of change of beneficiary: Simmons v. Simmons, 24 O. R. 662. Variation of terms of certificate and revocation of direction for payment: Neilson v. Trust Corporation, 24 O. R. 517. The interest of a wife in a policy of insurance effected by her husband on his own life and declared by him to be for her benefit, under R. S. O. 1887, ch. 136, was separate estate, and could be assigned by her during her husband's lifetime: Graham v. Canada Life, 24 O. R. 607. Apportionment by policy; variance by will: Re Dicks, 18 O. L. R. 657. A bequest by one of four policies, any one of which may be selected to answer the bequest, is not such a designation as will even in favour of preferred beneficiaries meet the requirements of the statute: MacLaren v MacLaren, 15 O. L. R. 142, 10 O. W. R. 835. Incomplete declaration of trust; revocable and not capable of taking effect as a will: Kreh v. Moses, 22 O. R. 307. Sufficiency of declaration by will in favour of wife: Re Lynn, 20 O. R. 475, or to change previous declaration in favour of child: Scott v. Scott, 20 O. R. 313. A testator holding a policy of insurance payable to "his order or heirs," made a will devising his real estate and proceeding, "I give the residue of my property, including life insurance, to my wife." Held, a sufficient

identification of the policy within this section, and operated as a valid declaration to the exclusion of creditors. The word "including" did not mean that the insurance was part of the residue, but that it was given in addition to the residue: Re Harkness, 8 O. L. R. 720, 4 O. W. N. 533. A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate under this section: Re Jansen, 12 O. L. R. 63. Where a will is validly executed, but afterwards revoked by marriage, the revocation of the will by marriage annuls the declaration of trust made in the will: Re Watters, 13 O. W. R. 385. Identification of policy: Re Roger, 14 O. W. R. 267, 18 O. L. R. 649. What is sufficient identification of policy in will: Re Watson and C. O. H. C., 3 O. W. N. 1605, 22 O. W. R. 834. Change of beneficiary; agreement not to change: Clarke v. Loftus, 19 O. W. R. 606, 21 O. W. R. 705, 2 O. W. N. 1288, 3 O. W. N. 1027, 24 O. L. R. 174, 26 O. L. R. 204. Assignment of policy to fiancée and designation of beneficiary distinguished: Wilson v. Hicks, 21 O. L. R. 623, 23 O. L. R. 496. *Prima facie* title to insurance moneys: see Blahoult v. Equitable Life, 11 O. W. R. 313. Changing benefit of policy as between members of the preferred class: see sec. 179 notes. The question whether insurance moneys are validly bequeathed to preferred beneficiaries may be determined by originating notice under Con. Rule 938: see Holmested and Langton, p. 1180, and cases there cited (1913, Rule 600).

171.—(4) Date from which the will speaks: see Wills Act, R. S. O. 1914, ch. 120, sec. 27. Retrospective effect of this section and its application considered: Re C. O. F. and McHutchion, 14 O. W. R. 251. Will containing general devise of all testator's life insurance; *semble*, will not affect policy issued after date of will: Re Cheeseborough, 30 O. R. 639.

171.—(5) Decision Re Cochrane, 16 O. L. R. 328, construing R. S. O. 1897, ch. 203, sec. 160, and its effect on change of law: Re Stewart, 4 O. W. N. 293, 23 O. W. R. 343. Re Cheeseborough, 30 O. R. 639, Re Harkness, 8 O. L. R. 720, and Re Cochrane, 16 O. L. R. 328, commented on and distinguished: Re Watters, 13 O. W. R. 385. See notes to sec. 171 (3) *ante*.

171.—(7) Where an insurance was effected in favour of mother, not expressly stated to be a beneficiary for value, and afterwards transferred to wife: see Potts v. Potts, 31 O. R. 452. The insured cannot of his will transfer the benefit of insurance from a beneficiary for value who is of the preferred class to another member of the preferred class: see sec. 179, Notes; Book v. Book, 1 O. L. R. 86. Beneficiary for value: Re Commercial Travellers and June, 13 O. W. R. 932. Beneficiary for value, but not so recognized in the policy: Clark v. Loftus, 24 O. L. R. 174, 26 O. L. R. 204. See also Re Mills, Newcombe v. Mills, 28 O. R. 563; Re Kemp and A. O. U. W., 9 O. W. R. 18, 11 O. W. R. 91, noted *ante*, sec. 171 (3). Policies effected under Friendly Society Acts, 1875 and 1896, (Eng.) are not assignable otherwise than by nomination under the Acts: Re Redman, (1901) 2 Ch. 471; Re Griffin, (1902) 1 Ch. 135.

171.—(8) Policy payable to wife of insured; assignment by insured to creditor; absolute nullity under Quebec law: Crawford v. Bank of Commerce, 12 O. W. R. 401; see Lee v. Abdy, 17 Q. B. D. 309. Informal assignment as security for debt; rights of other creditors: Thompson v. Macdonnell, 13 O. L. R. 653, 8 O. W. R. 721.

171.—(9) "Survivor," "surviving children": Re Jannison, 4 O. W. N. 1084, 24 O. W. R. 391. Where a preferred beneficiary dies, see *post*, sec. 178 (7), and notes.

172. Renewal receipt of accident policy; effect: Youlden v. London Guarantee, 28 O. L. R. 161, and cases there considered, and see notes to secs. 2 (14) and 156. Requirement of immediate written notice in personal accident policy held reasonable and that the Court had no jurisdiction under R. S. O. 1897, ch. 51, sec. 57 (3), or otherwise, to relieve against forfeiture ensuing through non-observance of the requirement. "Immediate notice" means "reasonable expeditious notice": Johnston v Dominion of Canada Guarantee and Accident, 17 O. L. R. 462. Failure by assured to give "immediate notice of accident;" condition precedent: Re Coleman's Depositories and Life and

Health Assurance Association, 1907, 2 K. B. 798: Hawes v. Canadian Ry. Accident, 44 S. C. R. 386. Requirement as to notice of accident in accident policies; lack of statutory conditions: Evans v. Railway Passenger Assurance Co., 21 O. W. R. 442, 3 O. W. N. 881. Expiry of accident policy; attempted renewal after accident: Carpenter v. Canadian Ry. Accident, 13 O. W. R. 821, 18 O. L. R. 388. What amounts to waiver by an accident insurance company of sufficiency of proofs of loss; clause providing against suicide: Fowlie v. Ocean Accident, 4 O. L. R. 146. What amounts to a finding of "accidental death:" Fowlie v. Ocean Accident, 4 O. L. R. 146. (See S. C. 33, S. C. R. 253). Release to further claim for injuries subsequently developing from the same accident: Kent v. Ocean Accident, 13 O. W. R. 1072, 1 O. W. N. 324, 15 O. W. R. 177, 20 O. L. R. 226. Construction of stipulations as to proof of death, etc., in accident policy: see Johnson v. Dom. Can. G. & A. Ins. Co., 11 O. W. R. 363; Atkinson v. Dom. Can. G. & A. Ins. Co., 11 O. W. R. 449, 16 O. L. R. 619. What is an "accident;" death from hemorrhage result of accident or disease: Davis v. Bro. Locomotive Engineers, 5 O. W. N. 279. Cause of death: Injuries " caused by the burning of a building;" " injuries happening from fits;" " external violent and accidental means;" construction of policy: Wadsworth v. Canadian Ry. Accident, 26 O. L. R. 55, 28 O. L. R. 537. Pneumonia consequent on accident; death resulting: Re Etherington, 1909, 1 K. B. 591. Policy issued to "traveller;" accident happening while acting as brakesman: Stanford v. Imperial Guarantee, 12 O. W. R. 1289, 13 O. W. R. 1171, 18 O. L. R. 562. More hazardous occupation than that stated in the application: McNevin v. Canadian Ry. Accident, 32 O. R. 284, 2 O. L. R. 531, 32 S. C. R. 194; Stanford v. I. G. & A. Ins. Co., 18 O. L. R. 562; Thomas v. Masons' Fraternal, 105 N. Y. St. Rep. 692. Double indemnity in accident insurance; "riding as a passenger:" Wallace v. Employers' Liability, 25 O. L. R. 80, 26 O. L. R. 10. Negligent exposure to unnecessary danger: Fowlie v. Ocean Accident, 4 O. L. R. 146, 33 S. C. R. 253.

173. A contract to pay "out of the total disability fund in accordance with the laws governing such fund sums not exceeding in the aggregate $1,000" is not

within this section: Hargrove v. Royal Templars, 2 O. L. R. 79. Application of this clause to cases in accident policies where the insured was engaged in more hazardous occupation than the application stated: see Stanford v. I. G. & A. Ins. Co., 12 O. W. R. 1289, 13 O. W. R. 1171, 18 O. L. R. 562.

174. Powers of executors and testamentary guardian in regard to insurance money for benefit of children: Campbell v. Dunn, 22 O. R. 98; but see notes to sec. 175 *infra*.

175. Where an infant entitled to insurance money lived with her mother in a foreign jurisdiction where security had been given by the mother, it was held that the security given in the foreign Court would not attach to her appointment as trustee under this act and the Court declined to appoint her unless she furnished the necessary security here: Re Slosson, 15 P. R. 156; see also Re Daniels, 16 P. R. 304; Re Berryman, 17 O. R. 573; Re Thin, 10 P. R. 490, and Re Andrews, 11 P. R. 199. Moneys payable to infants where no trustee or guardian appointed: Dodds v. A. O. U. W., 25 O. R. 570. Moneys directed to be paid to administrator appointed where executors had renounced and not permitted to be paid into Court: Merchants Bank v Monteith, 10 P. R. 588. Payment of life insurance moneys payable to infants: Campbell v. Dunn, 22 O. R. 98. Payment of proceeds to trustee for benefit of children: Dicks v. Sun Life, 14 O. W. R. 979, 1 O. W. N. 178, 461, 15 O. W. R. 366, 20 O. L. R. 369.

The purpose of the amendment of 1913 is to commit infants' shares of insurance moneys to the supervision of the Supreme Court as a Court of equity: Re Havey, 5 O. W. N. 45, 29 O. L. R. 336. The changes made in this section by the amendments of 1913 would seem to exclude executors and guardians appointed by the Surrogate Court from the right to be paid insurance moneys of infants, and to make them payable to a trustee appointed by the Court and to such a trustee, or in the absence of such a trustee into Court, only: Re Rennie Infants, 5 O. W. N. 459. Proceedings where money payable to infants; application to Court to appoint trustee to receive the

money; notice to insurers; security: Re Rennie Infants, 5 O. W. N. 459.

177. The insured then living in Ontario took out two policies in an Ontario company. These he assigned as collateral security to two notes, moved to a foreign country and there died, having actual possession of one of the policies at the time. Letters of administration were granted to a person in the foreign jurisdiction and also to an assignee of one of the policies here. It was held that the appointment of an administrator in Ontario was necessary and the money having been paid into Court, should be paid out to the administrator here: Re Ontario Mutual Life and Fox, 30 O. R. 666. The provisions of the Insurance Act provide a special mode of dealing with the shares of infants in insurance moneys and exclude the application of the ordinary rules of law so far as inconsistent therewith: Re Berryman, 17 O. R. 573. Foreign trustee; security: Re Slosson, 15 P. R. 156; Re Thin, 10 P. R. 490, and Re Andrews, 11 P. R. 199. A tutrix of infants in Quebec, duly appointed, is not entitled *qua tutrix* to moneys of infants paid into Court under the Act, but she may be appointed trustee of the fund and receive it upon giving proper security: Re Berryman, 17 P. R. 573. As to payment to infants out of the jurisdiction where the fund consists of insurance money: see Holmested and Langton, p. 231. Certificate of Judge of Court of Probate in another province where letters of guardianship had issued as evidence in support of petition under this section: Re Daniels, 16 P. R. 304.

178.—(1) Deceased insured his life in favour of his mother as sole beneficiary. This policy he later assumed to surrender in favour of a paid-up policy for $500, to be paid to his mother, "or in the event of her prior death" (which event occurred) to a sister. The sister was held entitled to the moneys as against the executors of the mother: Kelly v. McBride, 7 O. L. R. 30. As to effect of provisions securing the benefit of life insurance to wives and children on existing policies when it came into force: see Re Cameron, 21 O. R. 634. A supposititious wife of the holder of a benefit certificate who had married him in ignorance that he had a lawful wife living and had cohabited with him for some six years and up to his death,

believing herself during the greater part of this time to be his wife and to whom the certificate was made payable by name, with the appellation of "my wife" added, was held entitled as against the lawful wife to the moneys payable thereunder as being a "dependent" within the society's rules notwithstanding the conjunction of that word with a number of others importing relationship by blood or affinity: Crosby v. Ball, 4 O. L. R. 496. The section applies to benevolent societies: Swift v. Provident Institution, 17 A. R. 66. Children of "adopted" child: Fidelity Trust Co. v. Buchner, 26 O. L. R. 267. Position of preferred beneficiaries in Winding-up: Re Mutual Life, Wellington's Claim: 13 O. W. R. 1109, 18 O. L. R. 411. When insurance money is appropriated by the husband to the wife, as wife, the wife, if validly divorced before the husband's death, cannot get the insurance money, nor can she be heard to say that a divorce obtained by her on her application to a foreign Court is invalid: Re Williams and A. O. U. W., 14 O. L. R. 482, 10 O. W. R. 50, 215; see also Magurn v. Magurn, 11 A. R. 178; Swaizie v. Swaizie, 11 O. R. 324; O'Reilly v. O'Reilly, 12 O. W. R. 688, 13 O. W. R. 967, 16 O. W. R. 75, 21 O. L. R. 201; Cartwright v. Cartwright, 12 O. L. R. 272.

178.—(2) "Declaration" means "declaration designating a beneficiary:" Wilson v. Hicks, 1 O. W. N. 429, 15 O. W. R. 309; see 1 O. W. N. 1138, 16 O. W. R. 857. A designation of "legal heirs" as beneficiaries, although these legal heirs may in fact be members of the preferred class of beneficiaries does not come within this sec. and is revocable: Re Farley, 9 O. L. R. 517, 10 O. L. R. 540 (see sec. 163 notes). Once the insurance is made payable to the wife, the section applies and the assured cannot divert it to beneficiaries not in the preferred class. A change in the rules of a benevolent society will not affect this: Re Harrison, 31 O. R. 314, Re L'Union St. Joseph, 12 O. W. R. 37. Request to issue policy in wife's favour; trust created by operation of Insurance Act: Cunningham v. Can. Home Circles, 3 O. W. N. 118, 20 O. W. R. 205. A certificate was left blank for the designation of beneficiaries, but none were designated and no reference to the certificate was made in the insured's will. The by-laws of the society provided that unless designation was made the money should go one-half

to insured's wife and one-half to his children. It was held that the widow and children should divide the money between them and that the fund was no part of the estate in the hands of the executors: Babe v. Board of Trade, 30 O. R. 69. Where a testator has 4 policies each of the same date and terms in the same company, what amounts to a sufficient designation: see MacLaren v. MacLaren, 15 O. L. R. 142 (see sec. 171 (3), and cases noted there). Attempted displacement of trust: where there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust or condition is void, and not only void, but inoperative to raise any case of election: Wallaston v. King, (1869) L. R. 8 Eq. 165. The testator having power to appoint within the class of preferred beneficiaries, first gave the insurance moneys in trust for his wife for life, and then over; he could not do this and the wife was entitled to the insurance moneys as well as to the other benefits under the will: Re Edwards, 22 O. L. R. 367. "It is not desirable to incorporate the somewhat technical and not always satisfactory doctrine as to vesting of legacies into these policies of insurance:" per Boyd C., Re McKellar, 21 C. L. T., Occ. N. 381. Construction of disposition made by insured of fund for benefit of wife and children: Vesting of legacies: Re Shafer, 15 O. L. R. 266, 10 O. W. R. 409, 865. The interest of a wife in a policy effected by her husband on his life and declared by him to be for her benefit under R. S. O. 1887, ch. 136, was her separate estate and might in her husband's lifetime be assigned by her: Graham v. Canada Life, 24 O. R. 607. A will devising an insurance policy to executors for the benefit of the testator's wife and children was a sufficient declaration under R. S. O. 1887, Ch. 136, sec. 5: Re Lynn, 20 O. R. 475, Beam v. Beam, 24 O. R. 189; McKibbon v. Feegan, 21 A. R. 87.

The dominating idea underlying the sections of this Act which relate to preferred beneficiaries is the creation of a trust which withdraws the insurance moneys from the estate of the insured and from interference

by his creditors: Re Lloyd and A. O. U. W., 29 O. L. R. 312. The plaintiff was a judgment creditor of the defendant under a judgment against her separate estate for trade debts. On the death of her husband she became entitled to the proceeds of a policy made payable to her as beneficiary. Held that the effect of this section is to create a statutory trust of the insurance money in favour of the wife without restraint on anticipation. On the death of her husband the absolute right to the money vested in her, and her original interest being separate property within the Married Women's Property Act, the fruits of the trust must be regarded as separate property and liable to satisfy the plaintiff's judgment: Doull v. Doelle, 10 O. L. R. 411. Policies creating a trust for the wife as preferred beneficiary and not forming part of testator's estate: see Re Duncombe, 3 O. L. R. 510. The insured assigned an endowment policy to a creditor, the surplus to be paid to insured's wife, and subsequently elected to take the cash surrender value. A judgment creditor attached the fund in the company's hands, and as no action had been taken by the company, the insured withdrew his election and executed a declaration that the policy was held subject to the assignment for the benefit of his wife. It was held that his election to take the cash surrender value was a mere proposal to the company and revocable, and that the declaration in the wife's favour defeated the attaching creditor's claim: Fiskin v. Marshall, 10 O. L. R. 552. Policies of life insurance were by the terms thereof made payable to the deceased's personal representatives, but by his will after directing the payment of his debts he bequeathed all his estate to his widow, including the policies subject to the payment of the said debts. Held that the widow only took subject to the payment of the debts: Re Wrighton, 8 O. L. R. 630. Where wife entitled, her interest not affected by absolute assignment to a creditor: Fisher v. Fisher, 28 O. R. 459, 25 A. R. 108, 28 S. C. R. 494. Benefit certificate amounting to voluntary settlement in favour of sisters, dependents as defined in the rules of the benefit society; although not within the protection of R. S. O. 1887, Ch. 136, the sisters were held entitled as against creditors of the insured's estate which was insolvent: Re William Roddick, 27 O. R. 537. Order for receiver to sell; sub-

sequent declaration by insured for benefit of wife and children: Weeks v. Frawley, 23 O. R. 235.

178.—(3) A man with wife and children insured "for benefit of wife and children." The wife died and the man remarried and had a child by second wife. The widow and her child were entitled to participate: Re Browne, 1903, 1 Ch. 739; see also Re Parker, 1906, 1 Ch. 526. A man effected insurance "for the benefit of his wife, or if she be dead, between his children equally." The wife died and the insured remarried and had a child. The money went to all the children equally, but the widow was not entitled to participate: Re Griffiths, 1903, 1 Ch. 739. A policy of insurance under this section will enure to the benefit of an after taken wife: Re Parker's policies, 1906, 1 Ch. 526. Insured left a policy of insurance payable to his "Wife B.K." if living, and if dead, to his children. B.K. died and insured remarried. The wife living at the time of insured's death was entitled by statutory construction: Re Kloepfer, 5 O. W. N. 133, 25 O. W. R. 101. "Wife" means wife living at the maturity of the contract notwithstanding first wife is designated by name; and this applies to part as well as the whole of the insurance: Re Lloyd and A. O. U. W., 4 O. W. N. 1246, 5 O. W. N. 5, 29 O. L. R. 312. Designation of "wife" second wife will take: Re Bottomley and A. O. U. W., 5 O. W. N. 83, 25 O. W. R. 26. Right of second wife surviving insured as preferred beneficiary: Lambertus v. Lambertus, 5 O. W. N. 420. And see also: Re Sons of Scotland and Davidson, 2 O. W. N. 200, 17 O. W. R. 300; Re Eaton, 23 O. R. 593. See R. S. O. 1914, ch. 120, sec. 27, notes.

Death of one of two designated beneficiaries in lifetime of assured: Right of survivor: see Re Lloyd and A. O. U. W., 4 O. W. N. 1246, 5 O. W. N. 5, 29 O. L. R. 312. Survivorship among children; representation of grandchildren: Murray v. Macdonald, 22 O. R. 557, and see notes to sec. 178 (7), *infra*.

178.—(5) As to indorsements made by unmarried man: see Toronto General Trusts Co. v. Sewell, 17 O. R. 442. See also: Re McHutchion and C. O. F., 13 O. W. R. 1010, 14 O. W. R. 251.

178.—(7) "One or all of the designated preferred beneficiaries:" Re Caiger, 4 O. W. N. 1174, 24 O. W. R. 442; Re Lloyd and A. O. U. W., 4 O. W. N. 1246, 5 O. W. N. 5, 24 O. W. R. 546, 29 O. L. R. 312. Former rule as to lapse on death of preferred beneficiary: Re Eaton, 23 O. R. 593. Ascertainment of beneficiary—right of representation of grandchildren: Re Sons of Scotland and Davidson, 17 O. W. R. 300, 2 O. W. N. 200. "Survivor," "surviving children:" Re Jannison, 4 O. W. N. 1084, 24 O. W. R. 391. A policy was made payable to insured's mother "or in the event of her prior death," to a sister. The mother predeceased the insured and the sister was held entitled to the insurance money as against the executors of the mother: Kelley v. McBride, 7 O. L. R. 30. See also as to death of beneficiary: Wicksteed v. Munro, 10 O. R. 283, 13 A. R. 486. Distribution among survivors of preferred beneficiaries: Re Irwin, 3 O. W. N. 936. The contention that this section does not apply where there was only one beneficiary originally named who dies in the lifetime of the assured, cannot be upheld: Re Henderson and C. O. F., 8 O. W. R. 117. The insured effected a policy in favour of his wife and two children, and perished with his wife in a storm on the Great Lakes. There was no evidence of survivorship. The personal representative of the wife claimed a third of the money but it was held that (apart from sub-sec. 7) a preferred beneficiary within sub-sec. 1 only acquires an interest contingent on being alive when the insured dies, and the wife's representatives being unable to prove this, were not entitled: Re Philips and Chosen Friends, 12 O. L. R. 48. Designation of wife as beneficiary; subsequent designation by will in favour of mother or sisters; predecease of mother: see Re C. O. F. and McHutchion, 13 O. W. R. 1010, 14 O. W. R. 251. Certificate was payable to assured's wife (naming her) one-half, and to daughter, one-half. Designated wife died and assured re-married and no change was made in certificate. The second wife took one-half by force of sub-sec. 3 (*supra*). Sub-section 7 can be given full effect by dealing with it as providing for survivorship only where one or more or all of the designated beneficiaries die in the lifetime of the assured, provided there is no wife living at the maturity of the contract: Re Lloyd and A. O. U. W., 29 O. L. R.

312. Amendment of 1913 considered. Power of father (assured) after his wife's death to defeat infant's interest in policy: Re Rennie Infants, 5 O. W. N. 459.

179. The Wills Act, R. S. O. 1914, ch. 120, sec. 30, has no application to case of limited powers, such as those exercisable with reference to beneficiaries under the Insurance Act: Cloves v. Awdry, 12 Beav. 604, but only to cases where the testator has power to appoint in any manner he may think proper: Re Cochrane & A. O. U. W., 11 O. W. R. 956, 16 O. L. R. 328. The construction given by the Courts to the case of lapsed legacies or lapsed appointments falling into residue (*e.g.*, Falkner v. Butler, Ambl. 514), is not warranted in dealing with attempts to change beneficiaries under the Insurance Act: Re Cochrane & A. O. U. W., 11 O. W. R. 956, 16 O. L. R. 328. The power to vary can be exercised by will so long as the allotment is confined to beneficiaries of the preferred class: Re Lynn, 20 O. R. 475; McKibbon v. Feegan, 21 A. R. 87; Re Cheeseborough, 30 O. R. 639. Where certificate became trusts under R. S. O. 1887, ch. 136, they could not be revoked or replaced: Migneaud v. Packer, 21 O. R. 267, 19 A. R. 290; Re Grant, 26 O. R. 120. Where a certificate became a trust in the wife's favour, its surrender could only take place with the wife's consent under 48 Vic. ch. 28; R. S. O. 1897, ch. 203, sec. 160 (5) also considered: Cartwright v. Cartwright, 8 O. W. R. 109, 12 O. L. R. 272. The insured might vary but not destroy the trust created by the policy and declare a new trust which would or might deprive his children of all benefit in the trust: Neilson v. Trusts Corporation of Ontario, 24 O. R. 517. The insured had two policies payable "for the use and behoof" of his wife and children. By his will he directed that one-half be given to the wife and one-half to the children. By a codicil he directed that all be given the wife "in lieu of the house deeded to her and since disposed of." The house had not, in fact, been disposed of, and was vested in the wife. Held, that the wife was entitled to the insurance moneys and was not put to election between the house and one-half the insurance money, the essential elements of a case of election being wanting: Mutchmor v. Mutchmor, 8 O. L. R. 271. A

person having effected an insurance on his life in favour of his mother, the policy not expressly stating that she was a beneficiary for value, subsequently transferred the benefit of it to his wife alone. Held, that the provisions of the statute must prevail and that the wife was entitled to the policy moneys: Potts v. Potts, 31 O. R. 452. Benefits passing away from brother named in certificate to wife by virtue of will of insured contrary to rules of the society issuing the certificate: Gillie v. Young, 1 O. L. R. 368. When a policy is payable to a beneficiary for value who is also one of the preferred class of beneficiaries, the assured cannot by his will transfer the benefit of the insurance to another beneficiary of the preferred class. Such a case is governed by sec. 171: Book v. Book, 1 O. L. R. 86. The by-laws of a benefit society providing that any indorsement could be revoked, are modified or controlled by this section: Re Harrison, 31 O. R. 314. Where benefit certificate was payable to wife of assured and subsequently by will he designated his mother and sisters as beneficiaries, and his mother predeceased the assured, the certificate being unaltered, payment into Court was directed: Re McHutchion and C. O. F. 13 O. W. R. 1010; and payment out to sisters: Re McHutchion and C. O. F., 14 O. W. R. 251. Bequest of insurance moneys to wife for life, with remainder to others not preferred beneficiaries: Re Edwards, 2 O. W. N. 323, 17 O. W. R. 643, 22 O. L. R. 367 (see sec. 178 (2), note). Where after making his will altering the apportionment of policies among beneficiaries, the insured cancelled his policies and had new ones issued to his "executors in trust," it was held that this did not affect the rights of the parties, as the executors would take in trust for those beneficially entitled: McIntyre v. Silcox, 29 O. R. 593, 30 O. R. 488. The insured cannot, except by express variation of the allotment and apportionment of the insurance money among the preferred beneficiaries, deprive the widow of her share nor make the acceptance by the widow of the sum so allotted conditional upon such acceptance being in lieu of dower: Re Lester, 13 O. W. R. 343; see also Fisken v. Marshall, 10 O. L. R. 552; Griffith v. Howes, 5 O. L. R. 349; Re Cochrane, 16 O. L. R. 328, 11 O. W. R. 956. Where policies amounting to $6,000 were apportioned among

a wife and nine children, and by the insured's will amounts in all $5,100 were reapportioned in specific varying sums, among eight children, nothing being said of the wife and remaining child, it was held that the insured could make the reapportionment, and the wife and remaining child took the $900. One of the policies having turned out worthless, the sum going to each beneficiary was abated in due proportion: Re Carbery, 30 O. R. 40. What is sufficient evidence of change of beneficiary: Simmons v. Simmons, 24 O. R. 662. A provision in a reapportionment of insurance amongst preferred beneficiaries directing that a share shall not be paid to a certain beneficiary until he is 25 years old, is ineffective: Re Canadian Home Circles and Smith, 9 O. W. R. 738, 14 O. L. R. 322. A certificate issued by a benefit society to a married woman provided that the benefit should be payable to her "legal heirs as designated by her will." She left three children. By her will she gave specific legacies to her husband and each of the three children by name, the insurance to her executors to pay debts, and the residue to the children. It was held that the bequest of the insurance money was inoperative; that it was payable to the three children as "legal heirs designated by the will," and that the children were not bound to elect between the benefits specifically given them and the insurance money: Griffith v. Howes, 5 O. L. R. 439. Where the insured had a policy designated in favour of wife and children, and varied the designation in favour of one of the same class who was also a creditor with the intention of exonerating his estate from debt, a Divisional Court considered the transfer null and void under the Statute as being an attempt to convert the insurance moneys to the insured's estate and also invalid as not being a *bona fide* exercise of the power of appointment vested in the insured. The Court of Appeal, without interfering with the interpretation placed upon the Statute by the Divisional Court, reversed their decision: Re Kemp, Johnson v. A. O. U. W., 9 O. W. R. 899, 14 O. L. R. 424, 11 O. W. R. 91, 15 O. L. R. 339. Change of beneficiary: Agreement not to change: Clarke v. Loftus, 24 O. L. R. 174, 19 O. W. R. 606, 2 O. W. N. 1288, O. L. R., 21 O. W. R. 705, 3 O. W. N. 1027. As against a second wife and adopted daughter, a first wife will not be heard to

impugn the jurisdiction of the Court which she had invoked to grant her a divorce: Re Williams and A. O. U. W., 14 O. L. R. 482; see sec. 178 (1), note. As to variation of beneficiary generally: see sec. 171 (3), notes.

184. Rules and regulations of friendly societies: see Johnston v. C. M. B. A., 24 A. R. 28; Fawcett v. Fawcett, 26 A. R. 335; Long v. A. O. U. W., 25 A. R. 147 (notes to sec. 2 (51)); Cerri v. A. O. F., 28 O. R. 111, 25 A. R. 22; Morgan v. Hunt, 26 O. R. 568; Long v. A. O. U. W., 25 A. R. 147 (notes to sec. 156) ; Fidelity Trust v. Buchner, 26 O. L. R. 367; Racher v. Pew, 30 O. R. 483; Gillie v. Young, 1 O. L. R. 368; Re Harrison, 31 O. R. 314; Lints v. Lints, 6 O. L. R. 100 (notes to sec 171 (3)); Re Harrison, 31 O. R. 314; Morgan v. Hunt, 26 O. R. 568; Johnston v. C. M. B. A., 24 A. R. 88; Yelland v. Yelland, 25 A. R 91; Babe v. Board of Trade, 30 O. R. 69; Re William Roddick, 27 O. R. 537; Crosby v. Ball, 4 O. L. R. 496; Re L'Union St. Joseph, 12 O. W. R. 37 (notes to sec. 178) ; and see also Hoefner v. Canadian Order of Chosen Friends, 29 O. R. 125.

187. A benevolent society attached to their declaration of incorporation a printed book stated to contain a copy of the constitution and by-laws, which were to govern the society; held that these became part of the organic law of the society and changes made in the by-laws in accordance with the provisions of the constitution were valid and binding. The mere fact of becoming a member raises no implied contract to pay dues and assessments and there is no obligation for the breach of which an action will be. Liabilities may be imposed on members by changes in the by-laws which did not exist when they became members. This section does not create a personal liability to pay assessments when none exists apart from it. All conditions prescribed in the constitution in order to withdrawal from membership must be rigorously observed. A suspended member is still a member, and where there is liability on his part for dues and assessments that liability continues, including those which become payable after suspension and before expulsion: Re Ontario Insurance Act and Select Knights, 31 O. R. 154.

188. The meaning of the section is that in the case of assessments which by implication are of fixed amount and which by the rules of the society are payable at fixed dates it is left to the society to provide for the consequence of non-payment; but if the periodicity of payment does not exist, the Statute intervenes and regulates the procedure: Re Select Knights, 29 O. R. 708; See Re Massachusetts Benefit, 30 O. R. 309. It is not a renewal of contract of insurance, but a continuance of the original contract when after default and suspension, a member of a benevolent society pursuant to the rules of the society pay the assessments as of right and is reinstated: Long v. A. O. U. W., 25 A. R. 147. Total disability through insanity; suspension for non-payment of dues: McCuaig v. I. O. F., 19 O. L. R. 613, 14 O. W. R. 935, 1 O. W. N. 166. Payment on account of premium; waiver of forfeiture: Whitehorn v. Canadian Guardian, 19 O. L. R. 535, 14 O. W. R. 804. Membership in good standing: McKechnie v. Grand Orange Lodge, 18 O. L. R. 555.

189. Member changing occupation and not complying with rule of society as to notice: Wilson v. S. O. E., 14 O. W. R. 912, 1 O. W. N. 144. The action of the domestic tribunal is final unless contrary to natural justice, or in violation of the rules of the society or done *mala fide*: Thompson v. Court Harmony A. O. F., 1 O. W. N. 870, 16 O. W. R. 330.

191.—(1) Standing timber is not a "commodity" within the wording of the former section: C. P. R. v. Ottawa Fire Ins. Co., 9 O. L. R 493, 11 O. L. R. 465. Insurable interest in property not owned by the insured but for the destruction of which by fire the insured is liable: C. P. R. v. Ottawa Fire Ins. Co., 9 O. L. R. 493, 11 O. L. R. 465.

192.—(2) As to the effect of a "renewal;" not a new contract of insurance: Agricultural S. & L. Co. v. Liverpool L. & G. Co., 32 O. R. 369, 3 O. L. R. 127, 33 S. C. R. 94; notes to secs. 194 and 2 (14).

194. Query: Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties: Guerin v. Manchester Fire, 29 S. C. R. 139. Where a contract of insurance was

not in the form of a policy, the statutory conditions still governed it; waiver of right to cancel: Bradt v. Dominion Grange Mutual, 25 S. C. R. 154. Where a policy does not contain the statutory conditions but contains other conditions not printed as variations, it must be read as containing the statutory conditions and no others: Findley v. Fire Ins. Co. of North America: 25 O. R. 515. Under a parol contract, an implication is raised that a proper policy would be issued subject to the statutory conditions, and such variations as are just and reasonable: Coulter v. Equity Fire, 7 O. L. R. 180, 9 O. L. R. 35. An interim receipt does not modify or impair a valid parol contract: *Ib.* Uniform conditions in policies of fire insurance; constitutionality: see Citizens Ins. Co. v. Parsons, 7 App. Cas. 96.

194.—(1) This condition must be taken to refer to statements and representations on which the policy is based, whether the risk they relate to is physical or moral. Where the applicant was asked if incendiary danger was threatened or apprehended and untruly answered "No," the policy was avoided: Findley v. Fire Ins. Co. of N. A., 25 O. R. 515. Even where the insured did not read over the application and had not been told that the question had been answered in the negative: Knisley v. British America, 32 O. R. 376. Question: "Have you ever had any property destroyed or damaged by fire?" Held immaterial: Stott v. London & Lancashire, 21 O. R. 312. A variation of the first condition required insured to disclose incumbrances and it was objected that the insured had omitted to do so. Held that the object of the condition was to obtain information before accepting the risk, which is usually done by questions and answers in a written application. As there were no questions here, written or verbal, no duty was imposed on the insured to communicate the existence of the mortgage: Coulter v. Equity Fire, 9 O. L. R. 35. A variation of this condition providing that any incumbrance by way of mortgage should be deemed material is too wide to be just or reasonable and the onus was on the insurers who asserted its materiality: *Ib.* The mortgage clause attached to a policy which provided that "the insurance as to the interest only of the mortgagees therein shall not be

invalidated by any act or neglect of the mortgagor or owner, etc.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for a policy. Quære, would the mortgage clause enable a mortgagee to bring an action in his own name alone on a policy? Agricultural L. & S. v. Liverpool L. & G. Co., 32 O. R. 369, 3 O. L. R. 127, 33 S. C. R. 94; see Greet v. Citizens Ins. Co., 27 Gr. 121, 5 A. R. 596; Haslem v. Equity Fire, 8 O. L. R. 246, as to right of mortgagee to sue in his own name. Where insured conceals a material fact—defence where policy in hands of assignee for value without notice: Pickersgill v. London and Provincial, 1912, 3 K. B. 614. Misrepresentation or omission; undisclosed incumbrance: Fritzley v. Germania Mutual, 14 O. W. R. 18, 19 O. L. R. 49. As to misrepresentations generally: see sec. 156, notes.

194.—(2) A variation of this condition providing that "if the premises insured become untenanted or vacant and so remain for more than 10 days without notifying the company the policy will be void," is reasonable. "Untenanted" is to be read as "unoccupied." Meaning of "untenanted and vacant:" Spahr v. North Waterloo Ins. Co., 31 O. R. 525. The fact that the owners have entered into an executory contract for pulling down the insured building and for the sale of the materials for less than the insurance is no bar to their right to recover the full amount of insurance when the building is burnt down before the time for transfer of possession: Ardill v. Citizens Ins. Co., 22 O. R. 529, 20 A. R. 605. A chattel mortgage is not a "sale or transfer," but it is a "change of title" and an "incumbrance," and where a variation of condition requiring these to be notified was not complied with the policy was avoided: Citizens Ins. Co. v. Salterio, 23 S. C. R. 155. Changing the occupation of the insured premises from a dwelling to a hotel is a change material to the risk: Guerin v. Manchester Fire, 29 S. C. R. 139. A variation of "to the company or its local agent" to "authorized agent" in the clause requiring notice of material change which was explained to mean the company's secretary only, was held not unjust or

unreasonable where the company's head office was in Ontario: Lount v. London Mutual Fire, 9 O. L. R. 549, 699. The fact that a dwelling is unoccupied is not *per se* a "change material to the risk" within the condition in a fire policy on household furniture: Boardman v. North Waterloo Ins. Co., 31 O. R. 525. Vacant or unoccupied: Dodge v. York Fire, 2 O. W. N. 571. Change in occupation material to risk, use of gasoline: Anglo-American v. Morton, 2 O. W. N. 237, 19 O. W. R. 870, 46 S. C. R. 635, 23 O. W. R. 316. Where the business of a partnership is taken over by a limited liability company formed for the purpose, there is a material change of interest which requires the assent of the insurers even though the partners hold nearly all the stock in the company: Peuchen v. City Mutual Fire, 18 A. R. 446. Increased hazard: Re Standard Mutual Fire, 2 O. W. N. 235, 17 O. W. R. 407. Mortgage subsequent to application; vendors' liens on implements are not material to the risk: Fritzley v. Germania Mutual, 14 O. W. R. 18, 19 O. L. R. 49. A security under the Bank Act is not a chattel mortgage which must be disclosed within the meaning of a special condition, making void the policy if the property "become encumbered by a chattel mortgage:" Guimond v. Fidelity Phenix, 47 S. C. R. 216. The statutory policy is avoided only by an increase of risk within the knowledge or control of the assured: Heneker v. British America Assurance, 14 C. P. 57. And this applies where a tenant has been let in and makes changes for his own purposes, there being no difference whether the tenancy began before or after the date of the policy: London and Western Trusts v. Canadian Fire Ins. Co., 8 O. W. R. 872, 11 O. W. R. 781, 13 O. L. R. 540, 16 O. L. R. 217. Change of location of insured chattels: see Annotation, 1 D. L. R. 745.

194.—(3) A mortgagee of the insured premises to whom payment is to be made "as his interest may appear," cannot recover on the policy when his mortgage has been assigned and he has ceased to have an interest at the time of the loss: Guerin v. Manchester Fire, 29 S. C. R. 139. Where a policy of insurance in one sum covers buildings and chattels, and the land is conveyed by deed without the consent of the insurers, the

policy is avoided *in toto* and does not remain in force as to the chattels: Dunlop v. Usborne and Hibbert Farmers Mutual, 22 A. R. 364. Where a mortgagor insured with loss payable to the mortgagee "as his interest may appear" and subsequently released his equity of redemption to the mortgagee, no consent being obtained from the insurers, the mortgagee could not recover for a loss, because the mortgagor had ceased to have an interest and because the conveyance was a breach of this condition: Pinkey v. Mercantile Fire, 2 O. L. R. 296. Leasing property insured is not a transfer of interest: National Protector Fire Co. v. Nivert, 1913, A. C. 507. Where property is assigned for benefit of creditors, effect is not to void policy if no consent obtained: Wade v. Rochester German, 16 O. W. R. 1004, 2 O. W. N. 59, 1076, 19 O. W. R. 99, 23 O. L. R. 635. Changed condition of policy material to risk: see Morton v. Anglo-American, 2 O. W. N. 1470, 19 O. W. R. 870, 46 S. C. R. 635.

194.—(5) Where subsequent insurance was effected without notifying the insurers, the fact that the subsequent insurance was effected through a sub-agent of the insurer's general agent who had also acted in procuring the prior insurance, should not be regarded as affecting the company with constructive notice of the subsequent insurance: Imperial Bank v. Royal Ins. Co., 12 O. L. R. 519. Where a policy was void by reason of subsequent insurance of which the insurers were not notified, they were ordered to return the last premium received by them in ignorance of the fact that the policy was no longer in force: Imperial Bank v. Royal Ins. Co., 12 O. L. R. 519. Insurance effected by mortgagees without the mortgagor's assent after attemped cancellation under covenant in mortgage not "subsequent" insurance nor "double" insurance, and does not affect the mortgagor's right of recovery on the policy effected by him: Morrow v. Lancashire Ins. Co., 29 O. R. 377, 26 A. R. 173. Subsequent insurance in another company in substitution for a prior insurance for the same amount previously assented to, does not require the assent of the insurers; assent express or implied to subsequent insurance is sufficient even if given after loss and may be evidenced by the insurers joining in an adjustment of loss: Mutchmoor v. Waterloo

Mutual, 4 O. L. R. 606. Where there is a condition requiring disclosure of concurrent insurance (which is done) and subsequently the concurrent insurance is replaced by other substituted insurance in other companies there is no breach of condition: National Protector Fire Co. v. Nivert, 1913, A. C. 507. Where a condition required that notice of subsequent insurance be given to the insurers "forthwith," this condition did not apply where the property was destroyed by fire on the day that an application for further insurance was accepted and notice did not reach the insurers until after the loss: Temple v. Commercial Union, 29 S. C. R. 206. A "renewal" of an insurance policy is not a new contract of insurance. Where at the time of the original application there was undisclosed prior insurance which rendered it void, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval: Agricultural S. & L. Co. v. Liverpool L. & G., 32 O. R. 369, 3 O. L. R. 127, 33 S. C. R. 94. What amounts to a breach of the condition against subsequent insurance unless assented to; subsequent policy a nullity: see Equitable Fire v. The Ching Wo Hong, 1907, A. C. 96. Breach of condition requiring notice to assurers and their consent to subsequent insurance: Western Assurance v. Doull, 12 S. C. R. 454; Northern Assurance v. Grand View Building Association, 183 U. S. 308, 319; Imperial Bank v. Royal Ins. Co., 8 O. W. R. 148. Subsequent insurance undisclosed: Mutchmoor v. Waterloo Fire Ins. Co., 4 O. L. R. 606; Thompson v. Equity Fire Ins. Co., 10 O. W. R. 761, 12 O W. R. 373, 17 O. L. R. 214, 41 S. C. R. 491. Negligence of agent in not disclosing prior insurance: Beaudry v. Rudd, 14 O. W. R. 197, 1 O. W. N. 326, 15 O. W. R. 197.

194.—(6*a*) Where the insured disclosed their title, which was that of lessees, to the insurer's agent, and the policy subsequently issued to the insured as owners, they were not precluded from recovery by this condition as the insurers had notice by their agents, and it was their duty to have endorsed on the policy the necessary statement as to it. At all events they were estopped from setting up the condition: Davidson v. Waterloo Mutual, 9 O. L. R. 394.

194.—(6*f*) Gasoline on the premises: Lewis v. Standard Mutual Fire, 44 S. C. R. 40. Gasoline "stored or kept:" Thompson v. Equity Fire, 17 O. L. R. 214, 41 S. C. R. 491; and see also: Anglo-American v. Morton, 46 S. C. R. 635; Mitchell v. London Assurance, 12 O. R. 706, 15 A. R. 262; Williams v. Fireman's Fund Ins. Co., 54 N. Y. 569; May on Insurance, 4th ed., p. 242.

194.—(7) As to reasonable requirements in regard to notice: see Lount v. London Mutual Fire, 9 O. L. R. 549, 699.

194.—(8) The insurers issued an interim receipt for 30 days. The insured thinking he was getting insurance for one year remitted to the company a year's premium and they accepted it. The insurers were held liable. If they wished to treat the insurance as for 30 days only they should have notified the insured and returned him the proportion of premium. Not having done so they were liable under this condition as "policy" includes "interim receipt" and also were estopped: Coulter v. Equity Fire, 7 O. L. R. 180, 9 O. L. R. 35. The insured held machinery as lessees and disclosed their title to the insurer's agent to whom they verbally applied for insurance, who had authority to accept the risk and issue interim receipts and did so. The policy issued stated that the insured were owners. Held that the terms of this condition as to policies issued after application extends to verbal as well as written applications: Davidson v. Waterloo Mutual, 9 O. L. R. 394. Where the application disclosed two prior insurances of $4,000, but the policy assented to only one; it was held that if the insurers had not intended to assent to $8,000 prior insurance they would have been bound under this condition to set out in writing the particulars wherewith policy differed from the application: Mutchmoor v. Waterloo Mutual, 4 O. L. R. 606. Insurer may be estopped by laches: McCutcheon v. Traders Fire, 2 O. W. N. 1136, 19 O. W. R. 279.

194.—(12) The insured sent his policy to the insurers with an endorsed surrender, and a letter asking that the insurance be cancelled and unearned premium returned. Owing to misdirection the letter was delayed

and did not reach the company until the goods had been destroyed by fire. Held that the letter only took effect from the time of its receipt and by that time the relations of the parties were so changed that the surrender did not operate: Skillings v. Royal Ins. Co., 4 O. L. R. 123, 6 O. L. R. 401. A policy of insurance covering the buildings or mortgaged property assigned to the mortgagees as collateral security cannot be cancelled by the insurance company at the request of the mortgagees without notice to the mortgagors: Morrow v. Lancashire Ins. Co., 29 O. R. 377, 26 A. R. 173. Variation inconsistent with the provision for notice held ineffective: Bradt v. Dominion Grange, 25 O. R. 100, 22 A. R. 68, 25 S. C. R. 154. About a week before the fire, the insured write to the company's local agent that they had decided to cancel the existing policy and have a new one issued for a reduced amount, but this was never communicated to the head office nor action taken on it. Held this was merely an intimation of the insured to have the policy cancelled and a new one substituted which was never carried out, and was not a notice as required by the condition: Merchants Fire v. Equity Fire, 9 O. L. R. 241. A notice of cancellation should be wholly in writing and should inform the insured that the policy will be terminated at the expiration of the prescribed statutory period after notice. Where a company gave a notice which was in effect an immediate cancellation with return of unearned premium, it was held that the policy had not been cancelled: Bank of Commerce v. British America Assurance Co., 18 O. R. 234.

194.—(18) Where an insurance company repudiates liability on a policy, they cannot object that proofs of loss have not been furnished: Morrow v. Lancashire Fire, 29 O. R. 377, 26 A. R. 173. Certain conditions in a policy required proof of loss to be filed within 14 days after loss and provided that no claim should be payable for a specified time after proof of loss; the condition as to production of proof of loss was a condition precedent to the liability of the insured. Neither a local agent nor an adjuster has power to waive compliance with a condition precedent to the insurer's liability nor extend the time for their fulfilment: Margeson v. Commercial Union, 29 S. C. R.

601; Brownell v. Atlas Assurance Co., 29 S. C. R. 537. The " actual cash value of articles insured " within the meaning of policy defined: see Fritzley v. Germania Mutual, 14 O. W. R. 18, at p. 24, 19 O. L. R. 49, at p. 56. Notice of loss in writing; sufficiency of proof; relief against imperfect compliance with statutory conditions: Strong v. Crown Fire, 20 O. W. R. 901, 22 O. W. R. 734, 23 O. W. R. 701, 3 O. W. N. 48, 1534, 4 O. W. N. 584, 10 D. L. R. 42, 29 O. L. R. 33, and see notes to sec. 199 *post*. Particulars required: Patterson v. Oxford F. M. Ins. Co., 4 O. W. N. 140, 23 O. W. R. 122. Notice and proof of loss: Bell Bros. v. Hudson Bay Ins. Co., 44 S. C. R. 419.

194.—(20) Materiality of misstatement: Patterson v. Oxford Farmers Mutual, 4 O. W. N. 140, 23 O. W. R. 122; and see notes to secs. 156 and 194 (1) *ante*.

194.—(21) Proceedings under this condition are in the nature of an arbitration and not a valuation merely. Arbitrators must be indifferent, and where one of the arbitrators was sub-agent and interested in obtaining risks for the defendant company, although only to a small extent, the award was void: Vineberg v. Guardian Fire, 19 A. R. 293; see also Race v. Anderson, 14 A. R. 213. Costs of arbitration under this condition: see Hughes v. Hand in Hand, 7 O. R. 615; St. Philips Church v. Glasgow and London, 17 O. R. 95. Reference after action; mistake of agent: Smith v. City of London Ins. Co., 14 A. R. 328. Reference in action: Clary v. British America, 12 P. R. 357. Refusal to admit liability: Hughes v. London Assurance, 4 O. R. 293. Waiver: McIntyre v. National, 5 A. R. 580. Where a condition provided that no action should be brought for any claim under the policy until after an award should have been obtained as provided, the making of such an award was a condition precedent to a right of action for loss: Guerin v. Manchester Fire, 29 S. C. R. 139. Where a policy not containing any mortgage or subrogation clause nor any direct agreement with the mortgagee is effected by the mortgagor with loss payable to the mortgagee as his interest may appear, an appraisement of loss under this condition is binding on the mortgagee, although he has not been consulted in or notified of the appraisement: Haslem v. Equity Fire, 8 O. L. R.

246. In such a case the mortgagee can sue the insurance company in his own name for the amount due: Haslem v. Equity Fire, 8 O. L. R. 246; Greet v. Citizens Ins. Co., 27 Gr. 121, 5 A. R. 596. Onerous terms of appraisement not constituting a just and reasonable variation of this statutory condition: see Cole v. London Mutual, 10 O. W. R. 930, 15 O. L. R. 619. Special agreement for joint survey: see Axler v. London, Liverpool & Globe, 12 O. W. R. 100; Cole v. London Mutual, 15 O. L. R. 619. Motion to stay proceedings is too late after issue joined: see R. S. O. 1887, 62, sec. 6; Cole v. Canadian Fire Ins. Co., 15 O. L. R. 336; and see now R. S. O. 1914, ch. 65, sec. 8 and notes. Insurers or insured under a policy containing or subject to this clause are "parties to a submission" within sec. 6 of R. S. O. 1897, ch. 62: Hughes v. Hand in Hand, 7 O. R. 615. The power given to stay proceedings is upon application after appearance and before defence. An application after delivery of defence will be refused: West London Ins. Co. v. Abbott, 29 W. R. 584; Cole v. Can. Fire Ins. Co., 10 O. W. R. 906, 16 O. L. R. 336. See R. S. O. 1914, ch. 65, and notes.

194.—(22) Where proof of loss furnished and insured advised that the claim would not be paid, and the policy contained a condition that it should not be payable until 3 months after receipt of proofs of loss, an action brought within the 3 months was premature: Mutual Fire Ins. Co. v. Frey, 4 A. R. 293, 5 S. C. R. 82. Where a policy has a mortgage clause the mortgagee is not bound as the "assured" to make proofs of loss; the mortgagor is the person to make them. The mortgagor is bound to make proofs of loss so that 60 days may elapse thereafter before the expiry of the year limited for bringing the action. A mortgagor neglecting to do this does not prejudice the mortgagee whose action, if brought within the year, is not brought prematurely even if the 60 days have not elapsed through the neglect of the mortgagor to make proofs of loss: Anderson v. Saugeen Mutual, 18 O. R. 355. Completion of proof of loss: Morton v. Anglo-Am. Ins. Co., 2 O. W. N. 237, 46 S. C. R. 635. A variation cutting down the time to bring action from 1 year to 6 months is not just or reasonable and is void: Strong v. Crown Fire, 4 O. W. N. 1319, 23 O. W. R. 701, 29 O. L. R. 33. Sufficiency

of proofs: premature action: National Stationery v. Traders Fire, 13 O. W. R. 367. Where insurance assigned who can sue: effect of R. S. O. 1914, ch. 109, sec. 49: assignment by way of charge: Thompson v. Equity Fire, 17 O. L. R. 214, 41 S. C. R. 491; National Stationery v. Traders Fire, 13 O. W. R. 367.

194.—(24) A variation of this condition reducing the time for bringing an action to 6 months is unjust and unreasonable: Merchants Fire v. Equity Fire, 9 O. L. R. 241; see also Strong v. Crown Fire, 29 O. L. R. 33; note to 194 (22) *ante*. This condition bars the remedy and not the right; subrogation mortgagor delaying proof of loss to prejudice of mortgage: see Anderson v. Saugeen Mutual, 18 O. R. 355. Waiver of condition: Cousineau v. City of London Fire Ins. Co., 15 O. R. 329. A stipulation in a printed policy setting a limit to the time for bringing action under the policy does not apply to a contract of reinsurance: Home Insurance Co. v. Victoria Montreal Fire Ins. Co., 1907, A. C. 59.

195. The conditions printed in black ink and the variations in the same type in bright scarlet sufficiently complies with the requirements of the section: Lount v. London Mutual, 9 O. L. R. 549. Provision as to non-receipt of a policy ineffectual through not being printed in different ink: Bradt v. Dominion Grange, 25 O. R. 100, 22 A. R. 68, 25 S. C. R. 154. "Co-insurance clause" when inserted pursuant to this section in consideration of a reduction of premium is "just and reasonable:" Eckhardt v. London Ins. Co., 29 O. R. 695, 27 A. R. 373, 31 S. C. R. 72. "Co-insurance clause" is a condition and not a mere direction as to the mode of ascertaining the amount of loss and is void if not printed in accordance with the provision of the Act: Wanless v. Lancashire, 23 A. R. 224. A policy issued in 1895 insured S.S. Baltic "whilst running on the inland lakes during the season of navigation. To be laid up during the winter months in a place of safety." The Baltic laid up in 1893 and never afterwards went to sea. She was destroyed by fire in 1896. It was held that the policy never attached. That the stipulation was not a condition, but a description of the subject matter and did

not come within the provisions as to variations of the statutory conditions: Great Northern Transit v. London Assurance Co., 29 S. C. R. 577. Where a policy did not contain the statutory conditions, but contained conditions not printed as variations, it was read as containing the statutory conditions and no others: Findley v. Fire Ins. Co. of North America, 25 O. R. 515. Variations in conditions. Fritzley v. Germania Mutual, 14 O. W. R. 18, 19 O. L. R. 49. Condition as to loss by leakage or discharge of sprinkler system: see Davies v. Canadian Casualty, 14 O. L. R. 166, 39 S. C. R. 558.

196. Conditions dealing with the same subjects as those given by the Statute and by variations of the statutory conditions should be tried by the standard afforded by the Statute and held not to be just and reasonable if they impose upon the insured terms more onerous, stringent or complicated than those attached by the Statute to the same subject or incident: Smith v. City of London Ins. Co., 14 A. R., at p. 337, 15 S. C. R. 69; Ballagh v. Royal Ins. Co., 5 A. R. at p. 107; May v. Standard Ins. Co., 5 A. R. at p. 622.

197. A condition that any mortgage or lien shall be deemed material, if designed to prevent any Judge or jury determining the fact of the materiality is not just or reasonable: Fritzley v. Germania Mutual, 14 O. W. R. 18, 19 O. L. R. 49. Where the premium is reduced in consideration of the insertion in a policy of fire insurance in the manner prescribed in section 195 of the condition commonly known as the "co-insurance condition," that condition is *prima facie* valid and should not be held not "just and reasonable" without evidence to that effect: Eckhardt v. Lancashire Ins. Co., 29 O. R. 695, 27 A. R. 373, 31 S. C. R. 72. See *ante* sec. 195, notes.

199. This sec. construed and compared with former sec. R. S. O. 1897, ch. 203, sec. 172: Strong v. Crown Fire, 29 O. L. R. 33. When forfeiture through imperfect compliance with conditions inequitable: Strong v. Crown Fire, 4 O. W. N. 584, 1319, 23 O. W. R. 701, 29 O. L. R. 33. Grounds for application of this section: Thompson v. Equity Fire, 17 O. L. R. 214, 41 S. C. R. 491.

205. As to powers of provincial fire insurance companies to make contracts and insure property throughout Canada: see In re Companies, 48 S. C. R. 331.

211. Winding-up under R. S. C., ch. 144 and ch. 34: Re Mutual Life, Wellington's Claim, 13 O. W. R. 1109, 18 O. L. R. 411.

216. The Ontario Legislature has power to confer on the Master the powers given by this Act. The Master has power to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a company for services to ascertain whether they shall appear as creditors in the schedules, but he cannot adjudicate on whether they have been guilty of such conduct as deprives them of their right to claim as creditors. He has also power to settle schedules of contributories, but cannot adjudicate on the question whether officials of the company have been guilty of such breach of duty as to make them liable for any loss by reason thereof. Such matters can only be determined by action: Re Dominion Provident, 25 O. R. 619.

219. The amount for which the holder of an unmatured policy payable at death is to rank against an insolvent insurance company in liquidation is the difference, if any, at the date of commencement of the winding-up proceedings between and in favour of the present value of the reversion in the sum insured at the decease of the life, and the present value of a life annuity for an amount equal to the future premiums which would become payable during the estimated duration of life of the insured: Re Merchants Life, 1 O. L. R. 256, 2 O. L. R. 682. Valuing policies; contingent claims maturing after winding-up begun: Re Law, Car and General Ins. Corporation, 1913, 2 Ch. 103. Holder of unpaid shares upon acknowledged trust: Re Standard Mutual, 1 O. W. N. 974.

220. See Re Insurance Act, re Select Knights, 31 O. R. 154.

222. The provision of Con. Rule 769 (1913, Rule 502) that notice of filing a Master's report is to be served on the opposite party is a prerequisite to the report becoming absolute. Where the report is on a claim to rank on the assets of an insurance corporation in

compulsory liquidation under the Insurance Act, notice of filing the report given in the Ontario Gazette and other newspapers is not tantamount to personal service: Re Select Knights, 9 O. R. 708; but see provisions introduced in 1901, ch. 21, sec. 3, and now amended and appearing as sub-secs. (2)-(6) of this section.

CHAPTER 184.

The Loan and Trust Corporations Act.

2.—(2) See Rex. v. Pierce, 9 O. L. R. 374; note to sec. 128.

9. Terminating shares: see sec. 101 notes. Provisions of English Act, 6 & 7 Wm. IV, ch. 32, and of English Building Societies Act 1874, 37-38 Vic., ch. 42, especially secs. 13 and 16, compared and contrasted with R. S. O. 1897, ch. 205; Re York County Loan, Claims of holders of matured and withdrawable shares, 11 O. W. R. 888.

18.—(e) At common law, it seems that a corporation and a natural person can hold lands only as tenants in common and not as joint tenants. This has been altered in England (see 62 and 63 Vic. (Imp.) ch. 20). Difficulty may arise over the appointment of a corporation as trustee jointly with an individual: Re Thompson, Thompson v. Alexander (1905), 1 Ch. 229. Can a company be next friend: Fidelity Trust v. Buchner, 22 O. W. R. 72, 3 O. W. N. 1208, 26 O. L. R. 367. No company can be or be appointed guardian of the person of an infant. See former provisions of Companies Act, 7 Edw. VII. ch. 34, sec. 149.

22. Bearing of this section on B. N. A. Act, section 92, cl. 11; a company legally incorporated by a Province is not limited to confine its operations within the Province which created it: Re York County Loan, 11 O. W. R. 507; see also In re Companies, 48 S. C. R. 331. Effect of lack of by-law; position of shareholders out of the province as creditors: Re York County Loan, 11 O. W. R. 507.

24. See Re York County Loan (shareholders in arrears), 11 O. W. R. 701. Permanent shareholders acquiring

stock in manner not in compliance with the provisions of R. S. O. 1897, ch. 204, secs. 13 and 15: Re York County Loan, Permanent Shareholders' Claim, 11 O. W. R. 624.

31. A reserve fund was constituted by by-law out of the existing fund "together with such sums as may be contributed thereto or as the directors may retain from undivided profits." Many shareholders contributed and received interest at dividend rate. In winding-up, the contributors were not entitled to rank as creditors on the assets for the sums so contributed: Re Atlas Loan, 7 O. L. R. 706.

35.—(1) Where the plaintiff mortgaged his lands as collateral security for the value of stock advanced to him, which stock he assigned to the company and covenanted to repay its par value in 96 monthly payments "as per rules," etc. The company sold out to a similar company and the plaintiff accepted shares in the new company and agreed to observe its by-laws. Having made the 96 payments the plaintiff asked for a discharge, but the stock having depreciated 38 per cent. he was held not entitled to it until he paid his proportion of the deficiency of the assets: Lee v. Canadian Mutual Loan, 3 O. L. R. 191.

35.—(5) The words of the section cover mortgages executed prior to its passing: Bradburn v. Edinburgh Life, 5 O. L. R. 657. Where the loan was made and the property was situate here and the mortgage provided the option of payment here, the local law must govern in relation to the contract and its incidents: Bradburn v. Edinburgh Life, 5 O. L. R. 657.

36. In line 1, for " 14 and 15 " read " 15 and 16:" 4 Geo. V. ch. 2, Schedule (29).

50. A loan company having issued "prepaid terminating shares " to the plaintiff, amalgamated under this and following sections with another company; see consideration of rights of such a shareholder to be treated as a creditor or to be compelled to take permanent shares substituted for his stock: Lennon v. Empire Loan, 12 O. L. R. 560, 8 O. W. R. 162.

63.—While this section relieves a company from seeing to the execution of any trust to which shares are subject, it does not empower them to disregard the fact

that shares assigned to them as security are "in trust: Birkbeck Loan v. Johnston, 3 O. L. R. 497, 6 O. L. R. 258.

76. When a building society is known to be insolvent, no rule can be passed affecting priorities of members *inter se*: Sixth West Kent Building Society v. Hills 1899, 2 Ch. 60.

81. By-laws: see Re York County Loan; Permanent Shareholders' Claim, 11 O. W. R. 624.

82. Confirmation of by-laws: see Re York County Loan, Permanent Shareholders' Claim, 11 O. W. R. 624.

91. Re York County Loan. (Case of shareholders in arrears), 11 O. W. R. 701.

94. "Bond debenture or obligation" includes money deposited on a savings account: Re Ging, 20 O. R. 1.

95. "Reasonable doubt:" see Re Ging, 20 O. R. 1.

98.—(7) In line 2, for " 9 " read " 8:" 4 Geo. V. ch. 2, Schedule (30).

98. See Re York County Loan, Permanent Shareholders' Claim, 11 O. W. R. 624.

101. The position of a holder of terminating shares who has given notice of withdrawal under by-laws permitting him to do so is not that of an ordinary creditor and cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members he is entitled to be paid the amount due him before they can divide the assets. He remains a member of the corporation until he has been "paid out:" Sibun v. Pearce, 44, Ch. D. 354. In that sense he is a creditor: Re Blackburn and District Benefit, 24 Ch. D. 421; *sub nom.*: Walton v. Edge, 10 App. Cas. 33. Terminating shares; a rule that a member may withdraw his shares and receive their value ceases to operate not only when the company becomes insolvent, but at the moment when there is a stoppage of business or a recognition of the fact that business must be stopped. A member who has given notice of withdrawal which matured before the passing of resolutions for dissolution was held to have

gained priority to other members: Re Ambition Investment Society, 1896, 1 Ch. 89. A member who gave notice of withdrawal and subsequently accepted an advance on the security of his share was held to have waived his notice of withdrawal: Re Counties Conservative Society; Davis v. Norton, 1900, 2 Ch. 819; see Re York County Loan (Case of shareholders in arrears), 11 O. W. R. 701.

102. Written statements made by the president of a loan company when applying to a guarantee company for a policy to protect the loan company against loss from defalcations of a general manager, as to there being an effective audit, though recited in the agreement cannot be set up as an answer to a claim under the guarantee unless R. S. O. 1897, c. 203, sec. 144 (1) has been complied with. (See R. S. O. 1897, c. 183, sec. 156): Elgin Loan v. London Guarantee, 8 O. L. R. 117.

104. "Director," "Officer:" Powell Rees v. Anglo-American Mortgage Co., 26 O. L. R. 490.

122.—(1*a*) In line 1, strike out the word "hereafter:" 4 Geo. V. ch. 2, Schedule (31).

128. Effect of non-registration: Powell Rees v. Anglo-American Mtge. Co., 26 O. L. R. 490. The contracts referred to in clause (b) of 4 Edw. VII., ch. 17, sec. 4 (see now sec. 130), is not restricted to such contracts as are mentioned in R. S. O. 1897, ch. 205, sec. 2 (5). The effect of clause (b) is to prohibit the making of such contracts as are dealt with by that clause under the penalty therein mentioned and the enactment is *intra vires* the Provincial Legislature: Rex v. Pierce, 9 O. L. R. 374. Foreign loan company taking mortgage: Euclid Avenue Trusts Co. v. Hohs, 24 O. L. R. 447.

130. See R. v. Pierce, 9 O. L. R. 374, note to sec. 128, *supra*.

133. There was no right of appeal to the Court of Appeal from a judgment or order of a Divisional Court made on an appeal to that Court under this section from a magistrate's conviction: Rex v. Pierce, 10 O. L. R. 297. Provisions for appeals under the Summary Convictions Act, see R. S. O. 1914, ch. 90, secs. 10, 11, notes.

CHAPTER 185.

The Ontario Railway Act.

Refer to Abbott, Law of Railways (Can.); Farmer, the Ontario Railway Act; Jacobs, Railway Law of Canada; Macmurchy and Denison, The Canadian Railway Law; Macmurchy and Denison, Canadian Railway Cases; Browne and Theobald on Railways (Eng.); Baldwin, American Railroad Law (including Street Railroads); Thornton, Fences and Private Crossings (U.S.); Hudson on Compensation (Eng.); Nichols, Power of Eminent Domain (U.S., with Can. Cases); Lewis, Eminent Domain (U.S.); Brown on Carriers (Eng.); Macnamara, Law of Carriers (Eng.); Darlington on Railways (Eng.); Disney, Law of Carriage by Railways (Eng.); Schouler, Bailments and Carriers (U.S.); Cross, Law of Lien and Stoppage *in Transitu* (Eng.); Beven on Negligence.

2.—(*a*) Enforcement of orders of the Board: see secs. 260 and 205 post, and notes, and R. S. O. 1914, ch. 186, sec. 27.

2.—(*d*) See post, sec. 90 (32) and sec. 242 (4).

2.—(*h*) See post sec. 241 (3) and 259. Highway Crossings: see secs. 118-128. Other provisions: see secs. 114 (1c), 155. Highway has been held to "include" (see R. S. C. 190, ch. 37, sec. 2 (11), a road allowance not used or opened: Tp. of Gloucester v. Canada Atlantic, 3 O. L. R. 85; Regina v. Hunt, 16 C. P. 145. As to road laid out on plan: see Toronto v. G. T. R., 2 O. W. R. 3, 4 O. W. R. 491; see also sec. 155 notes.

2.—(*k*) Lands: see as to conveyance secs. 83, 302. Note as to minerals; see sec. 133 and notes.

2.—(*m*) See secs. 82, 83, notes.

2.—(*o*) "Railway" and "extension;" liability of general undertaking for costs of construction of separate subordinate undertaking: Pearson v. Dublin & S. E. Railway, 1909, A. C. 217. See R. S. C. ch. 37, sec. 2 (21).

2.—(*t*) "And with which this Act is incorporated:" see Re Port Arthur Electric, 18 O. L. R. 376.

2.—(*u*) The Toronto Railway is a street railway within this sec.: Re West Toronto and Toronto Ry., 25 O. L. R. 9.

2.—(*x*) An engine with tender is a train: Hollinger v C. P. R., 21 O. R. 705, 20 A. R. 244; see also Cox v. Great Western Ry., 9 Q. B. D. 106; McLeod v. Cammill, 1895, A. C. 57. Is a hand-car a "train:" see Burtch v. C. P. R., 13 O. L. R. 632; Vaccaro v. Kingston and Pembroke Ry., 11 O. W. R. 836 at 839. An engine returning to the yard after pushing a train up a grade is a "train:" Fralick v G. T. R., 1 O. W. N. 309, 15 O. W. R. 55, 43 S. C. R. 495. See also note to R. S. O. 1914, ch. 146, sec. 3 (5).

2.—(*y*) "Undertaking:" Phelps v. Niagara Central Ry., 18 O. R. 581, 19 O. R. 501. Amalgamation of two "undertakings:" Atty.-Gen. v. North Eastern Ry. 1906, 2 Ch. 675.

2.—(*z*) See R. S. C., ch. 37, sec. 2 (34).

APPLICATION OF ACT.

3. See Dominion Railway Act, R. S. C. 1906, ch. 37, secs. 5, 6, 8. Purpose of the section: Kerley v. London & Lake Erie, 26 O. L. R. 588, 4 O. W. N. 1234. By R. S. C. ch. 37, sec. 6, it is provided that that Act shall apply to railways declared to be for the "general advantage of Canada" (see B. N. A. Act, sec. 92, sub-sec. 10c). Where the subject matter of the legislation is obviously beyond the powers of the local legislature there is no necessity for an enacting clause specially declaring the work to be for the "general advantage of Canada:" Hewson v. Ontario Power Co., 6 O. L. R. 11, 8 O. L. R. 88, 36 S. C. R. 596. The Supreme Court of Canada is divided on the question whether or not a recital in the preamble to a private Act is a sufficient declaration within B. N. A. Act, sec. 92, sub-sec. 10c: Hewson v. Ontario Power Co., 36 S. C. R. 596. "General advantage of Canada:" Conflict of Dominion and Provincial Acts: see Toronto Belt Line v. Lauder, 19 O. R. 607; Darling v.

Midland Ry., 11 P. R. 32; Barbeau v. St. Catharines, etc., Ry., 15 O. R. 586; Re St. Catharines, etc., Ry. and Barbeau, 15 O. R. 583; Nihan v. St. Catharines, etc., Ry., 16 O. R. 459; Clegg v. G. T. R., 10 O. R. 708; Re Grand Junction Ry. Co. v. Peterborough, 6 A. R. 339. Application of this Act to the Temiskaming and Northern Ontario Ry.: see R. S. O. 1914, c. 38, sec. 17. The commission is a department of government and not responsible for the neglect or misconduct of servants though appointed by themselves: see Gillies Bros. v. T. & N. O. Ry. Com., No. 2, 10 O. W. R. 975. Where a railway subject to this Act crosses another which is subject to the Dominion Railway Act, the first railway is brought within the jurisdiction of the Dominion Board of Railway Commissioners "in respect of such crossing:" C. P. R. v. G. T. R., 12 O. L. R. 320; see also R. v. Toronto Ry. Co., 26 A. R. 491. It is not competent to a Provincial Legislature to impose conditions precedent to the exercise of powers conferred by the Dominion Parliament: Toronto v. Bell Telephone, 1905, A. C. 52. Where a railway is within the federal jurisdiction, the province has no power to regulate the structure of a ditch (C. P. R. v. Parish of N. D. de Bonsecours, 1899, A. C. 367), or the structural conditions of roadbeds or to make regulations as to crossings (G. T. R. v. Therrien, 30 S. C. R. 485), or fences (Madden v. Nelson, etc., Ry. 1899, A. C. 626), but may regulate the cleaning of the ditch so as to prevent inundation of adjoining land (C. P. R. v. Parish of N. D. de Bonsecours, 1899, A. C. 367, and see R. S. C., ch. 37, sec. 251). The Dominion Railway Committee can empower a Provincial electric railway to cross a Federal railway at grade, contrary to the desire of the Federal railway and the charter of the Provincial railway: G. T. R. v. Hamilton Radial, 29 O. R. 143. The Ontario Supreme Court at the instance of a creditor of the railway company has power to appoint a receiver both where the company is under Provincial Legislative jurisdiction and where it is under Federal jurisdiction if there is no Federal legislation providing otherwise: Wile v. Bruce Mines Ry., 11 O. L. R. 200; see also Grey v. Manitoba, etc., Ry. 1897, A. C. 254; Toronto General Trusts Co. v. Central Ontario Ry. 6 O. L. R. 1, 8 O. L. R. 342, 1905, A. C. 576. The

Mechanics Lien Act, R. S. O. 1914, ch. 140, does not apply to Federal Railways: Crawford v. Tilden, 9 O. W. R. 781, 13 O. L. R. 169. As to the application of R. S. O. 1914, ch. 146, sec. 5, see note to sec. 108 *infra*. As to R. S. O. 1914, ch. 146, generally and especially, sec. 10, which was held to be valid and applicable to Federal railways: see Canada Southern v. Jackson, 17 S. C. R. 316, 4 Cart. 451. The provisions of the Dominion Act giving a right of action "for the full amount of damages sustained" is *intra vires* and the restriction of amount under R. S. O. 1914, ch. 146, does not apply to an action thereunder: Curran v. G. T. R., 25 A. R. 407.

6. Purpose of the sec.: Kerley v. London & Lake Erie, 26 O. L. R. 588, 4 O. W. N. 1234. Franchise to St. Ry.; private Act and general Act: Sandwich v. S. W. & A. Ry., 17 O. W. R. 45, 2 O. W. N. 93. As to provision in special Acts as to passenger fares on electric railways: see sec. 210 (1) *infra*.

ORGANIZATION OF THE COMPANY.

8. By-laws: see secs. 163 *et seq.* notes, and R. S. O. 1914, ch. 1, sec. 28 (g).

9. As to companies offering stock for public subscription: see Companies Act, R. S. O. 1914, ch. 178, Part VIII, secs. 111, *et seq.* and notes. As to prospectus and directors' liability: see same Act, Part VII, secs. 99 *et seq.* and notes. As to directors and their powers: see same Act, Part VI, secs. 83 *et seq.* and notes. Signature of stock book: see Ray v. Blair, 12 C. P. 257. Withdrawal of subscription: Smith v. Spencer, 12 C. P. 277. Payment of percentage: Port Dover, etc., Ry. v. Grey, 36 U. C. R. 425. Conditional: Whitby and Port Perry Ry. v. Jones, 31 U. C. R. subscriptions: Moore v. Murphy, 11 C. P. 444; Moore v. Gurney, 21 U. C. R. 127, and 22 U. C. R. 209; 170; Bullivant v. Manning, 41 U. C. R. 517; Wilson v. Ginty, 3 A. R. 124; Newman v. Ginty, 29 C. P. 34. Powers of provisional directors: Selkirk v. Windsor, etc., Ry., 1 O. W. N. 731, 2 O. W. N. 193, 15 O. W. R. 87, 16 O. W. R. 1, 17 O. W. R. 317, 20 O. L. R. 290 21 O. L. R. 109, 22 O. L. R. 250.

10. Municipal corporations duly empowered by the laws of their province may take shares in a Dominion Railway: R. S. C. 1906, ch. 37, sec. 99. As to municipal bonuses: see R. S. O. 1914, ch. 192, sec. 397, which section comprises what were formerly secs. 130 to 146 of the Railway Act, 6 Edw. VII, ch. 30.

11. "Expressly called for that purpose:" see notes to Companies Act, R. S. O. 1914, ch. 178, sec. 16. As to preference shares: see sec. 41 *infra,* and notes to Companies Act, R. S. O. 1914, ch. 178, secs. 78 *et seq.* In allotting new stock the directors must be fair. Anything in the nature of manipulation, either with a view to or which results in control of the voting power, is *ultra vires* and not susceptible of being ratified by shareholders: Punt v. Lynn, 1903, 2 Ch. 517. Anything looking to a confiscation of corporate rights or privileges by a majority at the expense of a minority is frowned upon by the Court: Griffith v. Paget, 5 Ch. D. 898; Meunier v. Hooper, L. R. 9 Ch. 350; Percival v. Bright 1902, 2 Ch. 425; Martin v. Gibson, 10 O. W. R. 66, 15 O. L. R. 623. See notes to Companies Act: R. S. O. 1914, ch. 178, secs. 83 *et seq.*

12. Mandamus calling annual meeting: see Hatton v. M. P. & B. Ry., M. L. R. 1 S. C. 69. Jurisdiction of the Court in matters of internal management: Burland v. Earle, 71 L. J. P. C. 1, 1902, A. C. 83. As to general meetings: see notes to Company Act, R. S. O. 1914, ch. 178, secs. 43 *et seq.*

14. Votes of bondholders: see Weddell v. Ritchie, 10 O. L. R. 5, and see *post* sec. 50. In the absence of special provision to the contrary, a shareholder partially paid up has the same voice as one fully paid up, provided the former is not in arrears for calls: Purdom v. Ontario Loan, 22 O. R. 597; see Companies Act, R. S. O. 1914, ch. 178; notes to Part III, secs. 43 *et seq.*

17.—(1) See Dom. Ry. Act, R. S. C. 1906, ch. 37, sec. 110. See Companies Act, R. S. O. 1914, ch. 178, Part VI, sec. 83 *et seq.* and notes.

17.—(4) See Companies Act, R. S. O. 1914, ch. 178, notes to sec. 87.

17.—(7) This sub-sec. and sub-secs. (8) and (9) are identical with R. S. O. 1914, ch. 178, sec. 85 (3), (4), (5).

17.—(10) Personal liability of president on acceptance of bill of exchange: Madden v. Cox, 5 A. R. 473.

17.—(12) A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined in that Act: Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 553, A.-G. v. Great Eastern Ry., 5 App. Cas. 473; Baroness Wenlock v. River Dee, 10 App. Cas. 354. Act of the directors; generally as to liability of directors: see Companies Act, R. S. O. 1914, ch. 178, especially notes to secs. 84, 91, 93, 95.

19. See R. S. C. 1906, ch. 37, sec. 112; see also notes to Companies Act, R. S. O. 1914, ch. 178, sec. 93.

20.—(1) Powers of provisional directors: see Allen v. Ontario and Rainy River Ry., 29 O. R. 510. Powers of directors: see Michie v. Erie and Huron Ry., 26 C. P. 566; Re North Simcoe Ry., 36 U. C. R. 101; Peterborough and Victoria v. G. T. R. 18, U. C. R. 220; McLaren v. Fisken, 28 Gr. 352; Wilson v. Ginty, 3 A. R. 124; Denison v. Leslie, 3 A. R. 536. Authority of directors of electric railway to contract for equipment, etc. Position where authority exceeded: Thomas v. Walker, 1 O. W. N. 1094. Office of solicitor and salary: Falkener v. Grand Junction, 4 O. R. 350. Office and salary of managing director: Reynolds v. Whitley, 26 Gr. 519. When a by-law is passed at a general meeting providing for the allotment of certain new stock by the shareholders, directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves: Stephenson v. Vokes, 27 O. R. 691; see also Martin v. Gibson, 10 O. W. R. 66, 16 O. L. R. 623. Allotment of shares to director though a questionable act may be ratified: Christoper v. Noxon, 4 O. R. 672. By-laws: see Companies Act, R. S. O. 1914, ch. 178; notes to sec. 89-90; see also Interpretation Act, R. S. O. 1914, ch. 1, sec. 28 (*g*).

23. See Companies Act, R. S. O. 1914, ch. 178, sec. 92 notes.

27.—(1) "Interval of two months:" see Buffalo, etc., Ry. v. Parke, 12 U. C. R. 607; Moore v. McLaren, 11 C. P. 534; Port Dover, etc., Ry., v. Grey, 36 U. C. R. 425. Cf. Dominion Railway Act, R. S. O. 1906, ch. 37, secs. 125-130. See Companies Act, R. S. O. 1914, ch. 178, sec. 60 and notes.

27.—(4) Interest: Nasmith v. Dickey, 44 U. C. R. 414.

27.—(5) Right of action for calls: see Toronto, etc., Ry. v. Crookshank, 4 U. C. R. 309. As to nature of liability; see Companies Act, R. S. O. 1914, ch. 178, secs. 72-77 and 167 notes.

28. See Companies Act, R. S. O. 1914, ch. 178, sec. 56 and notes. Mandamus to enforce transfer of shares: Nelles v. Windsor, Essex and Lake Shore Ry., 16 O. L. R. 359.

29. See Companies Act, R. S. O. 1914, ch. 178, sec. 57 (1) and notes.

31. See Companies Act, R. S. O. 1914, ch. 178, sec. 72 and notes.

33. Forfeiture of shares: see Companies Act, R. S. O. 1914, ch. 178, sec. 62 and notes.

38. See Companies Act, R. S. O. 1914, ch. 178, sec. 74, 167 notes; and see R. S. C. ch. 37, sec. 98.

41. See R. S. C. 1914, ch. 178, sec. 78, *et seq.* and notes.

42. Dividends: Compare Dominion Act R. S. C. 1906, ch. 37, secs. 131, 133. See Companies Act, R. S. O. 1914, ch. 178, secs. 91, 95 and notes.

47. Cf. R. S. C. 1906, ch. 37, sec. 137. Where neither the company nor the shareholders see fit to impugn the validity of bonds, it is not competent for certain holders of bonds to impugn the position of other bondholders of their own class: Bank of Toronto v. Cobourg, etc., Ry., 10 O. R. 376. Assignment of debentures and coupons for interest: see McKenzie v. Montreal, etc., Ry., 27 C. P. 224, 29 C. P. 333.

48. Generally as to validity of mortgage of railway property: see Bickford v. Grand Junction Ry., 23 Gr. 302, 1 S. C. R. 696.

50.—(1) See R.S.C. 1906, ch. 37, secs. 143, 144, 145. Rights of bondholders and shareholders to vote. If the votes of bondholders entitled to vote are rejected, an arrangement before the meeting for confirmation is not properly confirmed even though confirmed by two-thirds of the actual shareholders present: Hendrie v. G. T. R., 2 O. R. 441.

50.—(2) Under a provision similar to sub-sec. 2 it was held that the bondholders' right to vote might be exercised at any time when interest was in arrear and was not restricted to the annual meeting. Each bondholder has one vote for every $100 of his bond, the shares being $100 shares: Weddell v. Ritchie, 10 O. L. R. 5; but see Bunting v. Laidlaw, 8 P. R. 538.

50.—(3) To give bondholders voting rights, their bonds must be registered as shares are registered. Registration can be compelled on a *prima facie* title being made out. No special provision by by-law is necessary: Re Thomson and Victoria Ry., 9 P. R. 119; Re Johnson & T. G. & B. Ry., 8 P. R. 535. The secretary of the company may be compelled to register bonds without the production of intermediate transfers: Re Osler and T. G. & B. Ry., 8 P. R. 506.

50.—(4) As to sale of railway as a going concern under a mortgage at the instance of bondholders: see Toronto General Trusts v. Central Ontario Ry., 8 O. L. R. 342.

51. Construction of power of sale in memo of hypothecation of railway bonds pledged as collateral security to a promissory note: Toronto General Trusts v. Central Ontario Ry., 7 O. L. R. 660, 10 O. L. R. 347. As to deposit of mortgage to secure bonds covering rolling stock leased to company: see R. S. O. 135, sec. 26.

52. See R. S. C. 1906, ch. 37, sec. 147; see Companies Act, R. S. O. 1914, ch. 178, secs. 23 (*l*), 78 (1*a*).

53. This section does not apply to street railway companies. See sec. 7 *ante*.

POWERS.

54.—(*a*) Cf. R. S. C. 1906, ch. 37, sec. 151. Right of way over lands occupied by another railway: G. T. R. v. Lindsay, etc., Ry. Co., 3 O. W. R. 54. As to taking lands without consent of the owners: see secs. 87-90 *post*.

54.—(*b*) As to aid to railways: see cases collected Ontario Digest Case Law, cols. 5806 to 5823, covering aid to railways by government, col. 5806; aid to railways by municipalities by by-laws, col. 5806; terms and conditions of aid, col. 5812; other cases, col. 5820; see also 1 Can. Ry. Cases, pp. 289-297. Powers of municipal councils to grant aid to railways, see R. S. O. 1914, ch. 192, secs. 395 and 397.

54.—(*c*) Alienation: see Pratt v. G. T. R., 8 O. R. 499. The statutes of limitation as to real property do not run against a railway unless where it may be shewn that the land in question is not necessary for the railway and therefore capable of being sold: McMahon v. G. T. R., 12 O. W. R. 324; G. T. R. v. Valliear, 7 O. L. R. 364. A stranger may acquire a title by possession to land vertically over a railway tunnel even though not superfluous land, subject to the right of the railway to use the tunnel: Midland Ry. v. Wright, 1901, 1 Ch. 738. In order to acquire a right of way by prescription over railway lands, the right must rest in the presumption of a grant and the rights of a railway to grant lands are restricted. If the actual grant would have been illegal, the implied grant cannot be valid: G. T. R. v. Valliear, 7 O. L. R. 364. Conditions of grants to railway and their enforcement: see Digest Ontario Case Law, col. 5960-63. As to minerals: see secs. 132-137, *post* and notes.

54.—(*e*) Junctions: see sec. 129.

54.—(*g*) Stations: see sec. 146.

54.—(*h*) See regulations of the Railway Board, Schedule 1, No. 5. Power to build branch lines; construction of contract; limitation of time: see C. P. R. v. James Bay Ry., 36 S. C. R. 42.

54.—(*i*) In the absence of express power a railway is not entitled to carry on the business of omnibus proprietors except as strictly incidental to and consequential on their business: A. G. v. Mersey Railway, 1907, A. C. 415.

54.—(*j*) The right of a railway to cut down trees is entirely distinct from their right to expropriate land. If compensation can be claimed for it, it must be distinctly demanded by the notice: Re O. & Q. Ry. Co. and Taylor, 6 O. R. 338. Damages for slashing: see Re Great Western Ry. and Chauvin, 1 P. R. 288.

54.—(*k*) As to bridges, tunnels, viaducts, trestles, etc.: see secs. 116-117. As to Highway Crossings: secs. 118-128. Railway crossings: sec. 129. Drainage: 109, 110. Fences: 114. Stretching electric wires across canal: see Dundas v. Hamilton Cataract Co., 18 O. W. R. 168, 2 O. W. N. 517.

54.—(*l*) Injury by flooding lands adjoining right of way through farm; right to damages and right to apply to Board: Woods v. C. P. R., 13 O. W. R. 49. Where a railway company, desiring to cross a highway where a stream crossed it, diverted the stream and built a new bridge, the railway was under no liability to keep the bridge in repair: Peterborough v. G. T. R., 32 O. R. 154, 1 O. L. R. 144. Interference with water course and navigation; special interest to enable private right of action to be maintained: Drake v. Sault Ste. Marie Pulp Co., 25 A. R. 251. If a railway divert a water course without filing plans under secs. 70-72 the owner injuriously affected has a right of action not limited to arbitration: Arthur v. G. T. R., 25 O. R. 37, 22 A. R. 89. What amounts to a water course: Arthur v. G. T. R., 25 O. R. 37, 22 A. R. 89; Ostrom v. Sills, 24 A. R. 526, 28 S. C. R. 485; Young v. Tucker, 26 A. R. 162; C. P. R. v. McBryan, 6 B. C. Rep. 136, 29 S. C. R. 359; Beer v. Stroud, 19 O. R. 10; Williams v. Richards, 23 O. R. 651. Diversion of water course: see Tolton v. C. P. R., 22 O. R. 204. Interference with drainage: Knill v. G. T. R., 8 O. W. R. 870. Cases collected, Dig. Ont. Case Law, col. 5870-5876; and see sec. 109 notes, *post*.

54.—(*p*) Authority of directors of electric railway to contract for equipment, etc. Position where authority exceeded: Thomas v. Walker, 1 O. W. N. 1094.

55. Stretching electric wires across canal: see Dundas v. Hamilton Cataract Co., 18 O. W. R. 168. Order for demolition of unapproved works, obstructing navigable waters: G. T. P. v. Rochester, 48 S. C. R. 238.

59. See R. S. C., ch. 37, sec. 155.

60. Sections 60-65 inclusive do not apply to street railway companies: see sec. 7 *ante*; but see sec. 65 (8).

62 See as to telegraph companies; arrangements with railway Co.: C. P. R. v. Western Union, 17 S. C. R. 151. Lease of telegraph lines: G. N. W. Tel. Co. v. Montreal Telegraph Co., 20 S. C. R. 170.

64. See Railway Board regulations, Schedule 1, No. 9.

65.—(1) See R. S. C., ch. 37, secs. 317, 364. Formerly the words "in this province or elsewhere" were in the sub-section. As to extra-territorial effect: see Macdonald v. G. T. R., 31 O. R. 663. Construction of traffic arrangement contract: Great Northern v. Furness & Co., 42 S. C. R. 234; see *post* secs. 211, 212, notes.

65.—(8) Order for interchange of traffic: Re Toronto and Toronto Ry., 26 O. L. R. 225; and see *post* sec. 212.

PLANS AND SURVEYS.

69. Sections of this part, 69 to 97 inclusive, do not apply to street railway companies: see sec. 7 *ante*. Sections 69 to 97 of this Act, do not apply to the Hydro-Electric Power Commission or any railway constructed or operated by it: R. S. O. 1914, ch. 187, sec. 12. For meaning of "land:" see *ante* sec. 2 (*k*).

70. See R. S. C., ch. 37, sec. 158, *et seq.* Railway Board regulations as to plans and surveys: see Sched. 1, No. 1 Location plans: McDonald v. V. V. and E. Ry., 44 S. C. R. 65. Jurisdiction of Railway Commissioners in respect of location of railway: Essex Terminal v. Windsor, Essex and Lake Shore, 40 S. C. R. 620. It is not necessary that the particular works should appear on the deposited plans: Weld v. L. & S. W. Ry., 32 Beav. 340. What is a sufficient delineation of lands: Re Huddersfield, L. R. 17 Eq. 476; Dowling v. Pontypool,

etc., Ry., L. R. 18 Eq. 714; Wrigley v. Lancashire, etc., Ry., 4 Giff. 352; Richards v. Scarboro Market, 23 L. J. Ch. 110; Protheroe v. Tottenham, etc., 1891, 3 Ch. 278. Order of the Railway Committee alone will not authorize a railway to begin operations and enter on lands. They are not entitled to proceed until they deposit a plan as required by statute: Parkdale v. West, 12 App. Cas. 602; Hendrie v. T., H. & B. Ry., 26 O. R. 667, 27 O. R. 46. The statutory provision requiring a plan to be filed before land can be expropriated applies to a deviation: Kingston and Pembroke Ry. v. Murphy, 17 S. C. R. 582. And a railway will be restrained from proceeding under a warrant for possession granted without the plan of the deviation being filed, even though the deviation be small: Brooke v. Toronto Belt Line Ry., 21 O. R. 401; see also Ontario and S. M. Ry. v. C. P. R., 14 O. R. 432; Quebec, etc., Ry. v. Gibsone, 29 S. C. R. 340. Where a watercourse is diverted by a company without plans being filed, the owner has a right of action not limited to arbitration: Arthur v. G. T. R., 25 O. R. 37, 22 A. R. 89. Necessity for approval of railway's route and location plans by Board. Order for demolition of unapproved works obstructing navigable waters: G. T. P. v. Rochester, 48 S. C. R. 238.

71.—(2) Condition imposed by Railway Board in approving location of railway on highway; compensation and damages to frontagers: G. T. R. v. Fort William, 43 S. C. R. 412, 1912, A. C. 224.

71.—(3) See R. S. C. 1906, ch. 37, sec. 167. What amounts to a deviation. When the road authorized is completed the compulsory power to expropriate may cease: Kingston and Pembroke Ry. v. Murphy, 17 S. C. R. 582. Extension of line: see C. P. R. v. Major, 13 S. C. R. 233; Vancouver v. C. P. R., 23 S. C. R. 1. Necessity for filing plan of deviation: Kingston and Pembroke Ry. v. Murphy, 17 S. C. R. 582. Meaning of "deviation" as affecting street railways: T. & Y. Radial v. Toronto, 4 O. W. N. 784, 28 O. L. R. 180, 25 O. W. R. 315 (P.C.).

74. See R. S. C., ch. 37, sec. 162.

75. See R. S. C., ch. 37, sec. 163 (3), (4), and sec. 74.

76. Railway Board Regulations, Sched. 1, No. 3.

79. Railway Board Regulations, Sched. 1, No. 2.

ACQUISITION OF LANDS.

81. Secs. 81 to 97 do not apply to street railway companies. Compulsory powers of street railway companies to take lands: see sec. 245 *infra*. The section sets the limits of what may be expropriated; the lands taken must be in one parcel: Stewart v. Ottawa, etc., Ry., 30 O. R. 599; see sec. 87. See R. S. C. 1906, ch. 37, sec. 180. Expropriated by public utility companies: see R. S. O. 1914, ch. 178, sec. 166. Statutory right to take foreshore of harbour: Vancouver v. C. P. R., 23 S. C. R. 1. Powers to expropriate being intended for commercial purposes are more strictly construed than those of municipal corporations: Harding v. Cardiff, 29 Gr. 308. What are proper purposes: Jenkins v. Central Ontario, 4 O. R. 593; Nihan v. St. Catharines, etc., Ry., 16 O. R. 459. Gravel: see sec. 92. Limitation of time as to powers of expropriation: G. W. Ry. v. Midland Ry., 1908, 2 Ch. 455, 644. Crown lands: Booth v. McIntyre, 31 C. P. 183; and see sec. 61, *ante*.

82. Compare R. S. C. 1906, ch. 37, secs. 183, 184, 185. See "owner," sec. 2 (*m*) *ante*. The scheme of the Act is that the railway shall deal with the person in possession as owner, and must proceed according to the Act. The matter of title is held in abeyance until a later stage of the expropriation proceedings: Stewart v. Ottawa, etc., Ry., 30 O. R. 599. A person in possession of land as owner, and having, therefore, title against all the world but the rightful owner, has a *prima facie* right to compensation on the taking of the land under compulsory powers: Perry v. Clissold, 1907, A. C. 73. Where a railway acquires land by voluntary purchase within its statutory powers, it cannot legally covenant limiting the use to which the land may be put so as to preclude in the use of the land the exercise of all its statutory powers: Re South Eastern Ry. and Wiffin, 1907, 2 Ch. 366. A mortgagor is not included among the persons who are enabled to convey to the company. He can only deal with his equity of redemption, leaving the mort-

gagee's compensation to be separately ascertained: Re Toronto Belt Line, 26 O. R. 413. A mortgagee having been dispossessed and the land taken by railway is entitled to recover the value of the lands as damages to be held by him as security for his mortgage money, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land: Delaney v. C. P. R., 21 O. R. 11; see also as to mortgagees: Scottish American v. Prittie, 20 A. R. 398; Re T., H. & B. Ry. and Burke, 27 O. R. 690. Right of husband of married woman considered: Bryson v. O. & Q. Ry. Co., 8 O. R. 380. Railway's agreement with husband, land owned by wife: Re Benson & Port Hope, etc., Ry., 29 U. C. R. 529; Great Western Ry. v. Baby, 12 U. C. R. 106. Widow entitled to a life estate with remainder to infant children in fee: Re C. P. R. and Bryne, 15 O. L. R. 45, 10 O. W. R. 278; Re Dolsen, 13 P. R. 84. Position of a vendee under a contract of sale considered: Mason v. South Norfolk Ry., 19 O. R. 132. Enforcement of judgment for vendor's lien: Lincoln Paper Mills v. St. Catharines, 19 O. R. 106. Executors: Mitchell v. G. W. Ry. Co., 38 U. C. R. 471; Owston v. G. T. R., 26 Gr. 93, 28 Gr. 428. Although the tenant for life has authority to contract for the sale and convey the fee simple of land required for the railway, the company are not warranted in paying him the full amount of the compensation: Cameron v. Wigle, 24 Gr. 8. See also as to rights of remaindermen and others interested: Young v. Midland Ry. Co., 16 O. R. 738, 19 A. R. 265, 22 S. C. R. 190; Re Dolsen, 13 P. R. 84; Dunlop v. Canada Central Ry., 45 U. C. R. 74; Slater v. Canada Central, 25 Gr. 363. *Cestui que trust*: Re James Bay Ry. and Worrell, 6 O. W. R. 473. Tenant: Johnson v. Ontario, etc., Ry., 11 U. C. R. 246. Lessees under renewable lease where lessors have option to renew or pay for improvements and who are overholding, no renewal lease having been granted though demanded, are tenants at will, and not entitled to compensation: C. P. R. v. Brown Milling Co., 13 O. W. R. 301, 18 O. L. R. 85.

83. See R. S. C., ch. 37, sec. 186. "Owner": see *ante*, sec. 2 (*m*); "land": see *ante*, 2 (*k*). The "agreement" vests the fee simple, a vesting order is unnecessary: Re Toronto and Niagara Power Co. and Webb, 10

O. W. R. 402. The Acts vest the land in the company and not merely a right of way or easement: Anglin v. Nickle, 30 C. P. 72. The company in ejectment can rely on the title acquired under the Act and is not driven to prove strictly the title of its grantors: Great Western Ry. v. Lutz, 32 C. P. 166. In treating with the owner of lands the solicitor of the company is not qualified to enter into any special agreement binding the company to maintain a crossing: Wood v. Hamilton, etc., Ry. 25 Gr. 135. Liability of company when money wrongly paid, *e.g.*, to life tenant: see Cameron v. Wigle, 24 G. R. 8; Young v. Midland Ry., 16 O. R. 738. As to mortgagees: see Scottish American v. Prittie, 20 A. R. 398; Re Toronto Belt Line, 26 O. R. 413; notes to sec. 82 *supra*. Fee simple; as to minerals: see sec. 133 *post*. As to power to alienate or to lose title by adverse possession: see sec. 54 (*c*) *ante* notes.

84. The right to compensation is not barred until the expiration of 20 years from the time the land is entered on and taken for railway purposes: Essery v. G. T. R., 21 O. R. 224. The rule as to costs is that when the company, desiring land for their own purposes which they might expropriate if the owners would not or could not make a valid deed, pay money into Court, not for the advantage of those entitled, but for their own purposes, the company must pay the costs including the costs of payment out: Re Dolsen, 13 P. R. 84; Re C. P. R. and Byrne, 10 O. W. R. 278, 15 O. L. R. 45; Re Toronto and Niagara Power Co. and Webb, 10 O. W. R. 402.

85. A company without authority diverted a water course and afterwards made compensation to the then owner. The equitable easement thus created was not valid against the registered deed of a subsequent purchaser without notice: Tolton v. C. P. R., 22 O. R. 204.

87. See Rules of the Board, Schedule 1, No. 4. Taking extra land: see Cavanagh and Atlantic Ry. Co., 14 O. L. R. 523. Municipal land: see Re G. T. R. and Ste. Cunégonde, 4 Can. Ry. Cas. 277.

88. Cf. R. S. C. 1906, ch. 37, sec. 191. "Lands which may suffer damage:" see notes to sec. 90 (10) *post*.

89. In ascertaining the amount of compensation, the date of taking must be ascertained with reference to the date of deposit of plan: James v. O. & Q. Ry., 12 O. R. 624, 15 A. R. 1. Where land is taken without filing maps or giving notice, the owner has a right of action not limited to arbitration: Arthur v. G. T. R., 22 A. R. 89. As to precedence between rival Dominion and Provincial companies and priorities: see Pontiac Pacific Ry. v. Hull E. Ry., Q. R. 11 S. C. 140. Plans not filed; running of limitation of action for damages: Lumsden v. T. and N. O. Ry., 15 O. L. R. 469; see R. S. C., ch. 37, sec. 192, 8-9 Edw. VII (D), ch. 32, sec. 3.

90.—(1) The notice must be definite as to the "land" sought to be acquired and must so state if the fee simple is intended to be taken: Lees v. Toronto and Niagara Power, 12 O. L. R. 505, 8 O. W. R. 294. Notice must not include lands not intended to be taken: Wood v. Atlantic, etc., Ry., Q. R. 2, Q. B. 335. A railroad has no right to give notice of intention to acquire a mere easement: Re James Bay and Worrell, 6 O. W. R. 512. Expropriation of right of way over lands occupied by another railway: G. T. R. v. Lindsay, etc., Ry., 3 O. W. R. 54. The right to cut down trees is entirely distinct from the right to expropriate land. It is a matter of separate demand: Re O. & Q. Ry. Co. v. Taylor, 6 O. R. 338; see sec. 54 (j). Requisites of notice: see Widder v. Buffalo and L. H. Ry., 24 U. C. R. 520. The foundation of the proceedings to take lands compulsorily is the notice served on the landowner. In the absence of this notice the railway is a trespasser and responsible in damages in the ordinary Courts of the country: Hanley v. T. H. & B. Ry., 11 O. L. R. 91. To bring themselves within this section the railway must take the proper preliminary steps: McIsaac v. Inverness Ry., 37 S. C. R. 134. The notice must state in cash the sum offered as compensation. An offer of crossing and station privileges is not within the section: Brooke v. Toronto Belt Line: 21 O. R. 401. Creation of new interest after notice to treat: Zick v. London United Tramway, 1908, 2 K. B. 126.

90.—(5) Offer of compensation: G. T. R. v. Ash, 4 O. W. N. 810. Where valuers are appointed by the parties

the price they agree on is not an "award" of compensation for land expropriated: Re Laidlaw and Campbellford, etc., Ry., 5 O. W. N. 534. See as to this and following clauses, notes to R. S. O. 1914, ch. 65.

90.—(6) Where arbitration is the proper remedy no action lies: Todd v. Meaford, 6 O. L. R., 469; Knill v. G. T. R., 8 O. W. R. 870. Disqualification; engineer of railway company: see Widder v. Buffalo, etc., Ry., 24 U. C. R. 520. Ratepayer of shareholder municipality: Re McQuillan and Guelph Junction Ry., 12 P. R. 294. See R. S. C., ch. 37, sec. 208.

90.—(7) Third arbitrator: Daly v. Buffalo, etc., Ry., 16 U. C. R. 238. "Opposite party" includes both mortgagor and mortgagee: Re T. H. & B. Ry. and Burke, 27 O. R. 690. "Opposite party;" mortgagee is to be treated as an opposite party and when he does not name an arbitrator the company is entitled to apply to have a sole arbitrator appointed: Re C. P. R. and Batter, 20 Occ. N. 317, 13 M. L. R. 200. A purchaser pending expropriation takes with notice and is bound by them: Re C. P. R. and Batter, *Ib.* Evidence in support of application may be by affidavit: Re C. P. R. and Batter, *Ib.*

90.—(9) Distinction between compensation for land and damages: Martini v. Gzowski, 13 U. C. R. 298. A company going on lands and making improvements before notice does not stand in the same position as an ordinary trespasser. They have a statutory right to acquire title. The company's improvements before depositing plan do not go to the owner. The lands dealt with are the lands of the company in the condition they were when the company entered, valued as of the date of filing the plan: Re Ruttan and Dreifus, 12 O. L. R. 187. What evidence can be given in regard to sales of neighbouring lands on expropriation proceedings: Re National Trust and C. P. R., 5 O. W. N. 221.

Expropriation of land, compensation for injurious affection of land not taken; method of computation: Re Ketcheson and C. N. O., 5 O. W. N. 36, 25 O. W. R. 20, 29 O. L. R. 339. Method of computing damages caused by severance and results flowing from

having to team clay for brick making over a farm crossing: Davies v. James Bay, 28 O. L. R. 544. It is not a proper principle for arbitrators to proceed by taking an average of the different estimates submitted. An award made on an improper principle will be set aside: G. T. R. v. Coupal, 28 S. C. R. 531; Fairman v. Montreal, 31 S. C. R. 210. The compensation is to be ascertained by subtracting the value of the lands after the taking from their value before the taking. The value should include an increase which may be owing to the contemplated construction of the railway: James v. O. and Q. Ry., 12 O. R. 624, 15 A. R. 1. Benefit to remaining lands; deduction: Re Credit Valley Ry. Co. and Spragge, 24 Gr. 231. The advantage resulting to the owner of a town site from it being made the terminus of a railway is a point which should be taken into account by way of set off under the Dominion Act, R. S. C. 1906, ch. 37, sec. 198: Point v. The Queen, 2 Ex. C. R. 149. Set off of increased value: Chateauguay, etc., Ry. v. Trenholme, Q. B. 11 K. B. 45. Excessive compensation: Great Western Ry. v. Baby, 12 U. C. R. 106; Great Western Ry. v. Dodds, 12 U. C. R. 133; Re Miller and Great Western Ry., 13 U. C. R. 582; Re Great Western and Chauvin, 1 P. R. 288 and see Dig. Ont. Case Law, col. 5948. Insufficient compensation: Re Armstrong and James Bay Ry., 12 O. L. R. 137.

Arbitrators have no jurisdiction to give interest as part of their award: Re Clarke and T. G. & B., 18 O. L. R. 628; Re Davies and James Bay Ry., 20 O. L. R. 534; Re Ketcheson and C. N. O., 29 O. L. R. 339. Interest on amount awarded: Re Cavanagh and Canada Atlantic, 14 O. L. R. 523, 9 O. W. R. 842. Date of commencement: James v. O. & Q. Ry., 12 O. R. 624, 15 A. R. 1. Rate of: Re Taylor and O. & Q. Ry., 11 P. R. 371; Re Philbrick and O. & Q. Ry., 11 P. R. 373. Right to: Re Foster and Great Western Ry., 32 U. C. R. 162. Diligence: Atlantic and N. W. Ry. v. Judah, 23 S. C. R. 231. Interest is properly allowed to the land owner from the time of the taking to the time of the award: James v. O. & Q. Ry., 12 O. R. 624, 15 A. R. 1. But only bank interest: Taylor v. O. & Q. Ry., 11 P. R. 371. As to "date of taking:" see sec. 89 note; and see notes to sec. 90 (34) *infra*.

Value of land taken: damage to residue: interference with working of farm: Re Davies and James Bay Ry., 20 O. L. R. 534, 1 O. W. N. 549, 15 O. W. R. 625, 4 O. W. N. 1154, 28 O. L. R. 544. Damage to remaining land: Re O. & Q. Ry. Co. and Taylor, 6 O. R. 338. Depreciation of land: Guay v. The Queen, 17 S. C. R. 30; Vezina v. The Queen, 17 S. C. R. 1. Depreciation of remaining land: Great Western Ry. v. Warner, 19 Gr. 506. Injury to land not taken; smoke, noise, dust, vibration; adaptability of land taken for purpose; elements of compensation: Re C. P. R. and Gordon, 11 O. W. R. 876. Interference with business: Todd v. Meaford, 6 O. L. R. 469. Interference with hotel and loss of license: Re Cavanagh and Canada Atlantic, 14 O. L. R. 523, 9 O. W. R. 842. Raising grade of farm crossing: Knill v. G. T. R., 8 O. W. R. 870. Where land expropriated and access to highway interfered with; compensation: Re Billings and C. N. Ry., 5 O. W. N. 396. Allowance for trade profits where lands for brick making taken for railway right of way: Davies v. James Bay, 28 O. L. R. 544. Compensation for minerals in slope supporting right of way; loss of trade profits: Re Davies and James Bay, 28 O. L. R. 544. Measure of damages where lands taken in eminent domain proceedings: 1 D. L. R. 508.

90.—(10) The provisions of 6 Edw. VII., ch. 30, sec. 68, sub-secs. (11), (12), (13), are omitted as being sufficiently covered by R. S. O. 1914, ch. 65, secs. 10, 15, 16. As to sub-sec. (10), referring to costs: see R. S. O. 1914, ch. 65, sec. 18 *et seq.* and notes, and see: R. S. C. 1906, ch. 37, sec. 199; also sec. 2 (7) *supra*. See as to taxation of costs under Dominion Act: Re Oliver and Bay of Quinte Ry., 7 O. L. R. 567. Arbitrators' fees and costs; recovery: Re Philbrick and O. & Q. Ry., 11 P. R. 373; Re Foster and Great Western, 32 U. C. R. 503. Right to costs where success divided; O. & Q. Ry. v. Philbrick, 12 S. C. R. 288. Pleading: Widder v. Buffalo, etc., Ry., 24 U. C. R. 222. Taxation: Re McDermott, 25 U. C. R. 152; Re McDermott and O. & Q. Ry., 12 P. R. 282, 328. Quantum: Re Bronson and C. A. Ry., 13 P. R. 440. Witness fees: Re McRae and O. & Q. Ry., 12 P. R. 282.

Extension of time for making award: see Re C. P. R. and DuCailland, 3 O. W. R. 33; In re Wynnes and Montreal Park and Island Ry., Q. R. 9 Q. B. 483.

90.—(12) Where arbitrator dies: see Montreal Park and Island Ry. v. Shannon, 28 S. C. R. 374, and see R. S. C. 1906, ch. 37, sec. 206.

90.—(13) See R. S. C. 1906, ch. 37, sec. 207. A railway company having given notice of requiring certain land and having taken possession of it cannot abandon their notice and give a new notice for the same land: Re Haskill and G. T. R., 7 O. L. R 429; C. P. R v. Ste. Thérèse, 16 S. C. R. 606; see Grimshawe v. G. T. R., 15 U. C. R. 224; Re Hooper and Erie and Huron Ry., 12 P. R. 408, and cases collected Dig. Ont. Case Law, col. 5993-6.

90.—(14) See R. S. C. 1906, ch. 37, sec. 205. Correction of clerical error: see R. S. O. 1914, ch. 65, sec. 10 (c), notes; Re McAlpine and Lake Erie, etc., Ry., 3 O. L. R. 230; Demorest v. Grand Junction Ry., 10 O. R. 515. Mistake in acreage: Re Brennan and Ottawa Electric Ry., 21 Occ. N. 20.

90.—(15) Where valuers are appointed by the parties, the price they agree on is not an "award:" Re Laidlaw and Campbellford, etc., Ry., 5 O. W. N. 534.

90.—(16) See R. S. O. 1914, ch. 65, sec. 17 and notes; see 1913 Rules 503, 492. Practice regarding appeals from arbitrators: Re Ketcheson and C. N. O., 5 O. W. N. 271, 25 O. W. R. 252. See also notice of appeal: Re Potter and Central Counties Ry., 16 P. R. 16. Hearing: Neilson v. Quebec Bridge Co., Q. R. 21, S. C. 329; Re Montreal and Ottawa Ry. and Ogilvie, 18 P. R. 120. Further appeal: Brierley v. T. H. and B. Ry., 25 A. R. 88. Appeal to Supreme Court: Brennan v. Ottawa Electric, 31 S. C. R. 311; Armstrong v. James Bay Ry., 38 S. C. R. 511; G. T. R. v. Coupal, 28 S. C. R. 531.

Award should only be altered where it is clear that it is the result of a gross error in law or in appreciation of the facts: Neilson v. Quebec Bridge, Q. R. 21 S. C. 329. The Court can not remit the case to

the arbitrators: see Re G. T. R. and Petrie, 2 O. L. R. 284; Re McAlpine and Lake Erie Ry., 3 O. L. R. 230. When the arbitrator awards that the landowner has suffered no damage no appeal lies: Re T. H. & B. Ry. and Kerner, 28 O. R. 14. Written reasons of the arbitrators are admissible as evidence on an appeal. The Court on appeal is to review the judgment of the arbitrators as it would that of an inferior Court: Re Brennan and Ottawa Electric, 21 Occ. N. 208. An arbitrator may properly make an affidavit shewing how the compensation awarded was arrived at. This is evidence on the appeal, as is also the examination of an arbitrator on a pending motion: Re Cavanagh and C. A. Ry., 14 O. L. R. 523. As to new evidence: see Pontiac Pacific Junction v. Sisters of Charity at Ottawa, Q. R. 20 S. C. 567. Excess and inadequacy of compensation as ground of appeal: see notes to sec. 90 (9) *supra*.

90.—(17) Payment or agreement: injunction: Burns v. James Bay Ry., 11 O. W. R. 570. See as to enforcement of award: execution by two arbitrators only; uncertain or unauthorized provisions and other objections to: Digest Ont. Case Law, col. 5985-91.

90.—(20) Payment of compensation is a condition precedent to the right of a railway interfering with the possession of land or the rights of individuals: Parkdale v. West, 7 O. R. 720, 8 O. R. 59, 12 A. R. 393, 12 S. C. R. 250, 12 App. Cas. 602. The foundation of the judge's authority to issue a warrant depends on a proper compliance by the railway with the preceding sections of the Act: Brooke v. Toronto Belt Line, 21 O. R. 401. How far the compulsory power will go: see Kingston, etc., Ry. v. Murphy, 17 S. C. R. 582. Sufficiency of notice: see Lees v. Toronto and Niagara Power Co., 12 O. L. R. 505. Immediate possession: McCarthy v. Tilsonburg, 2 O. W. N. 34, 16 O. W. R. 964. The warrant for possession must be supported and justified by the material filed. The proceedings will not be amended: Re Strong and the Campbellford, etc., Ry., 5 O. W. N. 25, 24 O. W. R. 966.

90.—(23) Immediate possession should not be given unless (1) the company has an indisputable right to

acquire the land in compulsory proceedings (2) there is some urgent and immediate need of action: Re Kingston, etc., Ry. and Murphy, 11 P. R. 304; C. P. R. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606. A bare trustee is not "the owner of the land, etc.," within the section. Notice must be served on all *cestuis que trustent*: Re James Bay Ry. and Worrell, 10 O. L. R. 740. In computing the 10 days, the day of service and the day of return must both be excluded: Re Ontario Tanners Supplies, 12 P. R. 563. Powers of County Court Judge: see Jenkins v. Central Ontario, 4 O. R. 593.

90.—(25) When the amount subsequently awarded the land owner is not more than he was previously offered, the costs of the application for the warrant should be borne by the land owner: Re Shibley and Napanee, etc., Ry., 13 P. R. 347. A Judge making order for payment out of compensation is *persona designata* and no appeal lies from his order: C. P. R. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606; Re T. H. & B. and Hendrie, 17 P. R. 199.

Limitation of actions; trespass and nuisance by building embankment, 6 years: Chaudiere Machine Co. v. Canada Atlantic Ry., 33 S. C. R. 11. Possession; Prescription, 20 years: Ross v. G. T. R., 10 O. R. 447; Essery v. G. T. R., 21 O. R. 224, and see notes to sec. 265 *infra*. Conveyance under the Act bars dower: Chewett v. Great Western Ry., 26 C. P. 118. Liability of company when money wrongly paid, e.g., to life tenant: see Cameron v. Wigle, 24 Gr. 8; Young v. Midland Ry., 16 O. R. 738, 19 A. R. 265, 22 S. C. R. 190. As to mortgagees: see Scottish American v. Prittie, 20 A. R. 398; Re Toronto Belt Line, 26 O. R 413; see notes to secs. 82, 84 *ante*.

90.—(33) Interest on compensation awarded: cases reviewed: Re Clarke and T. G. & B., 13 O. W. R. 699, 18 O. L. R. 628. Diligence in obtaining confirmation of title; interest: see Atlantic and North-West Ry. v. Judah, 23 S. C. R. 231; and see notes to sec. 90 (9) *supra*.

91. Compensation for closing up streets: Re Medler and Toronto, 1 O. W. R. 545, 3 O. W. R. 534. Compensation

for alterations in street: interference with access: injury from smoke: Re Macdonald and T. H. & B. Ry., 2 O. W. R. 721, 723. Where railway on highway, compensation to owners abutting on highway: G. T. P. v. Fort William, 43 S. C. R. 412. Raising grade of farm crossing: Knill v. G. T. R., 8 O. W. R. 870. No compensation can be allowed to owner of land fronting on street along which a railway is lawfully constructed, there being no particular interference with access: Powell v. T. H. & B. Ry., 25 A. R. 209. No compensation for structural damages caused to buildings or for personal inconvenience by reason of interference with access: Re T. H. & B. and Kerner, 28 O. R. 14; Ford v. Metropolitan Ry., 17 Q. B. D. 12. Operation of engines causing vibration rendering house uninhabitable: Hopkin v. Hamilton Electric, 2 O. L. R. 240. A claimant is entitled to compensation for injury to lands by reason of a railway, owing to alterations of grades of streets and other structural alterations, and is entitled to compensation notwithstanding that no part of such lands have been taken by the railway: Re Birely and T. H. & B. Ry., 28 O. R. 468, 25 A. R. 88. But the compensation recoverable must be based on injury or damage to the land itself and not on personal inconvenience to the owner: Powell v. T. H. & B. Ry., 25 A. R. 209. Condition imposed by Ry. Board in approving location of railway on highway, compensation and damages to frontagers: G. T. R. v. Fort William, 43 S. C. R. 412, 1912 A. C. 224.

92. Where there is no market for gravel, land taken for that purpose is to be paid for as farm land only: Vezina v. The Queen, 17 S. C. R. 1. Gravel on highway; title in municipality: see Municipality of Louise v. C. P. R., 22 Occ. N. 124, 12 M. L. R. 124. See Mitchell v. G. W. Ry., 35 U. C. R. 159, 38 U. C. R. 471; Re Watson and Northern Ry., 5 O. R. 550.

94. See R. S. C., ch. 37, sec. 226; Bertram and Sons v. Hamilton and Dundas Street Ry., 6 Can. Ry. Cas. 158.

95. See *ante*, secs. 54 (c), 82 and notes.

CONSTRUCTION AND EQUIPMENT.

99.—(1) Secs. 99-103, inclusive, do not apply to street railway companies: see *ante* sec. 7. Appliances for coupling: Stone v. C. P. R., 26 O. L. R. 121, 47 S. C. R. 634. Defective coupler: Injury to brakeman: Darrant v. C. P. R., 12 O. W. R. 294, 13 O. W. R. 316. Accident happening in coupling cars: Insurance benefit: Farmer v. G. T. R., 21 O. R. 299. Directions given by conductor as to coupling: Authority: Weegar v. G. T. R. 23 O. R. 436, 20 A. R. 528, 23 S. C. R. 422. Street railway coupling: defective plant: negligence: Bond v. Toronto Ry., 24 S. C. R. 715. See *post*, sec. 288, note (*a*).

99.—(3) Action for injuries arising out of breach of this section in regard to brakes and couplers: Durant (Darrant) v. C. P. R., 12 O. W. R. 294, 13 O. W. R. 316. Defective brake: evidence not connecting defendants' negligence with engine driver's death: Woolsey v. C. P. R. 11 O. W. R. 1030. Hand brakes supplementary to air brakes: Brown v. Great Western Ry., 40 U. C. R. 33, 2 A. R. 64, 3 S. C. R. 159. Defective brakes: death of brakeman: brakeman's duty to examine condition of brakes: Badgerow v. G. T. R., 19 O. R. 191; Fawcett v. C. P. R. 8 B. C. 393, 32 S. C. R. 721; see also Markle v. Donaldson, 7 O. L. R. 376, and R. S. O. 1914, ch. 146, sec. 3, and notes. See *post*, sec. 288, note (*a*).

99.—(6) Dominion railway not affected by statute purporting to apply only to railways in respect of which the province had authority to enact such provisions: Monkhouse v. G. T. R., 8 A. R. 637. Knowledge by defendants of defect, or ignorance of it by the plaintiff, or notification to defendants or the plaintiff's superior officer must be pleaded and proved: Clegg v. G. T. R., 10 O. R. 708; see also Le May v. C. P. R., 18 O. R. 314, 17 A. R. 293; Misener v. Michigan Central, 24 O. R. 411; see R. S. O. 1914, ch. 143, sec. 5 and notes.

99.—(9) See R. S. C. ch. 37, sec. 265.

99.—(12) See R. S. C. 1906, ch. 37, sec. 267. Prosecution of company for nonfeasance and misfeasance:

see R. v. Hays, 14 O. L. R. 201. Neglect of statutory duty as to equipment for protection of employees: foreign car: Stone v. C. P. R., 26 O. L. R. 121, 47 S. C. R. 634. "Agreement to the contrary:" see R. S. O. 1914, ch. 146, sec. 10 and notes; see also Re Railway Act Amendment, 1904, 36 S. C. R. 136; and 4 Edw. VII. ch. 31 (D). As to sections of Quebec Code corresponding to Lord Campbell's Act and contracting out: indemnity or satisfaction: see Miller v. G. T. R., 34 S. C. R. 45, 1906, A. C. 187. As to effect of payment of insurance benefit: see Queen v. Grenier, 30 S. C. R. 42; Griffiths v. Earl Dudley, 9 Q. B. D. 357; Lougheed v. Collingwood Shipbuilding Co., 11 O. W. R. 329; Harris v. G. T. R., 3 O. W. R. 211, 550, 567; and notes to R. S. O. 1914, ch. 146, sec. 12. As to agreements with applicants for free passes, and for non-liability in consideration of reduced rates: see sec. 216 *post*, notes.

101. Negligence of electric railway in not giving notice by bell: Ford v. Metropolitan Ry., 4 O. L. R. 29; Mulvaney v. Toronto Railway, 38 S. C. R. 327; and see notes to sec. 155 (2), *infra*.

102. Operating without vestibule: R. v. Toronto Ry., 21 Occ. N. 120. Closing front vestibule and requiring passengers to enter car at rear: McGraw v. Toronto Ry., 12 O. W. R. 587, 13 O. W. R. 129, 18 O. L. R. 154.

104. Jurisdiction over "trailers:" R. v. Toronto Ry., 23 O. L. R. 187. Mode of entering car: McGraw v. Toronto Ry., 18 O. L. R. 154.

105—(2) Jurisdiction of Board: "Tracks" and "lines:" Re Toronto and Toronto and Suburban Ry., 4 O. W. N. 1379.

105.—(3) Powers of the Board: R. v. Toronto Ry., 2 O. W. N. 753, 18 O. W. R. 104, 23 O. L. R. 186.

105.—(6) Order to double track: Waddington v. T. & Y. Radial, 18 O. W. R. 621.

107.—(2) A person who is injured while getting into a public conveyance, after he has got on the step or

platform, but before the vehicle has begun to move is "riding as a passenger in a public conveyance," within the meaning of an accident insurance policy: Powis v. Ontario Accident Ins. Co., 1 O. L. R. 54.

THE ROAD BED AND ADJACENT LANDS.

108. Compare R. S. C. 1907, ch. 37, sec. 288 and R. S. O. 1914, ch. 146, sec. 5 and notes. The latter section was held not to apply to Dominion Railways: G. T. R. v. Washington, 1899, A. C. 275. The Dominion Act has been altered since that decision. As to application of Act to private railways: Cooper v. Hamilton Steel and Iron, 8 O. L. R. 353; note to R. S. O. 1914, ch. 146, sec. 5. Where a statutory direction has been imposed on an employer, and not observed, it is no defence that its non-observance is due to the negligence of a fellow servant of the person injured: Curran v. G. T. R., 25 A. R. 407. The right of action under this section is for the full amount of damages sustained, and the limitations of the Workmen's Compensation for Injuries Act, do not apply: Curran v. G. T. R., 25 A. R. 407. Unpacked frog: Default of contractor: Macdonald v. Walkerton and Lucknow, 1 O. W. N. 395, 15 O. W. R. 151. As to packing railway frogs: see Monkhous v. G. T. R., 8 A. R. 637; Clegg v. G. T. R., 10 O. R. 708; Misener v. Michigan Central, 24 O. R. 411; Le May v. C. P. R., 18 O. R. 314, 17 A. R. 293. The omission to have a lock at a railway switch, not otherwise securely guarded, is such negligence as to make the railway liable for the death of their servants resulting from the switch becoming misplaced: Rombough v. Balch, 27 A. R. 32. See *post*, notes to sec. 288, note (*m*).

109. See R. S. C. 1907, ch. 37. sec. 250, see *ante* sec. 54, (*k*), (*l*) and notes. Injury by flooding to lands adjoining right of way: Woods v. C. P. R., 1 O. W. N. 872, 16 O. W. R. 313. Flooding lands adjoining works: Niles v. G. T. R., 4 O. W. N. 820.

110. See R. S. C. 1907, ch. 37, sec. 251; R. S. O. 1914, ch. 198. Municipal drainage scheme: Re Dover and Chatham, 1 O. W. N. 327.

112. Relative rights and duties of railway companies and land owners, with regard to the use of farm crossings considered: Bender v. Canada Southern, 37 U. C. R. 25. Place for crossing: Burke v. G. T. R. 6 C. P. 484; In re Reist and G. T. R., 12 U. C. R. 675, Reist v. G. T. R., 6 C. P. R. 421. Other access: Carrol v. Great Western Ry., 14 U. C. R. 614. Delay in furnishing: Shaver v. Great Western, 6 C. P. 321. Acquisition of right of crossing by prescription: Guthrie v. C. P. R., 27 A. R. 64. Use by third party: Plester v. G. T. R. 32 O. R. 55. An owner whose land adjoins a railway upon one side is not entitled to a crossing: Therrien v. G. T. R., 30 S. C. R. 485. The statutory obligation to provide and maintain farm crossings originated in the Dominion Railway Act of 1888. The statutory provisions are not retroactive: Ontario Oil Lands v. Canada Southern, 1 O. L. R. 215; Carew v. G. T. R., 5 O. L. R. 653. Statutory right considered, also right to damages for insufficiency of crossing: see Re Armstrong and James Bay Ry., 12 O. L. R. 137. Compensation in lieu of crossing: Martin v. Maine Central Ry., Q. R. 19 S. C. 561. Agreement to provide entrance gates: right of way: T. H. & B. Ry. v. Hanley, 6 O. W. R. 921. Rights of landowners in established farm crossings and in maintenance of them: McKenzie v. G. T. R., 14 O. L. R. 671. Where a railway severs a farm and the company have made a farm crossing, no duty is cast on them, in the absence of agreement, to repair the approaches thereto within the farm: Palmer v. Michigan Central, 6 O. L. R. 90; see also 7 O. L. R. 87, and sec. 125 note. Maintenance of under-grade crossing: Leslie v. Pere Marquette, 2 O. W. N. 1316, 19 O. W. R. 613, 24 O. L. R. 206, 25 O. L. R. 326. What must be shewn in action for a farm crossing: title: jurisdiction: Bolduc v. C. P. R., Q. R. 23 S. C. 238. "Farm purposes:" use of crossing for business of brick yard: severance of ownership: T. H. & B. Ry. v. Simpson Brick Co., 13 O. W. R. 215, 17 O. L. R. 632. Damages for destruction of overhead farm bridge crossing, without authority from Commissioners: Kelly v. G. T. R. 13 O. W. R. 781, 1 O. W. N. 24, 211, 14 O. W. R. 602. Right to use culvert as a cattle pass: Oatman v. G. T. R., 2 O. W. N. 21, 16 O. W. R. 905.

"Farm:" "Land on either side of the railway" —discretion of the Board: Re New and T. H. & B. Ry. 12 O. W. R. 1049. Jurisdiction of Board: see Perrault v. G. T. R., 36 S. C. R. 671; McKenzie v. G. T. R., 14 O. L. R. 671.

113. Construction of farm crossing ordered: Riddell v. G. T. R., 22 O. W. R. 331.

114.—(1) The duty to fence is purely statutory. There is no common law liability to fence, either as regards the highway or adjoining properties: Westbourne Cattle Co. v. Manitoba and Northwestern Ry., 6 Man. L. R. 553; Gunning v. South Western Traction, 10 O. W. R. 285. For history of duty of railway companies to fence, and collection of cases: English, Scottish, Ontario and Manitoba: see appellant's factum, McKay v. G. T. R. 34 S. C. R. 81. A Dominion railway is not bound to comply with provincial legislation as to fencing: Madden v. Nelson and Fort Sheppard Ry., 5 B. C. 541, 1899, A. C. 626; and see Therrien v. G. T. R., 30 S. C. R. 485. Statutory obligation as to fences: McLeod v. Canadian Northern, 18 O. L. R. 616. The proper maintenance of cattle guards is a determining factor in considering whether the speed of a train is reasonable: Mackay v. G. T. R. 34 S. C. R. 81; Girard v. Quebec and St. John Ry., Q. R. 25, S. C. 245. Swing gates becoming unfastened through defective posts: Dolson v. C. P. R., 1 O. W. N. 1061. Duty to maintain sufficient gates: Dunsford v. Michigan Central, 20 A. R. 577; McMichael v. G. T. R., 12 O. R. 547. Consideration of effect of change of user of level crossing so as to increase the burden of the easement: Taff Vale Ry. v. Canning, 1909, 2 Ch. 48. Railway is under no obligation to fence each side of a culvert across a watercourse crossed by the railway: James v. G. T. R., 31 S. C. R. 420. Neglect of duty to fence will make company liable for death of infant, if the jury find that the deceased displayed such reasonable care as might be expected from one of his tender years: Tabb v. G. T. R., 8 O. L. R. 203; see also Newell v. C. P. R., 12 O. L. R. 21; Potvin v. C. P. R., 4 O. W. R. 511. Insufficient fence: children trespassing: invitation: Jenkins v. G. W.

R. 1912, 1 K. B. 525. Where horses escaped from land leased from railway company, where the tenant had agreed to maintain the fences: see Beck v. C. P. R., 10 O. W. R. 644. Owner of lands adjoining railway who has agreed to keep up gates, cannot claim against railway for defect in gates, and his tenant is in no better position: Yeates v. G. T. R., 14 O. L. R. 63. See as to duties regarding fences, gates and cattle guards: Dig. Ont. Case Law, col. 5878. See secs. 281, 282, 283 *post* and notes.

114.—(3) What is meant by passing "along" a highway: see Gunning v. S. W. Traction, 10 O. W. R. 285. Running along or across highways: see Dig. Ont. Case Law, col. 5881.

114.—(4) As to liability where cattle are at large contrary to the provisions of the Act: see sec. 281 *post*. Dilapidated fence: McCracken v. C. P. R. 13 O. W. R. 412. Extent of the statutory duty to maintain cattle guards and fences: see Hainer v. G. T. R., 36 S. C. R. 180. Injuries to animals at crossings: Ont. Dig. Case Law, col. 5898, by want of, or defects in fences, col. 5890, by want of, or defects in cattle guards, col. 5906.

114.—(5) Under the provisions of 6 Edw. VII., ch. 30, sec. 87 (4), the railway did not need to fence if the lands were not "improved or settled and enclosed." As to this see Phair v. Canadian Northern, 6 O. W. R. 137. What are settled and improved lands: McCracken v. C. P. R., 13 O. W. R. 412. Fencing; unenclosed lands: Re Ry. Commissioners' order and the C. N. O., 42 S. C. R. 443.

114.—(7) See notes to sec. 282, *post*.

115. Passing "along," "alongside of" a public highway: Gunning v. South Western Traction Co., 10 O. W. R. 285.

116.—(1) The car of a foreign corporation forming part of a Canadian train will render company liable if headway insufficient: Atcheson v. G. T. R., 1 O. L. R.

168. Railways are prohibited under a proper construction of this section from using higher freight cars than admit of seven feet clear headway: Deyo v. Kingston and Pembroke Ry., 8 O. L. R. 588: see McLauchlin v. G. T. R., 12 O. R. 418; Gibson v. Midland Ry., 2 O. R. 658; see R. S. O. 1914, ch. 146, sec. 5 (*a*) and notes.

116.—(4) As to erection and maintenance of bridge; operation and maintenance of swing: C. P. R. v. The King, 38 S. C. R. 211. Liability for repair of substitutional bridge: see Peterborough v. G. T. R., 32 O. R. 154, 1 O. L. R. 144. Contribution to cost and maintenance: Toronto v. G. T. R., 4 O. W. R. 304, 6 O. W. R. 632.

117. See First Schedule Regulation No. 8 of the Ontario Railway and Municipal Board Rules.

118.—(1) See R. S. C., ch. 37, sec. 235, 1-2 Geo. (D), ch. 22, sec. 6. Effect of order of Railway Committee; taking of lands: see Parkdale v. West, 7 O. R. 270, 8 O. R. 59, 12 A. R. 393, 12 S. C. R. 250, 12 A. C. 602; and see notes to sec. 91, *ante*. Operation on highways: see secs. 241, 246, 256, 259, 261. Evidence of consent of municipality: see Montreal Street Ry. v. Montreal Terminal Ry., 36 S. C. R. 369. See Schedule 1, Regulation No. 7 of the O. R. and M. Board Rules.

118.—(2) Where a railway track was being built across a city street lawfully and without negligence, neither the railway nor the municipality are liable in damages to a person who, while crossing, falls and is injured: Atkin v. Hamilton, 24 A. R. 389; Keachie v. Toronto, 22 A. R. 371; see R. S. O. 1914, ch. 192, sec. 460 (7).

119. Roadbed below level: G. T. R. v. Sibbald, 20 S. C. R. 259. Where the municipality raises the grade of highway, company not responsible: Carson v. Weston, 1 O. L. R. 15.

120. See 8-9 Edw. VII. (Dom.) ch. 32, sec. 4. Bridge over highway crossing; The Yonge Street Bridge Case: G. T. R. v. Toronto, 6 O. W. R. 852, 10 O. W. R. 483. It is no answer to the complaint of a landowner

where the company is proceeding without taking steps under secs. 81-90 to interrupt his use of a highway that the company has the authority of the Railway Committee. These sections apply to lands injuriously affected as well as to lands taken: Parkdale v. West, 12 A. C. 602; Hendrie v. T., H. & B. Ry., 26 O. R. 667, 27 O. R. 46; Jones v. Atlantic and North West Ry., Q. R. 14 K. B. 392. Apportionment of cost of construction of subway: Ottawa Electric v. Ottawa, 37 S. C. R. 355. Cost of maintenance of gates for the protection of the public at highway crossings: C. P. R. v. Toronto, 8 O. W. R. 348. By whom application can be made; private person: Re Reid and Canada Atlantic, 4 Can. Ry. Cas. 272; or municipality: Ottawa Electric v. Ottawa, 37 S. C. R. 355. Railways proceeding legally have right to cross streets without taking expropriation proceedings under the Act and without making compensation. See as to toll road acquired by city: Canada Atlantic v. Ottawa, 2 O. L. R. 336. A municipality may be a party interested in works for the protection of a railway crossing, though such crossing is neither within nor immediately adjoining its bounds: Carleton v. Ottawa, 41 S. C. R. 552. Liability of railway for action of watchman at gates: Hammond v. G. T. R., 9 O. L. R. 64. Reasonableness of precautions taken at crossing; necessity for watchman: Barclay v. Lake Erie and Detroit Ry., 30 S. C. R. 360. Absence of protection: Girouard v. C. P. R., Q. R. 19 S. C. 529. Dangerous crossing: Smith v. Niagara and St. Catharines Ry., 9 O. L. R. 158; and see sec. 129, 155, notes.

123. See 8-9 Edw. VII. (D), ch. 32, sec. 5 (1).

125. See 8-9 Edw. VII., ch. 32, sec. 8. Injury to infant playing; notice to public that bridge is not safe: Farrell v. G. T. R., 2 O. W. R. 85. Absence of railing: McInnes v. Egremont, 5 O. L. R. 713. See R. S. O. 1914, ch. 192, sec. 460 (7) and notes.

126. There is a distinction between an overhead bridge on a public highway and an approach on private lands. In the former case the approach is part of the bridge and is to be maintained by the railway; in the latter case it is for the owner to maintain the

approaches: Palmer v. Michigan Central, 7 O. L. R. 87; see sec. 86 note. A railway erected an overhead bridge, and afterwards without the consent of the municipality, raised it so that the approaches were at an incline greater than that prescribed. An accumulation of snow resulted and the plaintiff was injured. The accumulation of snow amounted to want of repair, for which the municipality was liable and the railway was also liable for misfeasance: Fairbanks v. Yarmouth, 24 A. R. 273.

127. Absence of signboard: Crouch v. Pere Marquette, 1 O. W. N. 637, 15 O. W. R. 694, 22 O. W. R. 333. When the planting of posts in the highway to support the signboard may be deemed a nuisance: see Soule v. G. T. R., 21 C. P. 308.

128. Liability of railway to repair approaches to level crossing: Hertfordshire County Council v. Great Eastern Ry., 1909, 2 K. B. 403.

129. Cf. R. S. C. 1907, ch. 37, sec. 227. As to precautions to be taken at highway crossings: see secs. 155, 156. As to regulations of the O. R. and M. Board as to crossings and junctions: see Schedule 1, No. 6. Crossing of provincial and Dominion railways: see R. S. C. 1907, ch. 37, sec. 8; C. P. R. v. G. T. R., 12 O. L. R. 320; see also Credit Valley Ry. v. Great Western Ry., 25 Gr. 507; G. T. R. v. Hamilton Radial Electric, 29 O. R. 143; C. P. R. v. Bay of Quinte Ry., 3 O. W. R. 542, 658. Jurisdiction of board to impose terms where one railway passes under another: James Bay Ry. v. G. T. R., 37 S. C. R. 372. Where junction with local railway is sought; municipal consent: see Toronto v. Metropolitan Ry., 31 O. R. 367. Board may order junction contrary to desire of one company: Niagara, St. Catharines, etc., Ry. v. G. T. R., 3 Can. Ry. Cas. 256. Protection and compensation: *Ib.* 263. Action on order; injunction: see C. P. R. v. Vancouver, Westminster & Yukon Ry., 10 B. C. R. 228. Indictment of railway companies for neglecting to maintain gates and post watchmen at crossing: R. v. G. T. R. and C. P. R., 12 O. W. R. 975. See *ante*, sec. 120, and *post*, sec. 157, notes.

131. See Montreal Park and Island Ry. v. Montreal, 43 S. C. R. 197, 256.

133. See *ante* secs. 2 (*k*) and 54 (*c*) and notes. Reservation by the Crown of minerals under right of way: see La Rose Mining Co. v. T. & N. O. Ry. Commission, 9 O. W. R. 513, 10 O. W. R. 516; T. & N. O. Ry. Com. v. Alpha Mining Co., 10 O. W. R. 1110, 13 O. W. R. 804. And see R. S. O. 1914, ch. 38, secs. 23, 24. Limestone is a "mineral:" Midland Ry. v. Robinson, 15 A. C. 19. So is clay: Midland Ry. v. Haunchwood Brick and Tile Co., L. R. 20 Ch. D. 552; Loosemore v. Tiverton, etc., Ry., L. R. 22 Ch. D. 25. Right of railway to subjacent and adjacent lateral support: Caledonian Ry. v. Sprot, 2 Jur. N. S. 623, 4 W. R. 659; Caledonian Ry. v. Belhaven, 3 Jur. N. S. 573; G. W. Ry. v. Bennett, L. R. 2 H. L. 27; Duke of Buccleugh v. Wakefield, L. R. 4 H. L. 399. Liability of railway for allowing water to flood mines below its right of way: Bagnall v. L. & N. W. Ry., 1 H. & C. 544.

138. Fire caused by accumulation of rubbish along tracks: see Rainville v. G. T. R., 25 A. R. 242, 29 S. C. R. 201; Grant v. C. P. R., 36 N. B. 528.

139.—(1) In an action to recover damages from fire, the plaintiff must shew something in the nature of negligence, *i.e.*, in construction or management or want of repair of the engine. The onus is not on the defendants to shew that they used reasonable contrivances with due care: Oatman v. M. C. R. R., 1 O. L. R. 145. *Qui jure suo utitur neminem laedit; nemo damnum facit nisi facit quod facere jus non habet*: Oatman v. Michigan Central, 1 O. L. R. 145, and cases there cited; New Brunswick Ry. v. Robinson, 11 S. C. R. 688; Canada Atlantic v. Moxley, 15 S. C. R. 145; Canada Southern v. Phelps, 14 S. C. R. 132; C. P. R. v. Roy, 1902, A. C. 220; Jackson v. G. T. R., 2 O. L. R. 689, 32 S. C. R. 245; Senesac v. Central Vermont, 26 S. C. R. 641. Where injury is occasioned by sparks from engine the railway is responsible without proof of direct negligence: Henley v. C. P. R., 21 Occ. N. 394. Injury from smoke: Re Macdonald and T., H. & B. Ry., 2 O. W. R., 721, 723. Fire from locomotive: Caledonia Milling Co. v. G.

T. R., 14 O. W. R. 394. Combustible material on right of way: Blue v. Red Mountain Ry., 12 B. C. Rep. 460, 39 S. C. R. 390, 1909, A. C. 361. Combustible matter: Laidlaw v. Crow's Nest Southern, 42 S. C. R. 355. Destruction by fire of wood piled near siding: Scott v. Pere Marquette, 13 O. W. R. 1113. Cause of fire; conjecture; evidence: Beal v. M. C. R. R., 19 O. L. R. 502, 1 O. W. N. 80, 14 O. W. R. 778. Fire damage to "standing bush." Rule of interpretation to be applied: Campbell v. C. P. R., 14 O. W. R. 144, 139, 18 O. L. R. 466. Meaning of "crops." Marsh hay baled and piled at siding destroyed by fire: Fraser v. Pere Marquette, 12 O. W. R. 531, 838, 13 O. W. R. 883, 18 O. L. R. 589. Damages for timber burnt by reason of negligence of railway; expiry of license: see Gillies v. Temiskaming and N. O. Ry. (No. 1), 10 O. W. R. 971. A Government Railway Commission are not responsible for the neglect or misconduct of servants: Gillies v. Temiskaming and N. O. Ry. (No. 2), 10 O. W. R. 975; see R. S. O. 1914, ch. 38, sec. 35. Fire from engine; Government railway: Chamberlin v. The King, 42 S. C. R. 350. Leger v. the King, 43 S. C. R. 164. Prairie Fire Ordinances, how far *ultra vires*: The King v. C. P. R., 39 S. C. R. 476; see also as to limitations of provincial railway legislation herein: C. P. R. v. Notre Dame de Bonsecours, 1899, A. C. 367; Madden v. Nelson and Fort Sheppard Ry., 1899, A. C. 626.

139.—(2) Fire insurance; credit for insurance moneys: Stratford v. T., H. & B. Ry., 6 O. W. R. 698.

139.—(6) An insurance company incorporated in Ontario insured a railway, part of whose line ran through Maine, against loss or damage to property in Maine, not including that of the assured. The policy was held not to cover standing timber, which the charter of the company did not permit it to insure. The policy was not on that account of no effect, as it covered other property in which the railway had an insurable interest and the premium was not recoverable: C. P. R. v. Ottawa Insurance Co., 9 O. L. R. 493, 11 O. L. R. 465, 39 S. C. R. 405.

141. Lapse of chartered powers; injunction to prevent construction of another railway: Chateauguay and

Northern Ry. v. Montreal Park and Island Ry., 35 S. C. R. 48. Commencement of work: Ontario and Sault Ste. Marie Ry. v. C. P. R., 14 O. R. 432; see Parkdale v West, 12 A. C. 602. Right to land owing to non-completion of work: Grand Junction Ry. v. Midland Ry., 7 A. R. 681. Forfeiture of charter: Hardy Lumber Co. v. Pickerel River Improvement Co., 29 S. C. R. 211. Failure to organize: see Hodgins v. O'Hara, 22 Occ. N. 29, 133. Limitation of time for exercise of statutory powers: Midland Ry. v. Great Western Ry., 1908, 2 Ch. 455, 644, 1909, A. C. 445. Non-user: see sec. 240, *infra* and notes.

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144. Train " behind time," accident at crossing: Hanley v. M. C. R., 13 O. L. R. 560.

146.—(1*a*) Station houses and accommodation for passengers there: see notes to sec. 161, *post*.

146.—(1*b*) Carrying passengers; powers of conductor as constable: see *post*, sec. 226 and notes. Payment of fares: sec. 148 and notes. Passengers on passes, etc.: sec. 216 and notes. Railways are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers and not under obligation to carry safely: East Indian Ry. v. Kalidas Mukerjee, 1901, A. C. 396. Furnishing third-class carriages under G. T. R. Act: see Robertson and G. T. R., 9 O. W. R. 629, 14 O. L. R. 497, 39 S. C. R. 506, (1909) A. C. 325. A passenger on a second-class ticket cannot be compelled to travel in a smoking car: Jones v. G. T. R., 9 O. L. R. 723. Criminal responsibility of officers of company in not providing the accommodation called for in their Act: see Rex v. Hays, 14 O. L. R. 201. Right of passenger to a particular seat; authority of conductor: Brazeau v. C. P. R., 11 O. W. R. 136. Ejection of drunken passenger: Delahanty v. Michigan Central, 10 O. L. R. 388. Assault on passenger; duty of conductor: Blain v. C. P. R., 5 O. L. R. 334, 34 S. C. R. 75. Expulsion of passenger: Jones v. G. T. R., 9 O. L. R. 723. Passenger

carried in pursuance of a contract: Railway Mail Clerk Kenny v. C. P. R., 5 Terr. L. R. 420. Overcrowding: Burriss v. Pere Marquette, 9 O. L. R. 259. And see generally Dig. Ont. Case Law, col. 5558-5864.

146.—(1*c*) Damages through refusal by a railway to furnish proper facilities for forwarding freight: Robinson v. Canadian Northern, 43 S. C. R. 387. Liability for destruction of goods in carriage; contract: Allen v. C. P. R., 19 O. L. R. 510, 21 O. L. R. 416, 1 O. W. N. 84, 897, 14 O. W. R. 752, 16 O. W. R. 512. Carriage of goods; claim for detention; notice required by contract: Newman v. G. T. R., 20 O. L. R. 285, 21 O. L. R. 72, 1 O. W. N. 345, 705, 15 O. W. R. 101, 845. Carriage of goods; failure to deliver; fault of connecting carrier; contract: Laurie v C. N. R., 21 O. L. R. 178, 1 O. W. N. 777, 16 O. W. R. 139. Action to recover damages for loss of goods shipped; application of condition of contract to give notice of loss where loss not known: Sheppard v C. P. R., 11 O. W. R. 697. Loss of goods while in possession of intermediate carrier: Jenckes Machine Co. v. C. N. R., 14 O. W. R. 307. Delivery of goods without surrender of bill of lading: condition: time for claim for loss: Tolmie v. M. C. R. R., 14 O. W. R. 32, 19 O. L. R. 26. Conditions in bill of lading: Lafontaine v. G. T. R., Q. R. 26 S. C. 455; Gelmas v. C. P. R., Q. R., 11 S. C. 253; Sheppard v. C. P. R., 11 O. W. R. 697. Delivery to wrong person: Conley v. C. P. R., 32 O. R. 258, 1 O. L. R. 345. Delay in delivery: Corby v. G. T. R., 6 O. W. R. 81, 492. Destruction by fire: Chandler Massey v. G. T. R., 2 O. W. R. 286, 407, 427, 1044. Animals; nuisance: Bennett v. G. T. R., 2 O. L. R. 425. Non-delivery and conversion of goods: Smith v. Canadian Express, 12 O. L. R. 84. Negligence in forwarding perishable goods: James v. Dominion Express, 13 O. L. R. 211. Conditions limiting liability; requiring insurance: St. Mary's Creamery v. G. T. R., 8 O. L. R. 1. Claim for non-delivery: Frankel v. G. T. R., 33 S. C. R. 115. Special contract limiting liability: Buskey v. C. P. R., 11 O. L. R. 1. Misdelivery: Armstrong v. Mich. Central, 1 O. W. R. 714. Loss by fire: McMorrin v. C. P. R., 1 O. L. R. 561. Loss: Ferris v. C. P. R., 15 Man. L. R. 134.

Liability for loss: McCormack v. G. T. R., 6 O. L. R. 577; Parker v. G. T. R., 3 O. W. R. 651. And see generally as to carriage of goods: Dig. Ont. Case Law, col. 5830-5854. Contracts limiting liability: see notes to sec. 146 (7).

146.—(7) See R. S. C. 1906, ch. 37, sec. 284 (7). The approval of the Railway Board of a condition in the shipping bill requiring notice of loss to be given within 36 hours will not deprive a shipper of his right of action: Sheppard v. C. P. R., 11 O. W. R. 697, 16 O. L. R. 259; see Hayward v. Canadian Northern, 4 W. L. R. 299. Except as modified by statute, the responsibility of a common carrier rests in Canada on the common law and may be so limited by special contract that the carrier shall not be liable even in case of gross negligence, misconduct or fraud on the part of his agents: Dodson v. G. T. R., 7 Can. L. J. N. S. 263, P. C. Special contract limiting liability (see R. S. O. 1906, ch. 37, sec. 284 (7)); cases collected: see Mercer v. C. P. R., 12 O. W. R. 1212, 17 O. L. R. 585. Live stock contract; limitation of liability; connecting railway: Sutherland v. G. T. R., 13 O. W. R. 321, 18 O. L. R. 139. Loss of boxes shipped; condition in contract; necessity for notice of loss: Sheppard v. C. P. R., 16 O. L. R. 259. Carriage of goods; special contract limiting liability; omission to give notice of loss; Mercer v. C. P. R., 17 O. L. R. 585. Special contract limiting liability for carriage of horse and passenger: Heller v. G. T. R., 25 O. L. R. 117, 488. Reasonableness of condition limiting liability of carrier: Williams v. Midland Ry., 1908, 1 K. B. 252, 13 Com. Cas. 119. Notice to passenger of special conditions in special contract exempting railway from liability: Nelson v. G. T. R., 26 O. L. R. 437, 27 O. L. R. 290, 47 S. C. R. 622. Limitation of liability in respect of lost baggage: see sec. 151, *infra*, and notes. As to liability where passenger travelling on pass: see sec. 216 *infra* notes. See also notes to R. S. O. 1914, ch. 133 and ch. 137.

147. "Upon his hat or cap:" see Farewell v. G. T. R., 15 C. P. 427.

148. Freight tolls and their collection: see *post*, sec. 186 and notes. Passenger, conductor as constable: see

post, sec. 226 and notes. A conductor may be authorized in putting a passenger off a train who is unable to produce or refuses to produce his ticket (G. T. R. v. Beaver, 22 S. C. R. 498), but where a passenger has given up his ticket, a conductor is not authorized to eject him for failing to produce a "hat check:" Haines v. G. T. R., 5 O. W. N. 298. It is not the law in this country that a passenger rightfully travelling on his ticket is bound to pay fare wrongfully demanded or leave the train on the conductor's order at the peril of not being able to collect damages for the assault committed in expelling him by force: Dancey v. G. T. R., 20 O. R. 603, 19 A. R. 664. Expulsion from car; transfer refused; damages: Grinsted v. Toronto Ry., 24 O. R. 683, 21 A. R. 578, 24 S. C. R. 570. Expulsion for misconduct: Davis v. Ottawa Electric, 28 O. R. 654. What amounts to a refusal to pay fare: Fulton v. G. T. R., 17 U. C. R. 428; Duke v. Great Western Ry., 14 U. C. R. 369; G. T. R. v. Beaver, 22 S. C. R. 498. Putting passenger off; damages; accidental injury: Williamson v. G. T. R., 17 C. P. 615. Inconvenience: Huntsman v. Great Western Ry., 20 U. C. R. 24. Non-production of ticket; offer to pay fare: Curtis v. G. T. R., 12 C. P. 89. Presentation of old ticket: Davis v. Great Western Ry., 20 U. C. R. 27. Where a person having a return ticket is put off at an intermediate point, the cause of action arises there and not where the ticket was issued: Ralph v. Great Western, 14 C. L. J. 172. Where a passenger having a return excursion ticket requiring identification neglects to identify himself, he cannot recover damages for being put off after refusing to pay fare, although he offers to identify himself: Taylor v. G. T. R., 4 O. L. R. 357. Ejection of drunken passenger: Delahanty v. Michigan Central, 7 O. L. R. 690, 10 O. L. R. 388. And see provisions of sec. 226, *infra*. Expulsion from car for refusal to pay fare; injury to passenger: Paget v. Toronto Ry., 12 O. W. R. 330, 1102, 42 S. C. R. 488. Third-class fares: G. T. R. v. Robertson, 39 S. C. R. 506. This section not inconsistent with Toronto Ry. Act: Paget v. Toronto Ry., 42 S. C. R. 488. Railway tickets as personal property: R. v. Chapman, 1910, W. N. 131. Railway tickets and travellers: 45 C. L. J. 499.

149. The railway is liable for injuries received by a passenger who is compelled to resort to the platform as a result of overcrowding: Burriss v. Pere Marquette, 9 O. L. R. 259. Overcrowding is evidence of negligence: Metropolitan R. W. Co. v. Jackson, 3 App. Cas. 193. Voluntary standing on platform: see Hurd v. G. T. R., 15 A. R. 58. Passenger standing on platform: Cornish v. Toronto St. Ry., 23 C. P. 355. Negligence; fall from vestibule of car: Thonger v. C. P. R., 1 O. W. N. 725, 15 O. W R. 859. Standing on footboard: Fraser v. London St. Ry., 29 O. R. 411, 26 A. R. 383. Accident to passenger riding on platform of tramcar; dangerous arrangement of car: Dynes v. B. C. Electric, 15 B. C. Rep. 429, 47 S. C. R. 395.

151. Destruction of luggage; joint contract for carriage of Chinamen; action by one: Chan Dy Chea v. Alberta Ry., 1 W. L. R. 371. Unchecked luggage; the mere fact of a passenger retaining possession of some luggage does not relieve the company from their liability as common carriers: Gamble v. Great Western Ry., 24 U. C. R. 407, 3 E. & A. 163. Commencement of responsibility towards baggage of intending passenger: Kerr v. G. T. R., 24 C. P. 209. Termination of responsibility: Penton v. G. T. R., 28 U. C. R. 367; Vineberg v. G. T. R., 13 A. R. 93. Disappearance of money package, absence of negligence: Stearn v. Pullman Car Co., 8 O. R. 171. Liability of railway company for loss of baggage; carrier or warehouseman: Hamel v. G. T. R., 2 O. W. N. 1286, 19 O. W. R. 533. Liability for baggage destroyed in baggage room: Carlisle v. G. T. R., 20 O. W. R. 860, 3 O. W. N. 510. Checked baggage; continuous journey; connecting lines: Smith v. G. T. R., 35 U. C. R. 547. Contents; evidence: Thomas v. Great Western, 14 U. C. R. 389. Merchandise: Lee v. G. T. R., 36 U. C. R. 350; Shaw v. G. T. R., 7 C. P. 493. The fact that a lost trunk contains miscellaneous articles, some properly baggage and some not, will not disentitle the owner to recover the value of such as are proper personal baggage; special contract; limitation of amount: Anderson v. C. P. R., 17 O. R. 747, 17 A. R. 480; Bate v. C. P. R., 18 S. C. R. 697. Loss or damage to luggage: Harris v. G. W. R., 1 Q. B. D. 515; Henderson v. Stevenson,

[L. R. 2 H. L. Sc. 470. Loss of luggage containing commercial samples; measure of damages: Chapman v. Canadian Northern, 12 O. W. R. 1035. Limitation of carrier's liability in respect of lost luggage: Lamont v. Canadian Transfer, 11 O. W. R. 953, 12 O. W. R. 882, 13 O. W. R. 1181, 19 O. L. R. 292. Where condition printed on check limiting carrier's liability, onus is on carrier to shew assent of passenger, and this not being shewn, the passenger may recover the full value: Spencer v. C. P. R., 4 O. W. N. 1446, 29 O. L. R. 122. See as to contracts limiting liability: notes to sec. 146 (7), *ante*.

152. Indictment of railway company for carrying dangerous explosives: see Criminal Code, secs. 221-247; Rex v. Michigan Central, 10 O. W. R. 660, and cases there cited; see R. S. C. 1906, ch. 37, secs. 286, 287. Where the plaintiff's son was killed by the explosion of a bomb brought by passengers into the railway carriage, the company was held not liable: see this case, note to sec. 144: East Indian Ry. v. Kalidas Mukerjee, 1901, A. C. 396; see also Collett v. London North Western, 16 Q. B. 984.

154. Regulations of municipal board; general requirements for interlocking at drawbridges: Rules, p. 17.

155.—(1) "Train:" see Cox v. Great Western Ry., 9 Q. B. D. 106; McCord v. Cammell, 1895, A. C. 57; Hollinger v. C. P. R., 21 O. R. 705, 30 A. R. 244. "Is a handcar a train?" Burtch v. C. P. R., 13 O. L. R. 632. Apparently not: Vaccaro v. Kingston and Pembroke Ry., 11 O. W. R. 836; see *ante*, sec. 2 (*h*); see also R. S. O. 1914, ch. 146, sec. 3 (*e*), and notes. Trains moving reversely: see notes to sec. 158, *post*. Neglect to give the statutory warning: Peart v. G. T. R., 10 A. R. 191 (Privy Council decision reported 10 O. L. R. 753); Champaigne v. G. T. R., 9 O. L. R. 589; Smith v. Niagara and St. Catharines Ry., 9 O. L. R. 158; Moir v. C. P. R., 10 O. W. R. 413; Royle v. Canadian Northern, 23 Occ. N. 25, 14 Man. L. R. 275; New Brunswick Ry. v. Vanwart, 17 S. C. R. 35; G. T. R. v. Rosenberger, 9 S. C. R. 311; Sibbald v. G. T. R., 18 A. R. 184, 20 S. C. R. 259; Henderson v. C. A. R., 25 A. R. 437, 29 S. C. R. 632; Shoebrink v. C. A. R., 16 O. R. 515; Hanley v. Michigan Central,

13 O. L. R. 560; Burtch v. C. P. R., 13 O .L. R. 632; Hanna v. C. P. R., 11 O. W. R. 1069; Sexton v. G. T. R., 13 O. W. R. 566. Griffith v. G. T. R., 17 O. W. R. 509, 2 O. W. N. 252, 2 O. W. N. 1059, 19 O. W. R. 53; Zufelt v. C. P. R., 2 O. W. N. 1063, 19 O. W. R. 77. This section does not apply to an engine engaged in shunting, and never being in the course of its work more than 80 rods from any level crossing which it crosses: McAlpine v. G. T. R. (1913) A. C. 838. It is necessary only that the warning should be such as ought to be apprehended by a person of ordinary faculties, in a reasonably sound, active and alert condition, and that the time given to avoid the danger should be reasonably sufficient to enable a person of that description to avoid it: McAlpine v. G. T. R., (1913) A. C. 838.

"Look and listen:" Andreas v. C. P. R., 2 West. L. R. 249, 37 S. C. R. 1; Hainer v. G. T. R., 36 S. C. R. 180; Wright v. G. T. R., 12 O. L. R. 114; Sims v. G. T. R., 10 O. L. R. 330, 12 O. L. R. 39; Morrow v. C. P. R., 21 A. R. 149; Vallee v. G. T. R., 1 O. L. R, 224; Misener v. Wabash Ry., 12 O. L. R. 71, 38 S. C. R. 94; Peart v. G. T. R., 10 A. R. 191, 10 O. L. R. 753.

Duty to give statutory warning extends to employees: see Canada Southern v. Jackson, 17 S. C. R. 316; see also Curran v. G. T. R., 25 A. R. 407; Bennett v. G. T. R., 3 O. R. 446; C. P. R. v. Boisseau, 32 S. C. R. 424. Actions against railway in respect of persons injured crossing tracks: see Dunsmoor v. National Portland Cement, 2 O. W. N. 281, 17 O. W. R. 555. In an action for damages for personal injuries, a plaintiff relying on the breach of a statutory duty must prove not only the breach, but also that the breach caused the injuries: McAlpine v. G. T. R., (1913) A. C. 838. Injury to persons at crossings by collision with trains: Dig. Ont. Case Law, col. 5910; by fright at approach of train, *Ib.* col. 5917; by obstruction in the highway, *Ib.* col. 5919; contributory negligence, *Ib.* col. 5920. Cars placed so as to obstruct view: Hansford v. G. T. R., 13 O. W. R. 1184. Foot caught between rail and plank: Stevens v. C.

P. R., 4 O. W. N. 697. As to injuries to persons crossing tracks of street railway companies: see notes to sec. 259, *post*. Injuries to cattle: see notes to secs. 281-283, *post*. Damages anl negligence generally: see sec. 288, *post*, notes (*e*), (*g*), (*l*).

155.—(2) Gong to be sounded: Wallingford v. Ottawa Electric, 9 O. W. R. 495, 14 O. L. R. 383; Bell v. Winnipeg Electric, 15 Man. L. R. 338, 37 S. C. R. 515; Deslongchamps v. Montreal St. Ry., Q. B. 14 K. B. 355, 37 S. C. R. 685; and see notes to sec. 101, *ante*.

156.—(1) Cf. R. S. C. 1906, ch. 37, sec. 277; crossing after signal that the way is not clear: see Graham v. Great Western Ry., 41 U. C. R. 324. Train must stop and other brakes should be provided in case the air brakes fail: Brown v. Great Western Ry., 40 U. C. R. 333, 2 A. R. 64, 3 S. C. R. 159; see McKay v. Wabash Ry., 10 O. W. R. 416, 40 S. C. R. 251. Bringing train to standstill at crossing: Johnston v. Thousand Island Ry., 17 O. W. R. 7, 2 O. W. N. 91. Collision of street car with G. T. R. train; negligence, "railway shock:" Toms v. Toronto Ry., 17 O. W. R. 254, 2 O. W. N. 169, O. L. R. Neglect of motorman to shut off speed on approaching crossing: Brenner v. Toronto Ry., 13 O. L. R. 423, 15 O. L. R. 195.

156.—(3) See Regulations of the Board; interlocking system. Rules, p. 15.

157. As to excessive speed: see Dominion Act, R. S. C. 1906, ch. 37, sec. 275. Excessive speed of street railways: sec. 259, *infra*, and notes. And see also Andreas v. C. P. R., 2 W. L. R. 249, 37 S. C. R. 1; Tabb v. G. T. R., 8 O. L. R. 203; Filiatrault v. C. P. R., Q. R. 18 S. C. 491. Moving train causing bodily injury. Construction of section and consideration of the provisions as to protection in Dominion Act: Bell v. G. T. R., 29 O. L. R. 247; see also G. T. R. v. McKay, 34 S. C. R. 81.

Gates and watchmen at highway crossings: Negligence; gates at level crossing: Mackison v. G. T. R.,

1 O. W. N. 903, 16 O. W. R. 516. Level crossing fatality; open gates; absence of watchman: Fraser v. G. T. R., 1 O. W. N. 322. Injury to and death of watchman at highway crossing; failure to give warning of approaching shunting cars: Lamond v. G. T. R., 11 O. W. R. 442, 158, and see *ante* secs. 120, 129, notes.

158. This enactment is for the protection of servants of the company standing on or crossing the track, as well as other persons: McMullin v. Nova Scotia Steel, 39 S. C. R. 593. Neglect to signal: Wright v. G. T. R., 12 O. L. R. 114; Lett v. St. Lawrence and Ottawa Ry., 1 O. R. 545, 11 A. R. 1, 11 S. C. R. 422. The necessity for signal applies to trains in the station yard: Boisseau v. C. P. R., 32 S. C. R. 424; Bennett v. G. T. R., 3 O. R. 446. See also as to trains moving reversely: Anderson v. Northern Ry., 25 C. P. 301; Levoy v. Midland, 3 O. R. 623; Casey v. C. P. R., 15 O. R. 574; Hollinger v. C. P. R., 21 O. R. 705, 20 A. R. 244; Moyer v. G. T. R., 2 O. W. R. 83. Electric car running backwards: Balfour v. Toronto Ry., 5 O. L. R. 735. Car running on left hand track: Heath v. Hamilton Street Ry., 8 O. W. R. 937. Engine shunting reversely; absence of statutory warning: Hobley v. G. T. R., 13 O. W. R. 294. Train moving reversely: neglect of statutory duty: Lamond v. G. T. R., 16 O. L. R. 365. Electric car moving reversely on highway; headlight and fender: R. v. Toronto Railway, 10 O. L. R. 26. Fender when car moving reversely: Toronto v. Toronto Ry., 10 O. L. R. 730. Liability of company for injury to trackwalker; man not in a position to be seen by engine-driver: Gilchrist v. G. T. R., 14 O. W. R. 9. Liability for injury and death of workman run over by train moving reversely in yard: Giovinazzo v. C. P. R., 13 O. W. R. 24.

160. Where injury is sustained by passenger in sleeping berth by being thrown out, some negligence on the part of the company must be shewn to make it liable, such as excessive speed or defect in roadbed: Smith v. C. P. R., 31 S. C. R. 367. Negligence of servant of Pullman Car Company; liability of both companies: Decue v. Wabash Ry., 3 O. W. R. 102. Responsibility for money package taken from berth: Stern v. Pullman Car Co., 8 O. R. 171.

161. As to stations and land for same: see *ante* sec. 54 (g). Access to station over the permanent way to highway, and when long user of such may amount to invitation or license to use same: Anderson v. G. T. R., 27 O. R. 441, 24 A. R. 672, 27 S. C. R. 541. A railway is not bound to maintain any but the usual and direct road for access to the station: Walker v. Great Western Ry., 8 C. P. 161. Invitation to cross tracks at a station: Jones v. G. T. R., 16 A. R. 37, 18 S. C. R. 696. Injury to passenger through unguarded excavation in station grounds: Oldright v. G. T. R., 22 A. R. 286. Sloping station platform: Hansen v. C. P. R., 40 S. C. R. 194. Permission to alight at point beyond station: Fleming v. C. P. R. 11 O. W. R. 982. Liability for breach of statutory duty in not furnishing accommodation for passengers at station: Morrison v. Pere Marquette, 4 O. W. N. 186, 544, 889, 27 O. L. R. 271, 551, 28 O. L. R. 319.

MUNICIPAL BONUSES.

162. See R. S. O. 1914, ch. 192, sec. 397.

BY-LAWS, RULES AND REGULATIONS.

163. A railway company may be liable to an engine man for injuries received through obeying conductor whom he is bound to obey, and who breaks the company's rules: Miller v. G. T. R. 32 S. C. R. 454; but not to the representatives of a conductor who is killed as a result of his own neglect of rules: Fawcett v. C. P. R. 8 B. C. R. 393, 32 S. C. R. 721; Sloan v. Georgia Pacific Ry., 44 Am. & Eng. Ry. Cases 553. When the disobedience of the rule is not the proximate cause of the injury: see Birkett v. G. T. R. 35 S. C. R. 296. Where the disobedience of the rule is the proximate cause, the railway is not liable, though they may be at fault, e. g., under sec. 116: Deyo v. Kingston and Pembroke Ry., 8 O. L. R. 588; or may have permitted laxity in enforcement of their rules: Maycock v. Wabash Ry., 9 O. W. R. 546, 10 O. W. R. 127; or although there may be a plain defect in the condition of the way: Holden v. G. T. R., 5 O. L. R. 301. Where the disobedience of rules by an engine-driver results

in the death of another employee, the company is liable: Muma v. C. P. R., 14 O. L. R. 147. Consideration of rules directing motorman as to speed of cars, in action for negligence: Brenner v. Toronto Railway, 13 O. L. R. 423, 15 O. L. R. 195, 40 S. C. R. 540. Disobedience of rules: collision: Walker v. Wabash, 18 O. L. R. 21. Where accident to motorman due to his disregard of rules, he could not recover: Harris v. London St. Ry., 39 S. C. R. 398. No action for negligence lies where death results through neglect of company's rules by deceased: Pettigrew v. G. T. R., 2 O. W. N. 57, 709, 16 O. W. R. 989, 18 O. W. R. 531, 22 O. L. R. 23. Injury to servant when disobeying rules of railway company: Bist v. London and S. W. Ry., 1907, A. C. 209; Anderson v. Mikado Mining Co., 3 O. L. R. 581. See also *post*, sec. 288, note (*k*). And see R. S. O. 1914, ch. 146, sec. 3 (*d*), note.

165. Special instruction inconsistent with system: Fralick v. G. T. R., 43 S. C. R. 494, and see 1 O. W. R. 309, 15 O. W. R. 55.

170. Statutory powers given to company to make rules: R. v. Toronto Ry., 23 O. L. R. 187.

INSPECTION OF RAILWAYS.

175. Repairs and renewals: Re West Toronto and Toronto Ry., 25 O. L. R. 9.

TOLLS.

177. The fact that a railway company has not had its tolls approved by order in council, was held not in itself to entitle the passenger to recover back the amount paid where it was such as he ought to have paid: Tees v. Ottawa and New York Ry., 31 O. R. 567. Authorized tolls: Duthie v. G. T. R., 4. Can. Ry. Cas. 304. Reasonable rates: Cooperage Stock Rates, 3 Can. Ry. Cas. 421; United Factories v. G. T. R., 3 Can. Ry. Cas. 424.

186.—(3) Passenger fares or tolls: see *ante* sec. 148 and notes. Lien for tolls: Re C. P. R. and Warren, 13 O. W. R. 225. "Owner's risk:" Swale v. C. P.

R., 4 O. W. N. 884, 5 O. W. N. 402, 24 O. W. R. 224. "Seize:" Carriers lien when maintainable and when terminated: Clisdell v. Kingston & Pembroke Ry., 13 O. W. R. 626, 18 O. L. R. 169. Carriage of goods received by railway subject to general lien for money due by shippers on any account. Rights of consignor stopping *in transitu*, as against railway: U. S. Steel Products Co., v. G. W. Ry. Co., 1913, 3 K. B. 357.

186.—(4) When sale of perishable goods delayed by strike, justified on part of carrier: Suris v. Midland Ry., 1913, 1 K. B. 103. Action for conversion of goods against railway and auctioneers: Swale v. C. P. R., 4 O. W. N. 884, 5 O. W. N. 402, 24 O. W. R. 224.

187. Tolls: Discrimination: Scott v. Midland Ry., 33 U. C. R. 580; Atty. Gen. v. Ontario, Simcoe and Huron, 6 Gr. 446. McDougall v. Covert, 18 C. P. 119; Re Cedar Lumber Products, 3 Can. Ry. Cas. 412; Re Tower Oiled Clothing, 3 Can. Ry. Cas. 417; Re Manufacturers Coal Rates, 3. Can. Ry. Cas. 438; Re Brant Milling Co., 4 Can. Ry. Cas. 259. Special rates: Re Canadian Freight Association, 3 Can. Ry. Cas. 427. By-laws: Discrimination; Scott v. Midland Ry., 33 U. C. R. 580.

188. Freight classification: Re Sydenham Glass Co., 3 Can. Ry. Cas. 409; Re Fruit Growers, 3 Can. Ry. Cas. 430; Re Almonte Knitting Co., 3 Can. Ry. Cas. 441.

200. Joint International tariffs: G. T. R. and British American Oil Co., 43 S. C. R. 311. The Board of Ry. Commissioners for Canada cannot make orders respecting through traffic over a provincial railway or tramway, which connects with or crosses a railway subject to the authority of the Parliament of Canada: Montreal St. Ry. v. Montreal, 43 S. C. R. 197, 256.

210. See wording of sec. 6 *ante*. Board to try all cases of breach of agreement, *post* sec. 260. Action to enforce agreement to sell "workmen's ticket," or limited tickets: see Hamilton v. Hamilton St. Ry.,

8 O. L. R. 642, 10 O. L. R. 594, 39 S. C. R. 673; Kingston v. Kingston Electric, 25 A. R. 462. Agreement as to special rates: Re Montreal Island Ry. and Montreal, 43 S. C. R. 256. School children's rates: Re Sandwich East and W. & T. Electric Ry., 12 O. W. R. 370, 16 O. L. R. 641. (See note to R. S. O. 1914, ch. 266, sec. 48 (3)). International Ry Co., at Niagara Falls, within the exception in sub-sec. (3): Re Niagara Falls Board of Trade and I. Ry. Co., 20 O. L. R. 197, 1 O. W. N. 312, 15 O. W. R. 119.

211. See R. S. C. 1906, ch. 37, sec. 317. Liability beyond railway's own line: delivery to connecting company's nearest station: Devlin v. G. T. R., 30 U. C. R. 537. Subsequent delay: Rogers v. G. W. Ry., 16 U. C. R. 389. Delivery to wrong person: Rennie v. Northern Ry., 27 C. P. 153. Subsequent loss: La Pointe v. G. T. R., 26 U. C. R. 479; and other cases: Dig. Ont. Case Law, cols. 5839-5843. Liability for goods received from other companies; through rate: Gordon v. G. W. Ry., 34 U. C. R. 224, 25 C. P. 488. Refusal of connecting company to receive goods: Crawford v. G. W. Ry., 18 C. P. 510, etc., Dig. Ont. Case Law, cols. 5843-5846; see also Vickers Express Co. v. C. P. R., 13 A. R. 210. Running arrangements: see Dig. Ont. Case Law, cols. 6039-6044. See also *ante*, sec. 65, notes.

212. Interchange of traffic with municipal railway: Toronto v. Toronto Ry., 26 O. L. R. 225, 3 O. W. N. 1021, 21 O. W. R. 723. See also *ante*, sec. 65 (8), notes.

216. Generally, as to agreements limiting the railway's liability: see sec. 146 (7) and notes. Liability in respect of luggage: see sec. 151 notes. In the absence of gross negligence a carrier is not liable for injuries sustained by a gratuitous passenger: Nightingale v. Union Colliery, 9 B. C. R. 453, 35 S. C. R. 65; Moffatt v. Bateman, L. R. 3 P. C. 115. Where condition in pass freeing company from liability not accepted by passenger: Franchère v. Central Vermont Ry., 35 S. C. R. 68. A head-on collision is *prima facie* evidence of negli-

gence as will entitle a gratuitous passenger to damages: Ryckman v. Hamilton Grimsby, etc., Ry., 10 O. L. R. 419. A condition freeing the company from liability is valid and can be taken advantage of by a connecting railway company: Bicknell v. G. T. R., 26 A. R. 431. Generally as to validity of agreements limiting the railway's liability: see sec. 146 (7). Reduced rates in consideration of non-liability: Cobban v. C. P. R., 26 O. R. 732, 23 A. R. 115; Drainville v. C. P. R., Q. R. 22 S. C. 480. Non-liability contract where shipper travelling on pass: Heller v. G. T. R., 3 O. W. N. 275, 642, 20 O. W. R. 478, 21 O. W. R. 219, 25 O. L. R. 117, 488. Injury to persons in charge of live stock, and travelling on a pass: Goldstein v. C. P. R., 1 O. W. N. 1086, 2 O. W. N. 964, 21 O. L. R. 575, 23 O. L. R. 536; Robinson v. C. P. R., 14 O. W. R. 706, 16 O. W. R. 725. Injury to person riding for half fare, and in charge of cattle: Robinson v. G. T. R., 3 O. W. N. 1345, 4 O. W. N. 309, 22 O. W. R. 290, 26 O. L. R. 437, 27 O. L. R. 290. Limiting liability by posting notice in cars that the fare less than the statutory maximum, and that in consideration of the reduced fare the company would not be liable beyond £25 damages: Held that perhaps they might do this by publishing alternative lists of fares and allowing passengers to elect: Clarke v. West Ham, 1909, 2 K. B. 858.

222. Applies only where the constable arrests the offender, and takes him before the justice, and not where a summons issues: R. v. Hughes, 26 O. R. 486. Where a railway watchman who was also a constable under the Railway Act, made an arrest and subsequently an action was brought for false arrest, it was held that the defendant company was not liable as the watchman acted, not as their servant, but as an officer of the law, in which capacity they exercised no control over him: Thomas v. C. P. R., 14 O. L. R. 55; see O'Donnell v. Canada Foundry, 5 O. W. R. 215; Dennison v. C. P. R., 36 N. B. 250. Liability of railway company for acts of constable: Nazarino v. C. P. R., 11 O. W. R. 662. See *post*, sec. 288, note (*j*).

POWERS OF PASSENGER CONDUCTORS AS CONSTABLES.

226. Ejection of drunken passenger: Delahanty v. Michigan Central, 10 O. L. R. 388. Assault on passenger: duty of conductor: Blain v. C. P. R., 5 O. L. R. 344, 34 S. C. R. 75. Expulsion of passenger: Jones v. G. T. R., 9 O. L. R. 723. Street car conductor justified in ejecting passenger who refuses to remove his feet from cushions: Davis v. Ottawa Electric Ry., 28 O. R. 654. Right of conductor to remove passenger from seat taken by another and temporarily vacated: Brazeau v. C. P. R., 11 O. W. R. 136. Expulsion from car: resulting chill, and illness: Grinsted v. Toronto Ry., 24 O. R. 683, 21 A. R. 578, 24 S. C. R. 570. See *post*, sec 288 note (j).

STREET RAILWAYS AND RAILWAYS OPERATING ALONG HIGHWAYS.

228. "Along highways:" see as to what this means, Gunning v. South Western Traction Co., 10 O. W. R. 285.

229. A railway company having only the usual statutory powers is not entitled, in the absence of express powers, to carry on the business of omnibus proprietors ancillary to its undertaking: Atty. Gen. v. Mersey Ry., 1906, 1 Ch. 811. "Tracks" mean, when applied to a railway laid on a highway, that part of it occupied by the railway: Re Toronto and Toronto and Suburban, 29 O. L. R. 105.

231. Agreements with street railways and the enforcement of them: see notes to secs. 259, 260 *post*. As to passenger fares on electric railways: see *ante* sec. 210 notes. Construction of agreement between Toronto and Toronto Railway: see City of Toronto v. Toronto Ry., 1907, A. C. 315; Re Toronto Ry. and Toronto, 19 O. L. R. 396. Effect of Toronto v. Toronto Ry., 1907, A. C. 315, and 8 Edw. VII., ch. 112, sec. 1, as to powers of Toronto Ry.: Re Toronto Ry. v. Toronto, 19 O. L. R. 396. Agreement with municipality: Re Waddington and York Radial, 4 O. W. N. 617.

231.—(*a*) Position of municipality when performance of agreement by company is prevented by the effect

of legislation, or by reason of the occupation of the street by another railway, with or without lawful authority: Ottawa v. Ottawa Electric Ry., 1 O. L. R. 377. Acquisition of land for car-barns; right of city to expropriate: Toronto Ry. v. Toronto, 13 O. L. R. 532, 1907 A. C. 315.

231.—(*f*) Extension of lines: City of Toronto agreement: neither the company nor the corporation has any street railway powers within new territorial additions, made during the term: remedy on failure to lay down new lines: company to determine what new lines should be laid, routes adopted, and stops chosen: Toronto v. Toronto Railway, 1907, A. C. 315; see also Toronto v. Toronto Ry., 5 O. W. R. 130, affirmed by P. C., see 1906, A. C. 117. Authority of city engineer to fix stopping places for cars: construction of agreement with municipality: Toronto v. Toronto Ry., 11 O. L. R. 103, 12 O. L. R. 534; Toronto v. Toronto Ry., 5 O. W. R. 130, affirmed 1906, A. C. 117. Operation, breach of conditions, construction and location of lines, use of highway, car service, time table, newly annexed territory: Toronto v. Toronto Ry., 9 O. L. R. 333, 10 O. L. R. 657, 37 S. C. R. 430. Streets in newly annexed territory, recommendation of engineer, option to others to lay down rails, stopping places: Toronto v. Toronto Ry., 11 O. L. R. 103, varied, 12 O. L. R. 534. Right to lay new tracks under Toronto city agreement: Toronto Ry. v. Toronto, 14 O. W. R. 578, 1 O. W. N. 5; see also Toronto v. Toronto Ry., 1907, A. C. 315; and 55 Vic. ch. 99, 8 Edw. VII., ch. 112.

231.—(*h*) By-law as to routes and speed; necessity for mayor's signature; ratio of track mileage to increased population; newly annexed territory: London St. Ry. v. London, 9 O. L. R. 439. As to damages for injuries from excessive speed: see *post* sec. 259 (f) and notes.

231.—(*i*) Agreement as to special rates: Re Montreal Island Ry., and Montreal, 43 S. C. R. 256. Enforcing agreement as to workmen's tickets: Hamilton v. Hamilton St. Ry., 39 S. C. R. 673; and see notes to sec. 210 *ante*.

231.—(*j*) Agreement for percentage of receipts; traffic beyond city: Hamilton v. Hamilton St. Ry., 8 O. L. R. 455. 10 O. L. R. 575, 38 S. C. R. 106; Montreal v. Montreal St. Ry., 1903, A. C. 482; Montreal St. Ry. v. Montreal, 1906, A. C. 100. Construction of the Toronto Railway agreement; mileage payments; interest: Toronto Ry. v. Toronto, 1906, A. C. 117.

232. Assumption of ownership of street railway by municipality: Re Berlin and Waterloo St. Ry. and Berlin, 19 O. L. R. 57, and see *post*, sec. 246, notes.

234. See R. S. O. 1906, ch. 37, secs. 9, 44, also Lord's Day Act, 6 Edw. VII., (D) ch. 27, especially sec. 3 (g-k), and R. S. O. 1914, Vol. II., p. 2962, see also sec. 241 *post*. Consideration of section, and constitutionality of it: Dominion and Provincial legislation regarding operation of railways on Sunday: Kerley v. London & Lake Erie, 3 O. W. N. 1498, 4 O. W. N. 1234, 26 O. L. R. 588, 28 O. L. R. 606. Sunday law respecting provincial railways: see article 48 C. L. J. 677.

239. Injury to gas pipes; pleading defences: Consumers Gas Co. v. Toronto Ry., 10 O. W. R. 105. Wires on public highway in proximity to bridge: Gloster v. Toronto Electric Light, 12 O. L. R. 413, 38 S. C. R. 27. Injury to person; proximity to highway: Findlay v. Hamilton Electric, 9 O. W. R. 434, 773, 11 O. W. R. 46. Exposed Switch: Bradd v. Whitney, 9 O. W. R. 656. Allowing guy wire to hang loose; contact with live wire: Labombarde v. Chatham Gas Co., 10 O. L. R. 446. Electric shock; death caused by: Royal Electric Co. v. Hevi, 21 Occ. N. 442. Electric wire; trespasser; use of pole by stranger: Randall v. Ottawa Electric, 6 O. L. R. 619, 24 Occ. N. 262, 4 O. W. R. 240, 269, 6 O. W. R. 913; Randall v. Ahearn and Soper, 34 S. C. R. 698. Electric wires; statutory authority; contact with derrick: Dumphy v. Montreal Light Co., Q. R. 28 S. C. 18, Q. R. 15, K. B. 11; and see R. S. O. 1914, ch. 146, sec. 3 (*a*) note.

240. Forfeiture of charter. The non-completion of work within the time limit would not *ipso facto* forfeit

the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared: Hardy v. Pickerel River, 29 S. C. R. 211. Where a company had a time limit within which to organize and obtain a license after the passing of its incorporating Act, no license having been obtained, the company ceased to exist when the time expired: Hodgins v. O'Hara, 22 Occ. N. 133. Forfeiture; effect on title to lands: Grand Junction v. Midland Ry., 7 A. R. 681; and see notes to sec. 141 *ante*.

241. Where a company are empowered to lay wires underground or overhead, there is no obligation on them on the ground of affording greater protection to the public, to lay their wires underground and not overhead. In the absence of evidence that such a precaution would have been efficient, there was no negligence in the respondents not insulating or guarding their wires: Dumphy v. Montreal Light, 1907, A. C. 454. Working of engines causing so much vibration as to render house uninhabitable, and to create a nuisance though doing no actual structural injury: see Hopkin v. Hamilton Electric, 2 O. L. R. 240. Power to erect poles to carry power line without leave of municipality: T. & N. Power Co. v. North Toronto, 28 T. L. R. 563, 23 O. W. R. 85. Consent by municipal authority a condition precedent to use of highway: Montreal Street Ry. v. Montreal Terminal Ry., 36 S. C. R. 369. Necessity for mayor's signature to by-law: London Street Ry. v. London, 9 O. L. R. 439. Railways on municipal streets: G. T. P. v. Fort William, 43 S. C. R. 412.

243. "Deviation" and relocation, section considered: Toronto v. Toronto and York Radial, 4 O. W. N. 784, 28 O. L. R. 180, 25 O. W. R. 315 (P. C.); and see notes to sec. 71 (3) *ante*.

245. As to effect of omission from private Act of general power to take land: Hopkins v. Hamilton Electric, 2 O. L. R. 240. As to expropriation: see secs. 81 to 90 and 91 *ante* and notes. As to terms on which an application for immediate possession may be granted: see sec. 90 (19) *et seq.*, and notes.

246. Municipality assuming ownership; principle of valuation; railway franchises and privileges: Town of Berlin and Berlin and Waterloo Ry., 8 O. W. R. 284, 9 O. W. R. 412, 13 O. W. R. 157, 19 O. L. R. 57, 42 S. C. R. 581; see also Kingston v. Kingston Light Heat and Power Co., 3 O. L. R. 637, 5 O. L. R. 348, affirmed by Privy Council, 20 April, 1904; Edinburgh Street Tramway v. Edinburgh, 1894, A. C. 456; Stockton and Middleboro Water Board v. Kirkleathem Local Board, 1893, A. C. 444; Re Berlin and Waterloo St. Ry. and Berlin, 19 O. L. R. 57, and see *ante*, sec. 232, and notes.

253. Absence of fenders on electric cars; cars running reversely; criminal law: R. v. Toronto Ry., 10 O. L. R. 26. Application of, and powers of the Board: Rex v. Toronto Ry., 2 O. W. N. 753, 18 O. W. R. 104. The "front" of a car is the end furthest forward when the car is in motion. The defendants operating a car 1,200 feet with the fender at the back, as so defined, were liable to the penalty: Toronto v. Toronto Ry. Co., 10 O. L. R. 730.

259.—(*a*) Duty to keep rails flush with street: Fox v. Cornwall St. Ry., 11 O. W. R. 222, 12 O. W. R. 942. Track, ties and rail above the level of highway; unreasonable user: Pow v. West Oxford, 11 O. W. R. 115; Harris v. Mills, 3 Ex. D. 271. Liability of railway company for grading: Macdonnell v. B. C. Electric Ry., 9 B. C. R. 542 (see as to railways, sec. 91 *ante*). Height of rails; change in street level: Eddy v. Ottawa City Passenger Ry., 31 U. C. R. 569. Enforcement of contract providing that rails be kept flush; nuisance, abatement: Atty. Gen. v. Toronto Street Ry., 14 Gr. 673, 15 Gr. 187. Indictment: R. v. Toronto St. Ry., 24 U. C. R. 454. Roadbed below level: G. T. R. v. Sibbald, 20 S. C. R. 259.

259.—(*c*) Liability for cost of new pavement between rails: St. Catharines v. Niagara, etc., Ry. Co., 14 O. W. R. 116.

259.—(*d*) Repair of streets; liability of municipality and remedy over against street railway: Carty v. London, 18 O. R. 122; Mead v. Etobicoke, 18 O.

R. 438; Stuart v. Metropolitan Ry., 6 O. W. R. 255; Van Cleaf v. Hamilton St. Ry., 5 O. W. R. 278, 628; Marsh v. Hamilton, 3 O. W. R. 525; Pow v. West Oxford, 11 O. W. R. 115. Obligation to keep highways in repair; agreement with street railway company; relief over: Robertson v. Toronto, 12 O. W. R. 870, 932. Contract with city corporation: repair of roadway outside rails: Re Hamilton and Hamilton St. Ry. Co., 1 O. W. N. 948, 16 O. W. R. 279. Non-repair of portion of highway occupied by street railway tracks: injury to person: Van Cleaf v. Hamilton St. Ry., 5 O. W. R. 278, 628; Borough of Bathurst v. Macpherson, 4 App. Cas. 256; Bull v. Shoreditch, 19 T. L. R. 64, 20 T. L. R. 254.

259.—(*f*) A street railway company is bound to recognise the rights and necessities of public travel, and so regulate the speed of their cars that they may be quickly stopped should occasion require it. They have no exclusive right of way at any speed they please: Gosnell v. Toronto Railway, 21 A. R. 553, 24 S. C. R. 582; see also King v. Toronto Ry., 8 O. W. R. 507. Excessive speed: Brenner v. Toronto Ry., 13 O. L. R. 423, 15 O. L. R. 195; Wallingford v. Ottawa Electric, 14 O. L. R. 383; Hill v. Toronto Ry., 9 O. W. R. 988; Deslongchamps v. Montreal Street Ry., 37 S. C. R. 685; Taylor v. Ottawa Electric Ry., 8 O. W. R. 612; Furlong v. Hamilton St. Ry., 2 O. W. R. 1007; Livingstone v. Sydney and Glace Bay, 37 N. S. Rep. 336; Mulvaney v. Toronto Ry., 7 O. W. R. 644, 38 S. C. R. 327; Inglis v. Halifax Electric Ry., 32 N. S. Reps. 117, 30 S. C. R. 256; Haight v. Hamilton St. Ry., 29 O. R. 279; Ewing v. Toronto Ry., 24 O. R. 694; Gosnell v. Toronto Ry., 21 A. R. 553, 24 S. C. R. 582; Danger v. London St. Ry., 30 O. R. 493; Green v. Toronto Ry., 26 O. R. 319; Brown v. London St. Ry., 2 O. L. R. 53; Dart v. Toronto Ry., 4 O. W. N. 315, 23 O. W. R. 380; McBain v. Toronto Ry., 1 O. W. N. 169, 395; Myers v. Toronto Ry., 4 O. W. N. 1120; Rice v. Toronto Ry., 1 O. W. N. 912, 2 O. W. N. 405, 16 O. W. R. 527, 17 O. W. R. 770, 22 O. L. R. 446; Jones v. Toronto and York Radial, 1 O. W. N. 267, 906, 14 O. W. R. 1168, 16 O. W. R. 522, 20 O. L. R. 71, 21 O. L. R. 421, 23 O. L. R. 331, 25 O. L. R. 158; Brill v. Toronto Railway, 13 O. W.

R. 114; Goodyear v. Toronto and York Radial, 13 O. W. R. 648; Huisley v. London St. Ry., 16 O. L. R. 350. Injury to infant; reckless speed: Lott v. Sydney and Glace Bay Ry., 42 S. C. R. 220. Injury to person driving on highway owing to horse becoming unmanageable through excessive speed of car: Foreman v. Berlin and Waterloo St. Ry., 11 O. W. R. 756. Injury to person crossing track after alighting—excessive speed: Cooper v. London St. Ry., 3 O. W. N. 1277, 22 O. W. R. 87, 4 O. W. N. 623; See *ante*, sec. 155 and notes; *post*, sec. 288 notes (*e*) (*f*).

259.—(*i*) The duty is cast on the company to exercise its privilege to remove the snow in a reasonable and proper way and without negligence: Mader v. Halifax Electric, 37 S. C. R. 94. Liability of the company to indemnify the city against damages recovered for injury to a person in consequence of being upset by snowbank thrown up by company: Mitchell v. Hamilton, 2 O. L. R. 58; Toronto v. Toronto Ry., 24 S. C. R. 589. Rights of company to sweep snow and to use electric sweepers: Montreal v. Montreal St. Ry., 1903, A. C. 482; Toronto v. Toronto Ry., 16 O. L. R. 205. Blocking highway a nuisance: Bell v. Cape Breton Electric, 37 N. S. Reps. 298. Removal of snow from street car tracks: Acton v. London U. T., 1909, 1 K. B. 68; Shea v. Reid Newfoundland Co., 1908, A. C. 520.

259.—(*o*) "The common law doctrine applicable generally to public highways in this country is that the public are entitled not only to a free passage along the travelled part, but to a free passage along any portion not in actual use of another traveller:" Per Boyd, C.: Pow v. West Oxford, 11 O. W. R. 115. What is meant by a "crossing" in the ordinary sense. It is not confined to the crossing of an intersecting street: Wallingford v. Ottawa Electric Ry., 14 O. L. R. 383; Brenner v. Toronto Ry., 13 O. L. R. 423. Consideration of "right of way:" Jones v. Toronto and York Radial, 23 O. L. R. 331, 25 O. L. R. 158. Mutual duty of motorman and driver of vehicle: Herron v. Toronto Ry., 28 O. L. R. 59. Driving waggon on car tracks when run into by car: Suri v. Port Arthur, 2 O. W. N. 864, 18 O. W. R. 822. Foot

passenger crossing street railway tracks: Slingsby v. Toronto Ry., 3 O. W. N. 1161, 21 O. W. R. 980. Passenger after alighting, crossing tracks: Cooper v. London St. Ry., 22 O. W. R. 87, 3 O. W. N. 1277, 4 O. W. N. 623. Reciprocal duties of motorman and driver of vehicle crossing tracks: 1 D. L. R. 783. See *post*, sec. 288, notes (*e*), (*f*).

260. See sec 105 (5) *ante*. Agreements with municipalities: see secs. 231 and 259, *ante* and notes. Passenger fares on electric railway: see *ante*, sec. 210 and notes. Order can be made specifying what is necessary to be done to constitute a substantial compliance with the agreement. But the Court will not grant specific performance where it cannot oversee the carrying out of the judgment if granted: Kingston v. Kingston Electric Ry., 25 A. R. 462. Specific performance of an agreement by a street railway company with a municipal corporation: Ottawa v. Ottawa Electric, 1 O. L. R. 377. Enforcement of agreement with municipality: Toronto v. Toronto Ry., 16 O. L. R. 205. The Board has authority to try all cases of breach of agreement, whether it is alleged by a municipal corporation that the railway company are guilty of the breach or *vice versa*: Toronto Suburban v. Toronto Junction, 11 O. W. R. 108. Order for repair or renewal of tracks and appeal: Re West Toronto and Toronto Ry., 25 O. L. R. 9. This section considered: Waterloo v. Berlin, 28 O. L. R. 206.

EXAMINATION FOR COLOUR BLINDNESS.

264. Where a railway permit an employee to engage in operation of trains without passing tests required by the Railway Commission they are liable for damages resulting: Jones v. C. P. R., 3 O. W. N. 1404, 13 D. L. R. 900 (P. C.). See *post*, sec. 288, note (*k*).

ACTIONS FOR DAMAGES.

265. Damages in general: see cases noted *post*, sec. 288. Damages for change in grade of streets, closing streets, interference with access: see *ante*, sec. 91, notes. Compensation where lands are taken, *ante*, sec. 90, esp. sub-sec. (9) and notes. Damages from fires, sec. 139. Failure to provide accommodation:

secs. 146, 161. Safety appliances: sec. 99. Non-protection of wires, etc.: sec. 239. Liability of directors: sec. 288. Freight contracts: sec. 146 (1c). Contracts limiting liability: sec. 146 (7). Damages through operation of street cars at excessive speed: sec. 259 (*f*). "Construction and operation of the railway:" Anderson v. C. N. R., 45 S. C. R. 355. Damages by "reason of construction:" West v. Corbett, 47 S. C. R. 596. Validity of the corresponding section of the Dominion Act, now R. S. C. 1906, ch. 37, sec. 306, discussed: see McArthur v. N. P. Junction Ry., 15 O. R. 733, 17 A. R. 86. What "damages" are included in the words of the section (*Ib.*), (followed: Lumsden v. T. & N. O., 10 O. W. R. 115, 11 O. W. R. 78). The Government Railway Commission is entitled to the benefit of this section: Lumsden v. Temiskaming and N. O., 10 O. W. R. 115, 11 O. W. R. 78, 15 O. L. R. 469. The limitation does not apply where a municipality seeks a remedy over against a street railway company for indemnity for a damage claim: Carty v. London, 18 O. R. 122; see also Kelly v. Ottawa St. Ry., 3 A. R. 616. Timber cut for construction; limitation: Lumsden v. T. and N. O. Ry., 15 O. L. R. 469. This section does not apply to an action for damages for tearing down an overhead farm crossing bridge: Kelly v. G. T. R., 1 O. W. N. 24, 211, 13 O. W. R. 781, 14 O. W. R. 602. Injuries suffered through refusal by a railway company to furnish proper facilities for forwarding freight are not within this section: Robinson v. Canadian Northern, 43 S. C. R. 387. The limitation applies to injuries sustained "by reason of the railway," and will not include a breach of their common law duty as carriers: Ryckman v. Hamilton, etc., Electric Ry., 10 O. L. R. 419. Limitation of action; trespass and nuisance by building embankment six years: Chandiere Machine Co. v. Canada Atlantic, 33 S. C. R. 11. Right of compensation for land taken is not barred until twenty years, and is not barred by the claimant's title to the land having been extinguished: Ross v. G. T. R., 10 O. R. 447; Essery v. G. T. R., 21 O. R. 224. See Dig. Ont. Case Law: Limitations of actions and damages: injury to land (col. 6000); injury to persons (col. 6003); lands taken (col. 6005); other cases (col. 6006).

266. Defective machinery; action under Workmen's Compensation Act: Schwoob v. Michigan Central Ry., 9 O. L. R. 86, 10 O. L. R. 647, 13 O. L. R 548. Negligence may consist in not having light on rear end of train: Boisseau v. C. P. R., 22 Occ. N. 258, 32 S. C. R. 424. Negligence of electric railway in not giving notice by bell: Ford v. Metropolitan Ry., 4 O. L. R. 29. Where ankle of sectionman fractured by coal from passing train: O'Brien v. M. C. R. R., 14 O. W. R. 581. "Vestibule" case: see R. v. Toronto Ry., 21 Occ. N. 120. Fender at front: Toronto v. Toronto Ry., 10 O. L. R. 730. Defective coupling: Bond v. Toronto Ry., 22 A. R. 78, 24 S. C. R. 715. Improper construction: Blackmore v. Toronto St. Ry., 38 U. C. R. 172. Dangerous steps: McCormack v. Sydney and Glace Bay, 37 N. S. Reps. 254. Absence of step: Blackmore v. Toronto St. Ry., 38 U. C. R. 172. See Re Railway Amendment Act, 4 Edw. VII. ch. 31 (D): 36 S. C. R. 136. See also *ante*, sec. 99 and notes, *post*, sec. 288 note (*a*); R. S. O. 1914, ch. 146, notes to secs. 3 (*a*), (*d*), (*e*), 5, 6, 7, 10.

As to effect of payment of insurance benefit: see Reg. v. Grenier, 30 S. C. R. 42; Griffiths v. Earl Dudley, 9 Q. B. D. 357; Lougheed v. Collingwood, 11 O. W. R. 329; Harris v. G. T. R., 3 O. W. R. 211, 550, 567; Farmer v. G. T. R., 23 O. R. 436, 20 A. R. 528, 23 S. C. R. 422; see also R. S. O. 1914, ch. 151, sec. 4 (2); ch. 146, sec. 12.

INVESTIGATION OF ACCIDENTS.

280. Reports made by the employees of a railway to their superior officers according to its rules concerning an accident resulting fatally are not privileged from production in an action for damages arising out of the accident if made in the regular course for the purpose of informing the superior officers: Savage v. C. P. R., 15 Man. L. R. 401, 1 W. L. R. 441; see also Stocker v. C. P. R., 5 Q. P. R. 117. But if made "in contemplation of litigation" are privileged: Orr v. Toronto Ry., 9 O. W. R. 30; Collins v. London General Omnibus Co., 68 L. T. 831; Hunter v. G. T. R., 16 P. R. 385. But note present wording of section.

ANIMALS AT LARGE.

281. See R. S. C. 37, sec. 294, 9-10 Edw. VII. (D), ch. 50, sec. 8. See notes to sec. 114, *ante*. Cattle running at large: see R. S. O. 1914, ch. 247, and notes. The Dominion Act, 9 and 10 Edw. VII., ch. 50, sec. 8, shifts the onus and in effect provides that the railway company, to escape liability, must prove that the animal was "at large," and at large through owner's negligence or wilful act or omission. "At the land of its owner: Palo v. Can. Northern, 5 O. W. N. 176, 25 O. W. R. 165; McLeod v. Can. Northern, 12 O. W. R. 1279. Animals on track; escape from adjoining field: meaning of "at large:" McLeod v. Canadian Northern, 12 O. W. R. 1279, 18 O. L. R. 616. Escape of animals on to track from adjoining enclosure: Yeates v. G. T. R., 9 O. W. R. 423. The plaintiff's cattle running at large under permission of a local by-law got on Crown lands and thence on the railway and were killed; held that the railway company were liable: Fensom v. C. P. R., 24 Occ. N. 87, 391, 7 O. L. R. 254, 8 O. L. R. 688. Sheep escaping to adjoining farm and thence to railway track: Higgins v. C. P. R., 12 O. W. R. 1030, 18 O. L. R. 12. Animals killed on track; negligence of owner; fences: Armour v. G. T. R., 12 O. W. R. 927, 13 O. W. R. 264. There is no common law liability to fence, it is purely statutory whether in respect of the highway or in respect of the adjoining properties: Gunning v. South Western Traction, 10 O. W. R. 285; Westbourne Cattle Co. v. Manitoba and North Western Ry., 6 Man. L. R. 553. Cattle killed at highway intersection; failure to give warning of approach of train: Sexton v. G. T. R., 13 O. W. R. 566; and see sec. 155, *ante*. See Bacon v. G. T. R., 12 O. L. R. 196; Lebu v. G. T. R., 12 O. L. R. 590; Carruthers v. C. P. R., 3 W. L. R. 455, 4 W. L. R. 441; Eggleston v. C. P. R., 36 S. C. R. 641; Daigle v. Temiscouata Ry., 37 N. B. R. 219; Lezotte v. Temiscouata, 37 N. B. R. 397; Schellenberg v. C. P. R., 3 W. L. R. 457; Tabb v. G. T. R., 8 O. L. R. 203; Perrault v. G. T. R., 36 S. C. R. 671; Nixon v. G. T. R., 23 O. R. 124. The owner of land adjoining a railway who agrees to keep up gates cannot claim for defect in such gates and his tenant is in no better position: Yeates v. G. T. R., 14 O. L. R. 63; Beck

v. C. P. R., 10 O. W. R. 644. Crown lands: Fensom v. C. P. R., 8 O. L. R. 688. See as to duties regarding fences, gates and cattle guards: Dig. Ont. Case Law, col. 5878. Running along or across highways: col. 5881. Injuries to animals at crossings: col. 5898. By want of or defects in fences: col. 5890. By want of or defects in gates and cattle guards: col. 5906.

281.—(2) A railway is under no obligation to maintain a fence on each side of a culvert across a water course and where cattle strayed through the culvert, thence to the highway, and thence to the railway, the company are not liable for injury to them: James v. G. T. R., 31 O. R. 672, 1 O. L. R. 127, 31 S. C. R. 420. On the proper construction of this section, while the company are exempt from liability if cattle are at large contrary to its provisions, yet if they get out by reason of failure of the railway to comply with statutory requirements such as fencing, guards, etc., and are killed or injured at some other point than the intersection, the company are liable unless they can shew negligence in the owner. The mere fact that they were at large and not in charge of a competent person is not sufficient: Arthur v. Central Ontario, 11 O. L. R. 537. Cattle "at large upon the highway:" Carruthers v. C. P. R., 39 S. C. R. 251. Cattle at large; a boy of ten may be a "competent person:" Sexton v. G. T. R., 13 O. W. R. 566, 18 O. L. R. 202.

281.—(6) "Right of way owned by the company;" as to what is meant by "along" a highway: see Gunning v. South Western Traction Co., 10 O. W. R. 285; and see sec. 228, *et seq.* Animal killed on track of electric railway: Gunning v. South West Traction Co., 10 O. W. R. 285. Electric railway as nuisance; injury to animals: Joyce v. Halifax St. Ry., 22 S. C. R. 258.

282. See R. S. C., ch. 37, sec. 295. See notes to secs. 114, 281, *ante*. Duty to keep gates closed: Woodburn Milling Co. v. G. T. R., 14 O. W. R. 553, 1 O. W. N. 10, 19 O. L. R. 276.

OFFENCES AND PENALTIES.

284. See R. S. C., ch. 37, sec. 407.

285. Long user of the permanent way in passing to and from the highway by passengers taking and leaving the company's trains does not amount to leave and license, and an action will not lie at the suit of a person injured when walking on the track under such circumstances: Anderson v. G. T. R., 27 O. R. 441, 24 A. R. 672, 28 S. C. R. 541. Boy of eight trespassing on unfenced premises of railway where he had no business or invitation; no action maintainable for his death: Newell v. C. P. R., 12 O. L. R. 21. Evidence may shew that the company so acquiesced in trespass as to be guilty of negligence and liable for resulting accident: Cooke v. Midland G. W. Ry., 1909, A. C. 229. Use of excessive force by conductor in ejecting from moving train person stealing ride: Brown v. C. P. R., 13 O. W. R. 879, 18 O. W. R. 409, 2 O. W. N. 773. Licensee or trespasser; injury to person riding on train "for a 'lift:'" Barnett v. G. T. R., 17 O. W. R. 67, 1 O. W. N. 491, 2 O. W. N. 102, 20 O. L. R. 390, 22 O. L. R. 84. Where a person is on a railway track under circumstances in which he cannot be looked on as a trespasser, the railway company is bound to use reasonable care towards him; whether he is entitled to the benefit of the provisions of the Railway Act requiring warning by bell or whistle on approaching a highway may be questioned: Anderson v. G. T. R., 27 O. R. 441, 24 A. R. 672. Question whether plaintiff was a trespasser: Carruthers v. T. & Y. Radial, 3 O. W. N. 14, 19 O. W. R. 983. Plaintiff struck by engine while on defendant's tracks: Fewings v. G. T. R., 14 O. W. R. 586, 1 O. W. N. 1. Railway not under obligation to look out for trespassers on its tracks; negligence must be shewn: Bondy v. Sandwich, etc., Ry., 2 O. W. N. 1476, 23 O. L. R., 19 O. W. R. 860. Duty to licensee and trespasser: see Annotations, 1 D. L. R. 240, 6 D. L. R. 76.

288.—(*a*) *Damages arising out of defective apparatus*: see *ante* secs. 99, 266 and notes. Latent defect in car wheel; derailment: Gaiser v. Niagara, etc., Ry., 14 O. W. R. 42, 19 O. L. R. 31. Breaking rail: Galusha v. G. T. R., 1 O. W. N. 559, 15 O. W. R. 595. Derailment of train: Ferguson v. C. P. R., 11 O. W. R. 470, 12 O. W. R. 943. Dangerous condition of tracks: Re

West Toronto and Toronto Ry., 3 O. W. N. 181. Defective controller; explosion: Fleming v. Toronto Ry., 4 O. W. N. 323, 27 O. L. R. 332, 47 S. C. R. 612. Dangerous condition of steps: McCormack v. Sydney and Glace Bay, 37 N. S. Reps. 254. Improper construction of car: Blackmore v. Toronto St. Ry., 38 U. C. R. 172. Defect in plant; coupling: Bond v. Toronto Ry. 22 A. R. 78, 24 S. C. R. 715.

(*b*) *Passengers injured getting on and off cars*: see *e.g.* Passenger alighting; door of coach closed: McDougall v. G. T. R., 4 O. W. N. 363, 23 O. W. R. 364, 27 O. L. R. 369. Defective step; injury to passenger alighting: Hoskin v. M. C. R. R., 1 O. W. N. 503, 2 O. W. N. 195, 17 O. W. R. 331. Injury to passenger alighting from cars: Wallingford v. Ottawa Electric Ry., 14 O. L. R. 383; Bell v. Winnipeg Electric Ry., 15 Man. L. R. 338, 37 S. C. R. 515; Gallinger v. Toronto Ry., 8 O. L. R. 698; Coolidge v. Toronto Ry., 9 O. W. R. 222, 623; Walker v. C. P. R., 1 O. W. N. 663, 15 O. W. R. 833; Tidy v. Toronto Ry., 12 O. W. R. 994. Injury to passenger alighting from car; negligence; defective system, car starting too soon: Haigh v. Toronto Ry., 16 O. W. R. 828, 21 O. L. R. 601. Premature starting car: Letcher v. Toronto Ry., 1 O. W. N. 59, 273, 14 O. W. R. 1240, 15 O. W. R. 65; Burman v. Ottawa Electric, 21 O. L. R. 446, 1 O. W. N. 941, 15 O. W. R. 494. Passenger alighting; jerk of car: Mazza v. Port Arthur, 14 O. W. R. 1108. Where a street car door is opened mechanically by the motorman, it is an invitation to the passenger to alight: Reeves v. Toronto Ry., 25 O. W. R. 91. Letting down the running board on an electric car and opening the door is an invitation to alight, and the railway is liable for damages ensuing through defect in the running board: Jones v. Hamilton Radial, 5 O. W. N. 282, 25 O. W. R. 267. Injury to passenger attempting to board car: Forwood v. Toronto, 22 O. R. 351; Dawdy v. Hamilton, etc., Ry., 5 O. L. R. 92. Boarding moving train; injury; duty to licensee: Perdue v. C. P. R., 1 O. W. N. 665, 15 O. W. R. 836.

(*c*) *Persons projecting beyond car.* Liability of omnibus company where passenger projects his arm and is injured: Simon v. London General Omnibus Co., 23 T. L. R. 463. Body of brakeman protruding beyond

car: Leitch v. Pere Marquette, 1 O. W. N. 562. Injury from striking post; passenger leaning out from car: Simpson v. T. & Y. Radial, 10 O. W. R. 33, 16 O. L. R. 31.

(*d*) *Injuries to passengers standing on platform*: see sec. 149, Notes.

(*e*) *Injuries to persons crossing street railway tracks*: see notes to sec. 259 (*f*) (excessive speed), and (*o*) (right of way). Liability of company to person crossing in front of car which omitted stopping at its usual stopping place: Tinsley v. Toronto Ry., 10 O. W. R. 1077, 12 O. W. R. 389, 15 O. L. R. 488, 17 O. L. R. 74. Injury to person crossing track: Hinsley v. London St. Ry., 11 O. W. R. 743; Milligan v. Toronto Ry., 11 O. W. R. 966, 12 O. W. R. 967; O'Leary v. Ottawa Electric, 12 O. W. R. 469; Hill v. Toronto Ry., 9 O. W. R. 988; King v. Toronto Ry., 8 O. W. R. 507; Deslongchamps v. Montreal St. Ry., Q. R. 14 K. B. 355, 37 S. C. R. 685; Mulvaney v. Toronto Ry., 7 O. W. R. 644; Taylor v. Ottawa Electric, 8 O. W. R. 612; Mitchell v. Toronto Ry., 5 O. W. R. 128, 38 S. C. R. 327; Furlong v. Hamilton St. Ry., 2 O. W. R. 1007; Livingston v. Sydney and Glace Bay, 37 N. S. Reps. 336; Gosnell v. Toronto Ry., 4 O. W. R. 522; Gallinger v. Toronto Ry., 8 O. L. R. 698; Daldry v. Toronto Ry., 6 O. W. R. 62; Hackett v. Toronto Ry., 10 O. W. R. 25; Brown v. London St. Ry., 2 O. L. R. 53. Injury to person working on track: Green v. Toronto Railway, 26 O. R. 319; Moran v. Hamilton St. Ry., 24 S. C. R. 717; Small v. Toronto Ry., 6 O. W. R. 97. Injury to pedestrian: Ricketts v. Sydney and Glace Bay Ry., 37 N. S. Reps. 270. Infirm person: Haight v. Hamilton St. Ry., 29 O. R. 279. Crossing in front of car: King v. Toronto Ry., 8 O. W. R. 507, in appeal (Privy Council): Toronto Ry. v. King, 12 O. W. R. 40. Liability of company for injury causing death of child crossing track: McKeown v. Toronto Ry., 12 O. W. R. 1297. As to warning and "Look and Listen" rule at highway crossings: see *ante*, sec. 155, and notes.

(*f*) *Vehicles on the tracks*: see also notes to sec. 259 *ante*. Vehicles crossing in front of car: Milligan v. Toronto Ry., 17 O. L. R. 530. Collision with vehicle: Cohen v. Hamilton Street Ry., 4 O. W. R. 19; Gosnell

v. Toronto Ry., 24 S. C. R. 582; Snell v. Toronto Ry., 27 A. R. 151; Bell v. Cape Breton Electric, 37 N. S. Reps. 298; O'Hearn v. Port Arthur, 4 O. L. R. 209. Collision with bicyclist: Preston v. Toronto Ry., 11 O. L. R. 56, 13 O. L. R. 69; Rowan v. Toronto Ry., 29 S. C. R. 717; Heath v. Hamilton St. Ry., 8 O. W. R. 937; Haverstick v. Emory (motor car), 8 O. W. R. 528. Frightening horses: Myers v. Brantford Street Ry., 27 A. R. 513; Robinson v. Toronto Ry., 2 O. L. R. 18; Drewitt v. Hamilton, etc., Ry., 9 O. W. R. 427.

(*g*) *The operation of trains*: see *ante* secs. 155-6-7-8 and notes. Shunting in station yard: Collier v. Michigan Central, 27 A. R. 630; Burley v. G. T. R., 10 O. W. R. 857; London and Western Trusts v. Lake Erie and Detroit Ry., 12 O. L. R. 28; Phillips v. G. T. R., 1 O. L. R. 28; Casey v. C. P. R., 15 O. R. 574. Shunting at highway crossing: Hollinger v. C. P. R., 20 A. R. 244; Henderson v. C. A. Ry., 29 S. C. R. 632. Injury to and death of yard foreman through negligence of engine driver in shunting train in yard; defective system: McDonald v. G. T. R., 14 O. W. R. 303.

(*h*) *Injuries to animals*: see *ante* secs. 281-282, notes.

(*i*) *Duties to trespassers*, etc.: see *ante* sec. 285 (*e*) and notes.

(*j*) *Scope of servants' authority*—Conductor: Dawdy v. Hamilton, etc., Ry., 1 O. W. R. 364, 781. Motorman: Coll v. Toronto Ry., 25 A. R. 55. Watchman: Hammond v. G. T. R., 9 O. L. R. 64. Foreman: Forsythe v. C. P. R., 10 O. L. R. 73. Officer in charge: Oldwright v. Hamilton Cataract Power Co., 3 O. W. R. 16, 397. Constable; watchman: Thomas v. C. P. R., 14 O. L. R. 55. Injuries to person falling from car in endeavor to avoid kick aimed by conductor: Wills v. Port Arthur, 12 O. W. R. 496; and see *ante* notes to secs. 222, 226.

(*k*) *Defective system; common employment, etc.*: see notes to R. S. O. 1914, ch. 146, sec. 3 (*a*); ch. 151; see also secs. 263-4 *ante*, and as to rules, secs. 163, 165, and notes. Liability for death of workman in yard from defective system under

clause (a), sec. 3, R. S. O. 1914, ch. 146: Giovinazzo v. C. P. R., 19 O. L. R. 325. Injury to brakeman; defective system; foreign car: Stone v. C. P. R., 3 O. W. N. 973. Breach of statutory duty in employment of incompetent signalman resulting in death of fireman on snow plough; common employment no defence: Jones v. C. P. R., 22 O. W. R. 439, 24 O. W. R. 917 (P.C.); see also Johnson v. Lindsay, 1891, A. C. 382; Groves v. Wimborne, 1898, 2 Q. B. 402; Butler v. Fife Coal Co., 1912, A. C. 149; David v. Britannic Merthyr Coal Co., 1909, 2 K. B. 146. Injury to signalman; servant of two railways: Pattison v. C. P. R. and C. N. R., 20 O. W. R. 18, 3 O. W. N. 45. Defective system; negligence of fellow servant: Fralich v. G. T. R., 1 O. W. N. 309, 15 O. W. R. 55, 43 S. C. R. 494.

(*l*) *Negligence and contributory negligence.* Acts of negligence, see under various heads noted. Failure of motorman to apply brakes and trip fender: Clairmont v. Ottawa Electric, 17 O. W. R. 52, 2 O. W. N. 108. Negligence; responsibility of conductor: Smith v. G. T. R., 20 O. W. R. 654, 3 O. W. N. 659, 21 O. W. R. 236. Negligence of foreman: Lennox v. G. T. R., 2 O. W. N. 1078, 19 O. W. R. 169. Head-on collision as evidence of negligence: London, etc., Trusts Co. v. G. T. R., 2 O. W. N. 225, 17 O. W. R. 413, O. L. R. Negligence; unauthorized signal to start car: Haigh v. Toronto Ry., 1 O. W. N. 1124. Injuries through negligent operation of street car; damage: Morin v. Ottawa Electric, 13 O. W. R. 850. Negligence; accident in yard; insufficient men: Canty v. C. P. R., 1 O. W. N. 661. Switch left open; injury to servant: Warren v. Macdonnell, 12 O. W. R. 493. Negligence in use of dangerous materials; explosives: Makins v. Piggott & Inglis, 29 S. C. R. 188; McShane v. T., H. & B. Ry., 31 O. R. 185. Passenger alighting from train; negligence of railway keeping doors closed: McDougall v. G. T. R., 4 O. W. N. 363, 23 O. W. R. 364, 27 O. L. R. 369. The standard of care required in a carrier of passengers: it is sufficient if the carrier adopt the best known apparatus, kept in perfect order, and worked without negligence by the servants he employed: Newbury v. Bristol Tramways, 29 T. L. R. 177.

Particulars of negligence: Rachar v. G. T. R., 14 O. W. R. 548; Tracey v. Toronto Ry., 13 O. W. R. 15. Negligence; evidence: Brennan v. G. T. R., 1 O. W. N. 365, 15 O. W. R. 146. Reasonable inference of negligence: Griffith v. G. T. R., 17 O. W. R., 2 O. W. N. 252, 19 O. W. R., 2 O. W. N. 1059, 21 O. W. R. 305. Servant killed while walking on tracks; ultimate negligence: McEachren v. G. T. R., 21 O. W. R. 187, 3 O. W. N. 628. "Stop, look and listen"—nature of the so-called rule to be observed at railway crossings considered: Misener v. Wabash Ry., 12 O. L. R. 71. Whether omission to observe such precaution amounts to contributory negligence is a question for the jury: Peart v. G. T. R., 10 A. R. 191, 10 O. L. R. 753; Vallee v. G. T. R., 1 O. L. R. 224; and see notes to sec. 155. Accident; crossing street; contributory negligence; cases reviewed: Tinsley v. Toronto Ry., 15 O. L. R. 438, 17 O. L. R. 74; see also Preston v. Toronto Ry., 13 O. L. R. 369. Contributory negligence: see Rowan v. Toronto Ry., 29 S. C. R. 717; O'Hearn v. Port Arthur, 4 O. L. R. 209; Preston v. Toronto Ry., 11 O. L. R. 56, 13 O. L. R. 369; Danger v. London St. Ry., 30 O. R. 593; Brenner v. Toronto Ry., 13 O. L. R. 423, 15 O. L. R. 195. Contributory negligence; "ultimate" negligence: see Radley v. London N. W. Ry., 1 App. Cas. 754, at p. 759; Scott v. Dublin and Wicklow Ry., 11 Ir. C. L. R. 377; Tuff v. Warman, 5 C. B. N. S., at p. 584; Davis v. Mann, 10 M. & W. 546; Brown v. London Street Ry., 2 O. L. R. 53, 31 S. C. R. 642; Reynolds v. Tilling, 19 Times L. R. 539, 20 Times L. R. 57; Brenner v. Toronto Ry., 13 O. L. R. 423, and see 15 O. L. R. 195; see Cases Dig. Ont. Case Law, col. 5920. Could the plaintiff by exercising reasonable care have avoided the accident? "He might have" is not a real answer: Badgeley v. G. T. R., 14 O. W. R. 425. Contributory negligence of children injured on highway through negligent driving: see Annotation 9 D. L. R. 522.

(*m*) *Damages* (*in general*). Computation of damages: see G. T. R. v. Jennings, 13 App. Cas. 800. "Full amount of damages sustained" is recoverable and the liability is not confined within the limits of R. S. O., ch. 160: Curran v. G. T. R. 25 A. R. 407; see G. T. R. v. Washington, 1899, A. C. 275, and see 108 *ante* and notes. "Person injured;" includes employee: Lemay v. C. P. R., 17 A. R. 293; see R. S. C.

1906, ch. 37, sec. 427. Measure of damages in case of death—(1) Of aged person: see Dewey v. Hamilton and Dundas Ry. Co., 9 O. W. R. 511; (2) Labourer, workman: Stephens v. Toronto Ry., 11 O. L. R. 19; Atcheson v. G. T. R., 1 O. L. R. 168; (3) Skilled workman: Stuart v. Davidson, 14 Man. L. R. 74, 34 S. C. R. 215; (4) Child: Renwick v. Galt, etc., Ry., 12 O. L. R. 35; Rombough v. Balch, 27 A. R. 32; McKeown v. Toronto Railway, 12 O. W. R. 1297, 14 O. W. R. 572, 1 O. W. N. 3; and see notes to R. S. O. 1914, ch. 151, sec. 4. Right to have deducted from damages the amount of accident insurance carried: Walker v. Wabash Ry., 13 O. W. R. 250, at 257; and see notes to R. S. O. 1914, ch. 151, sec. 4 (2), and to R. S. O. 1914, ch. 146, sec. 4 (2); see also notes to sec. 266 *ante*. Railway provident insurance as a defence to damage actions: see Article 41, Can. Law Journ., p. 465. Expulsion from car; resulting chill and illness: Grinsted v. Toronto Ry., 24 O. R. 683, 21 A. R. 578, 24 S. C. R. 570. Expulsion for misconduct: Davis v. Ottawa Electric, 28 O. R. 654. Damages for mental shock: Geiger v. G. T. R., 10 O. L. R. 511; Henderson v. Canada Atlantic, 25 A. R. 437; Victorian Commissioners v. Coultas, 13 App. Cas. 222. Damages for physical shock: Toms v. Toronto Ry., 22 O. L. R. 204.

(*n*) *Actions on freight contracts*: see sec. 146 (1*c*), notes. Action when railway has sought to limit its liability: see sec. 146 (7).

(*o*) *Operation of street cars at excessive speed*: see sec. 259 (*f*).

(*p*) *Damages for failure to provide accommodation:* see secs. 146, 161. Safety appliances: see sec. 99. Non-protection of wires, etc.: see sec. 239.

(*q*) *Damages from fires:* see sec. 139 and notes.

(*r*) *Compensation where lands are taken:* see sec. 90 and especially sec. 90 (9) and notes.

(*s*) *Damages for change in grade of streets;* closing streets; interference with access, etc.: see sec. 91, notes.

(*t*) *Limitations*: see sec. 265, *ante*, and notes.

(*u*) *Company's rules and their breach:* see sec. 163, notes.

(*v*) *Matters at stations:* see sec. 161, notes.

289. It is good cause for summary dismissal by a railway of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees: Marshall v. Central Ontario, 28 O. R. 241. This section is restricted to railways within the legislative authority of the province. The corresponding section (414) of the Dominion Act is somewhat different, and in a conviction the specific Act under which the conviction is made must be referred to: R. v. Treanor, 12 O. W. R. 1175, 18 O. L. R. 194.

292. See R. S. C., 1906 ch. 37, sec. 426; also Code R. S. C. 1906, ch. 146, sec. 517-521.

295. Enforcing orders of the board: see R. v. G. T. R. and C. P. R., 17 O. L. R. 601. As to liability of company in damages for act of servant within the scope of his employment: see sec. 288, notes. Criminal responsibility: see R. v. Hays, 9 O. W. R. 488, 14 O. L. R. 201; R. v. Toronto Railway, 10 O. L. R. 26.

CONVEYANCE OF LAND.

302. Bar of dower: Chewett v. Great Western Ry., 26 C. P. 118. Conveyances, see notes to sec. 90 *ante*.

CHAPTER 186.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD ACT.

The Ontario Railway and Municipal Board, Rules of Practice and Procedure; Regulations and Specifications, and Forms; The Ontario Railway and Municipal Board, Standard Specifications for Bridges, Viaducts, Trestles and other Structures; Annual Reports of the Ontario Railway and Municipal Board for 1906 and following years.

7. Regularity of hearing and jurisdiction of Board: Re Brussels and McKillop, 26 O. L. R. 29.

21. Jurisdiction of Board and of Court: Waterloo v. Berlin, 23 O. W. R. 337, 4 O. W. N. 256, 799, 28 O. L. R. 206. The jurisdiction of the Board is not exclusive so as to prevent a railway being indicted as a nuisance: R. v. Toronto Ry., 2 O. W. N. 753, 18 O. W. R. 104, 23 O. L. R. 186. Jurisdiction: see also G. T. R. v. Toronto, 42 S. C. R. 613. Powers of Board: Re Port Arthur Electric, 13 O. W. R. 811, 18 O. L. R. 376. Neglect of duty under Act, regulation, order or agreement: jurisdiction of Board: Toronto Suburban Ry. v. Toronto Junction, 11 O. W. R. 108. Order electric railway to lay trackage: see as to interpretation of 8 Edw. VII. ch. 112, sec. 1: Toronto v. Toronto Ry., 1910, A. C. 312. Jurisdiction of Court to order water supply to district annexed by order of the Board: Malone v. Hamilton, 4 O. W. N. 755, 23 O. W. R. 956. Admissibility of proceedings before the Board in evidence in another action; order of the Board: C. P. R. v. G. T. R., 9 O. W. R. 158, at p. 164. Pending actions: Re Berlin and B. & W. St. Ry., 8 O. W. R. 284, 9 O. W. R. 412.

22. Exclusive jurisdiction of Board: Toronto Suburban Ry. v. Toronto Junction, 11 O. W. R. 108. The Ontario R. & M. Board is not a criminal Court. The Supreme Court must deal with violators of the code: R. v. Toronto Ry., 18 O. W. R. 104, 2 O. W. N. 753, 23 O. L. R. 186.

26. See R. S. O. 1914, ch. 185, sec. 105 (5), notes.

27. Enforcement of orders of Railway Commission: see R. v. G. T. R. and C. P. R., 17 O. L. R. 601.

45.—(3) Appeal on question of law: Toronto Ry. v. Toronto, 14 O. W. R. 578, 19 O. L. R. 396.

48.—(1) Appeal from order of Railway Board. Effect of city of Toronto v. Toronto Ry., 1907, A. C. 315, and 8 Edw. VII. ch. 112, sec. 1: Re Toronto Ry. v. Toronto, 14 O. W. R. 578, 19 O. L. R. 397; and see Toronto v. Toronto Ry., 1910, A. C. 312. Appeal to Appellate Division and to P. C.: T. & Y. Radial v. Toronto, 25 O. W. R. 315. Jurisdiction to entertain appeal: Re Toronto and Toronto Ry., 11 O. W. R. 275. Appeal: Re Sandwich East and the Windsor and Tecumseh Electric, 16 O. L. R. 641; West Toronto v. Toronto Ry., 3 O. W. N. 181, 20 O. W. R. 271, 25 O. L. R. 9. Time within which to appeal: see G. T. R. v. Ontario Dept. of Agriculture, 42 S. C. R. 557. Functions of Supreme Court: N. Y. & O. Ry. v. Cornwall, 5 O. W. N. 304. Payment of $250 into Court to answer costs: Re Coniagas and Cobalt, 15 O. L. R. 386.

48.—(8) See R. v. Toronto Ry., 2 O. W. N. 753, 18 O. W. R. 104, 23 O. L. R. 186, noted sec 22, *ante*. See also Toronto Suburban Ry. v. Toronto Junction, 11 O. W. R. 108.

CHAPTER 187.

The Hydro-Electric Railway Act.

12. In line 1 for "68" read "69:" 4 Geo. V. ch. 2, Schedule (32).

CHAPTER 188.

THE ONTARIO TELEPHONE ACT.

See Telephone Systems: The Ontario Telephone Act, Municipal Ownership of Rural Telephone Systems: Francis Dagger (See Report of O. R. and M. Board, 1911).

8. By-law establishing telephone system; signature: Re Robertson v. Colborne, 4 O. W. N. 274, 23 O. W. R. 325. The erection of poles on highway under statutory authority relieves from liability under the doctrine of Fletcher v. Rylands, unless negligence is shewn: Roberts v. Bell Telephone, 4 O. W. N. 1099, 24 O. W. R. 428.

17. Collection from subscribers of additional cost imposed by law: Re Brussels and McKillop, 3 O. W. N. 781, 21 O. W. R. 628, 26 O. L. R. 29.

33. Application to Ontario Railway Board: Re Brussels and McKillop, 3 O. W. N. 781, 21 O. W. R. 628, 26 O. L. R. 29.

34. Agreement approved by Board; jurisdiction: Re Brussels and McKillop, 26 O. L. R. 29.

35. Varying agreement indirectly: Re Brussels and McKillop, 26 O. L. R. 29.

CHAPTER 189.

THE PUBLIC UTILITIES CORPORATIONS ACT.

CHAPTER 190.

THE GUARANTEE COMPANIES SECURITIES ACT.

6. See *e.g.* R. S. O. 1914, ch. 68, sec. 11. Bond of foreign guarantee corporation: Boyle v. Rothschild, 12 O. W. R. 104. Bond of guarantee company: Aldrich v. British Griffin (1904), 2 K. B. 850. Form of bond, *cf.*: Holmested & Langton Forms, No. 1297, p. 758.

8. The Lieutenant-Governor by Order in Council has approved of the following companies: Dominion of Canada Guarantee and Accident Insurance Company; Guarantee Company of North America; London Guarantee and Accident Company, Limited; Employers' Liability Assurance Corporation, Limited; United States Fidelity and Guaranty Company; Imperial Guarantee and Accident Company; London and Lancashire Guarantee and Accident Company of Canada; The Maryland Casualty Company; National Surety Company; Railway Passengers Assurance Company of London, England; The Guardian Accident and Guarantee Company of Montreal; Ocean Accident and Guarantee Corporation, Limited; Canadian Surety Company. See R. S. O. 1914, ch. 23, sec. 11, ch. 56, sec. 69.

CHAPTER 191.

THE CHEESE AND BUTTER EXCHANGES ACT.

CHAPTER 192.

The Municipal Act.

Refer to Biggar, Municipal Manual; Denton, Municipal Negligence respecting Highways; Dillon, Law of Municipal Corporations; Abbott, Municipal Corporations; Williams, Liability of Municipal Corporations for Tort.

Preliminary.

2.—(*f*) "Lands:" see Williams v. Cornwall, 32 O. R. 255. "Real property:" see provision of Interpretation Act extending the interpretation section of this Act to all enactments relating to municipalities. See also "land," "real property," as defined by R. S. O. 1914, ch. 195, sec. 2 (*h*). As to easements: see Belleville Bridge Co. v. Ameliasburg, 10 O. W. R. 988, 15 O. L. R. 174. Essery v. Bell, 13 O. W. R. 395.

6. Meaning of "acquire." Wider than in 3 Edw. VII., ch. 19, sec. 576 (3): Re Boyle and Toronto, 5 O. W. N. 97, 25 O. W. R. 67.

10. The Ontario municipality is wholly a creature of the Legislature, without abstract rights. The Legislature can vary its contracts and interfere with rights in litigation: Smith v. London, 13 O. W. R. 1148. Consideration of powers of municipal corporations as a branch of civil government to transact business within the limit of their powers without interference by the Courts: Norfolk v. Roberts, 28 O. L. R. 593. The Municipal Council is the voice of the municipality: Stoddart v. Owen Sound, 23 O. W. R. 165, 4 O. W. N. 171. The exceptions to the rule that a municipal corporation can only act by its seal are in regard to (*a*) insignificant matters of daily occurrence or matters of convenience amounting almost to necessity, (*b*) where the consideration has been fully executed, and (*c*) contracts in the name of the corporation made by agents who are authorized under the seal of the corporation to make such

contracts: Leslie v. Malahide, 15 O. L. R. 4. See also Young v. Corporation of Leamington, 8 App. Cas. 517; Hunt v. Wimbledon Local Board, 4 C. P. D. 40; Smart v. West Ham Union, 10 Ex. 686; Nicholson v. The Guardians of the Bradford Union, L. R. 1 Q. B. 620. Consideration of powers and functions of municipal councils: Parsons v. London, 3 O. W. N. 321, 20 O. W. R. 534. Municipal institutions in England and Canada: see article, 41 Canada Law Journal, p. 505.

PART I.

Formation of New Corporations and Alterations of Boundaries of Corporations.

13. Constitutionality of delegation by Legislature: Hodge v. the Queen, 9 App. Cas. 117. The method of procedure in the exercise of the power of erecting new corporations must be carefully followed: Trustees R. C. School Sec. v. Arthur, 21 O. R. 60. Census taken under the direction of the Council (sub-sec. 4): Re Fenton and Simcoe, 10 O. R. 27. Sufficiently near: Re Flatt and Prescott, 18 A. R. 1. Petitions and what should appear in them: Re Southampton and Bruce, 8 O. L. R. 106. What discretion the Council may exercise: Re Southampton and Bruce, 8 O. L. R. 106.

21. Where the municipal councils of a city and township entered into an agreement which was in fact *ultra vires*, and the terms of the agreement were subsequently embodied in a proclamation, the proclamation was held effectual and of the same validity as if its terms were contained in a statute: Barton v. Hamilton, 13 O. W. R. 1118, at 1126. Power of board to order for interchange of traffic: Toronto v. Toronto Ry., 26 O. L. R. 225.

32. The words "in force" are used as meaning "having the force of law" or as being in existence. A by-law has the force of law from its final passing although its prohibition does not become operative

until a later day: Re Denison and Wright, 13 O. W. R. 1056, 19 O. L. R. 5.

33. See Windsor v. Southern Ry., 20 A. R. 388.

34. A township in which extensive drainage works had been constructed was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the two new municipalities, each remaining liable as surety for the portion of debts it was not liable primarily to pay, and the provisions of this Act were made applicable as far as possible. Held that an action for damages incurred before the division caused by the drainage works, part of the area of which was in each township and asking to have the drains kept in repair, must be brought against both townships and not only against the one where the plaintiff's lands were situate: Wigle v. Gosfield South, 1 O. L. R. 519.

37. "Debts:" Woodstock v. Oxford, 22 O. L. R. 151.

38. On motion to set aside an award made by two of three arbitrators for the settlement of terms of separation and annexation, the evidence of the dissenting arbitrator as to the basis of the award is admissible: Re Southampton and Saugeen, 12 O. L. R. 214. In the valuation of assets and liabilities: (1) School houses are not to be allowed for as they are vested in School Boards whose limits of control may or may not be the same as the municipal limits. (2) Sidewalks are allowed for as they are within municipal control and liability. (3) Mistakes in construction (*e.g.* of waterworks) should not reduce value, being common incidents of such construction: Re Southampton and Saugeen, 12 O. L. R. 214.

39. Where limits are extended to take in township lands which were exempted from taxation: see Windsor v. Canada Southern, 20 A. R. 388.

40. Are bridges "property and assets" within the meaning of this section: Ottawa v. Nepean, 2 O. W. N. 49, 2 O. W. N. 480, 16 O. W. R. 969, 17 O. W. R. 1051.

PART II.

Municipal Councils; How Composed.

52. Comment on history of section: R. ex rel. Morton v. Roberts, 3 O. W. N. 1089, 22 O. W. R. 50, 26 O. L. R. 263. The qualification, partly freehold and partly leasehold, is satisfied by half the amount being freehold and half leasehold: R. ex rel. Burnham v. Hagerman, 31 O. R. 636. Title by possession confirmed by conveyance after election a sufficient qualification: R. ex rel. Burnham v. Hagerman, 31 O. R. 636. "Over and above all liens, charges and incumbrances affecting the same:" see R. ex rel. Ferris v. Speck, 28 O. R. 486. "Actual occupation" in the case of mortgaged premises means the exclusive unqualified right to possession (apart from the mortgage): R. ex rel. Sharpe v. Beck, 13 O. W. R. 457, 539. "Actual occupation:" R. ex rel. Milligan v. Harrison, 11 O. W. R. 554, 678, 16 O. L. R. 475. "Actual occupation:" see R. ex rel. Joanisse v. Mason, 28 O. R. 495. "As owner or tenant:" R. ex rel. Harding v. Bennett, 27 O. R. 314. Sale of qualifying property with mortgage back; right of mortgages assessed to qualify on legal estate: R. ex rel. Morton v. Roberts, 26 O. L. R. 263. Joint assessment; qualification considered: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929, 16 O. L. R. 581. Qualification of Councillor: R. ex rel. Beck v. Sharpe, 11 O. W. R. 642, 827. Construction of sec. 18, R. S. O. 1897, ch. 225, as to persons entitled to vote: Re Hagar Voters' List, 17 O. W. R. 1.

53.—(1) Grounds of disqualification: R. ex rel. Gardhouse v. Irwin, 4 O. W. N. 1043. Disqualification of Councillor as paid clerk of joint committee of two municipalities: Greville Smith v. Tomlin, 1911, 2 K. B. 9. A member of a School Board for which rates are levied cannot be elected Councillor and then resign as School Trustee and hold his seat as Councillor: R. ex rel. O'Donnell v. Broomfield, 5 O. L. R. 596. The respondent was a member of a School Board and his resignation as such not having been accepted by his co-trustees, he was disqualified for

the office of township Councillor: R. ex rel. Robinson v. McCarty, 5 O. L. R. 638. The respondent was a member of a School Board for a section that had no teacher and no school of its own, but the Board was organized and paid over rates levied to the Board of an adjoining section, who provided accommodation; held disqualified: R. ex rel. Zimmerman v. Steele, 5 O. L. R. 565. The respondent being a member of a School Board on the day of nomination, it does not save him to resign before the day of polling: R. ex rel. Zimmerman v. Steele, 5 O. L. R. 565; R. ex rel. Jamieson v. Cook, 9 O. L. R. 466; see R. ex rel. Rollo v. Beard, 3 P. R. 357; R. ex rel. Adamson v. Boyd, 4 P. R. 204. High School Trustee may be Water Commissioner: R. ex rel. Gardhouse v. Irwin, 4 O. W. N. 1043, 1097, 24 O. W. R. 466.

Disqualification in regard to interest under contract; the maxim *de minimis non curat lex* does not apply: R. ex rel. O'Shea v. Letherby, 12 O. L. R. 581. As to English provision where a member of a corporation is "interested or concerned in any contract:" see City of London Electric v. London, 1903, A. C. 434. Disqualification of Alderman for interest in municipal contract: R. ex rel. Slater v. Homan, 2 O. W. N. 1334, 19 O. W. R. 621. This section applies to a person having a contract with the School Board: R. ex rel. Martin v. Jacques, 4 O. W. N. 1112, 24 O. W. R. 457. The word "contract" must be construed in its widest sense, the object of the Legislature being to prevent anyone being elected whose personal interests might clash with those of the municipality. A member of a Council against whom the corporation held an unsatisfied judgment for costs was disqualified: R. ex rel. Macnamara v. Hefferman, 7 O. L. R. 289. Member interested in sub-contract: Ryan v. Willoughby, 30 O. R. 411, 27 A. R. 135. To buy on behalf of villagers, land intended to be conveyed to the Crown for a Government building in lieu of another lot which the Crown was to convey to the village corporation, is not to be interested in a contract on behalf of the corporation within the meaning of this section: R. ex rel. Fitzgerald v. Stapleford, 4 O. W. N. 1468, 29

O. L. R. 133. *Cf.* provisions of R. S. O. 1914, ch. 266, sec. 119, and cases noted there.

53.—(2*c*) See R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581 and notes to secs. 395 (*f*), and 396 (*e*), *post*.

PART III.

Municipal Elections.

56. This section applies to the qualification of electors, not of candidates: R. ex rel. Milligan v. Harrison, 11 O. W. R. 554, 678, 16 O. L. R. 475. Determination of residence; *animus revertendi*; Re Sturmer and Beaverton, 2 O. W. N. 1227, 19 O. W. R. 430, 24 O. L. R. 65. "Owner" includes a locatee: see Pattison v. Emo, 28 O. L. R. 228. Joint assessment; qualification considered: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929, 16 O. L. R. 581. Partnership: R. ex rel. Harding v. Bennett, 27 O. R. 314. See notes to R. S. O. 1914, ch. 6, the Ontario Voters' Lists Act, and esp. sec. 24.

57. Residing within the municipality: Fitzmartin v. Newburg, 2 O. W. N. 1114, 1177, 19 O. W. R. 267, 24 O. L. R. 102. Claiming to vote as tenant: Re Schumacher and Chesley, 21 O. L. R. 522, 1 O. W. N. 1041, 16 O. W. R. 641. "One month before the election:" Re Fitzmartin and Newburg, 24 O. L. R. 102. Qualifications of right to vote: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451. And see notes to R. S. O. 1914, ch. 6, sec. 24, and also notes to sec. 279, *post*.

58. A person's name was properly entered on the list as a tenant, but after final revision of the list he ceased to be a tenant or to occupy the property but continued to reside in the municipality and was a freeholder to an extent entitling him to vote. At an election he demanded a ballot and was willing to take the oath as a freeholder. Held, entitled, and a refusal to allow him to vote was a breach of duty by the returning officer: Wilson v. Manes, 28 O. R. 419, 26 A. R. 398. The voters' lists under the Municipal Act have the quality of finality as an integral

part of them. They indicate the persons entitled to vote in such manner that their qualification cannot be further enquired into: Re Mitchell and Campbellford, 11 O. W. R. 943, 16 O. L. R. 578; see also Re Port Arthur and Rainy River, Preston v. Kennedy, 14 O. L. R. 345, 9 O. W. R. 347; Re Saltfleet Local Option, 11 O. W. R. 326, 545; R. ex rel. McKenzie v. Martin, 28 O. R. 523; Re Armour and Onondaga, 14 O. L. R. 606, 9 O. W. R. 833; but see Re Cleary and Nepean, 14 O. L. R. 392, 9 O. W. R. 406. Objections to votes on account of what had taken place after the final revision of the roll, overruled: Re Armour and Onondaga, 14 O. L. R. 606, 9 O. W. R. 833. The Court will not enquire into the qualification of those entered on the voters' list: R. ex rel. McKenzie v. Martin, 28 O. R. 523.

A Judge holding a scrutiny under this Act may go behind the list to enquire if a tenant, whose name is on the list, has the residential qualification entitling him to vote: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 26 O. L. R. 339, 47 S. C. R. 451. There is jurisdiction at a scrutiny under the Municipal Act, to investigate the voter's qualification, so long as it does not conflict with the finality of the lists certified under the Act. The Judge has jurisdiction to investigate as to whether or not, in a given case, the right to vote, finally and absolutely certified by the list, was subsequently so exercised as to constitute the ballot deposited a legal vote: Re Aurora Scrutiny, 28 O. L. R. 475. See R. S. O. 1914, ch. 6, sec. 24, notes.

60. As to right of clerk to vote in local option contests: see sec. 270 *infra*, and notes. Giving casting vote at municipal elections: see sec. 127.

61. See Election Act, R. S. O. 1914, ch. 8, sec. 13. Paying a voter to act as scrutineer is not *per se* a corrupt practice: R. ex rel. Fitzgerald v. Stapleford, 29 O. L. R. 133.

68. The provision that every nomination is to state the full name, etc., of the candidate is directory, not imperative, and the presiding officer cannot after the close of the meeting for nominations, reject

those made on account of non-compliance with such requirements. *Semble* if objection is made at the time and the nominations are not amended, the presiding officer may then and there reject them: R. ex rel. Walton v. Freeborn, 2 O. L. R. 165. The provisions of sub-sec. (3) for the closing of the meeting for nomination after the lapse of one hour, only applies where no more than one candidate is proposed. Sub-sec. (4) applies where more than one candidate is proposed: Re Parke, 30 O. R. 498.

69.—(3) Form of withdrawal by candidate after nomination: see Biggar, p. 154, also form of election where candidate nominated for two or more offices, and elects for which he will run.

69.—(4) A candidate for the office of alderman, though in fact possessing the necessary property qualification, mis-stated it in his declaration under this section, and, as there set out, it was insufficient. This declaration, however, he supplemented by another before taking office as required by sec. 242, in which he shewed sufficient property qualification. It was too late after the election to contend that the mis-statement in the former declaration was ground for setting aside an election otherwise free from objection: R. ex rel. Martin v. Watson, 11 O. L. R. 336. The declaration is to be a statutory declaration in accordance with the Dominion form, and before the officers entitled under that Act to take such declarations: R. ex rel. Cavers v. Kelly, 7 O. W. R. 600; see also R. ex rel. Milligan v. Harrison, 11 O. W. R. 554, 16 O. L. R. 475. The declaration may be made and subscribed before the nomination: R. ex rel. Armstrong v. Garratt, 14 O. L. R. 395, 9 O. W. R. 636. Declaration of qualification is invalid if made before the town clerk: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929, 16 O. L. R. 581. Objections to declaration: R. ex rel. Milligan v. Harrison, 11 O. W. R. 554, 678, 16 O. L. R. 475.

71. See R. S. O. 1914, ch. 218, sec. 116; postponement in case of epidemics.

77.—(1) Disregard of these prescribed formalities commented on: Re Rickey and Marlborough, 14 O. L. R. 587, at 590.

77.—(1*d*) That a D. R. O. is a strong advocate for the passing of a by-law is not a disqualifying circumstance: Re North Gower L. O., 24 O. W. R. 489, 25 O. W. R. 224, 5 O. W. N. 249; and see Re Duncan and Midland, 16 O. L. R. 132.

77.—(3) Sub-secs. (3) and (4), see R. S. O. 1914, ch. 8, sec. 43.

81. See R. S. O. 1914, ch. 8, secs. 153, 154, 156.

83. Form of ballot box: Re Wilson and Wardsville, 2 O. W. N. 914.

88. "Screened from observation:" Re Quigley and Bastard, 24 O. L. R. 622.

89. In an election on a local option by-law, directions to voters were not furnished to the deputy returning officer. This was an irregularity not cured by sec. 150, the fact that, as far as shewn, no harm had resulted being no answer: Re Salter and Beckwith, 4 O. L. R. 51.

91. If a later list of voters has been validly certified by the Judge, but not delivered or transmitted to the clerk of the peace before the opening of the poll on polling day, it is not the proper list to be used at the election. *Semble*, the list must be certified and delivered or transmitted before the nomination. *Quære* whether a list can be validly certified on Sunday: R. ex rel. Black v. Campbell, 18 O. L. R. 269. Last list of voters certified by the Judge: Carr v. North Bay, 4 O. W. N. 1284. Proper list: see Re West Lorne, 19 O. W. R. 231, 967, 20 O. W. R. 738, 2 O. W. N. 1038, 3 O. W. N. 25, 422, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451. Proper list of voters in local option contests: see sec. 268 *infra*; and R. S. O. 1914, ch. 215, sec. 137 (2) and notes; see also R. S. O. 1914, ch. 6 and notes.

93. Duty of clerk as to the certificate of the Judge certifying list: Re Ryan and Alliston, 16 O. W. R. 794, 17 O. W. R. 222, 18 O. W. R. 841, 2 O. W. N. 161, 841, 21 O. L. R. 582.

99. Voting in more than one ward at a municipal election by general vote was an indictable offence under former sec. 158 a, 1 Edw. VII., ch. 26, sec. 9, and mandamus lay to a Police Magistrate having territorial jurisdiction to compel him to consider and deal with an application for an information for such an offence: In re R. v. Meehan, 3 O. L. R. 567; see now sec. 138 (g) which prescribes a penalty; see sec. 269 notes.

100. Deputy returning officers and poll clerks have a right to vote, even apart from special provisions: Re Joyce and Pittsburg, 11 O. W. R. 850, 16 O. L. R. 380. Right of D. R. O.'s and poll clerks to vote in local option contests: Re Armour and Onondaga, 14 O. L. R. 606, 9 O. W. R. 833; Re Local Option Saltfleet, 16 O. L. R. 293; Re Duncan and Midland, 16 O. L. R. 132 at 149. D. R. O.'s right to vote on local option by-laws: see sec. 274 *infra*. Position of paid scrutineer: Fitzgerald v. Stapleford, 4 O. W. N. 1468, 29 O. L. R. 133 (noted sec. 61 *ante*).

103. See Wilson v. Manes, 28 O. R. 419, 26 A. R. 398.

104. "Person intended to be named:" (Form 9) Re Schumacher and Chesley, 21 O. L. R. 522, 1 O. W. N. 1041, 16 O. W. R. 641. See Wilson v. Manes, 28 O. R. 419, 26 A. R. 398.

106. Ballots must be marked within the booth: Quigley v. Bastard, 2 O. W. N. 1047, 19 O. W. R. 176. The irregularity of a voter putting the ballot directly in the box instead of handing it to the D. R. O., cured by sec. 150: Re Duncan and Midland, 16 O. L. R. 132.

107. Polling places crowded at voting and counting, violation of secrecy of ballot: Re Service and Front of Escott, 13 O. W. R. 1215.

109. Neglect of D. R. O. to comply with requirements of this section: Re Praugley and Strathroy, 21 O. L. R. 54, 1 O. W. N. 706, 15 O. W. R. 890. The omission of an illiterate person to make a declaration is a mere irregularity: Re North Gower Local Option, 4 O. W. N. 1177, 24 O. W. R. 489, 25 O. W.

R. 224, 5 O. W. N. 249. Non-compliance with this section in the case of an illiterate voter can be cured by sec. 150; Re Ellis and Renfrew, 23 O. L. R. 427. Blind voter: Re Ellis and Pembroke, 21 O. L. R. 74, 15 O. W. R. 880.

111. The presumption is only *prima facie* evidence against the elector, and does not apply in proceedings to set aside an election: R. ex rel. Tolmie v. Campbell, 4 O. L. R. 25; see R. S. O. 1914, ch. 8, sec. 110.

112. Persons present: Re Quigley and Bastard, 24 O. L. R. 622. Where the provisions of this section were violated, it was held that the election was not conducted in accordance with the principles laid down in the Act (sec. 150) and the election was declared void: Re Service and Front of Escott, 13 O. W. R. 1215.

115. Compare secs. 115 to 123 inc., and R. S. O. 1914, ch. 8, secs. 113 to 121 inc.

122. Importance of the principle of inviolability of the ballots cast: R. ex rel. Hewson v. Riddell, 14 O. W. R. 49. Upon a scrutiny it was found, having regard to evidence both *viva voce* and by affidavit, that the ballot papers had been tampered with, and there was also a breach of the Act in the D. R. O. taking the ballot box to his own house instead of to the town clerk. It was impossible to say that the result of the election had not been affected thereby, and the election was set aside: R. ex rel. Ivison v. Irwin, 4 O. L. R. 192.

126. Making declaration elsewhere than at town hall may be an irregularity within the curative powers of sec. 150: R. ex rel. Armour v. Peddie, 9 O. W. R. 393, 14 O. L. R. 339. This section applies to local option contests: Re Ellis and Renfrew, 23 O. L. R. 427; see secs. 274, 275 *infra*.

127. As to right of clerk to vote: see secs. 60 and 270 and notes.

129. Compare secs. 129 to 142, with R. S. O. 1914, ch. 8, secs. 138, 143, 160, 161, 163, 164, 165, 191, 192, 174, 193, 194, 195 and 198.

131. Violation of provisions as to secrecy of ballot; irregularities; when curative provisions not applicable: Re Hickey and Orillia, 17 O. L. R. 317. Maintaining secrecy: Re Quigley and Bastard, 24 O. L. R. 622.

134. The provisions of the section as to declaration of secrecy are directory only, and failure of officers to comply with its requirements does not invalidate the election: Wynn v. Weston. 15 O. L. R. 1.

136. The provisions of this section must be construed as absolutely excluding such testimony: R. ex rel. Ivison v. Irwin: 4 O. L. R. 192. Upon a scrutiny the Judge has no power to inquire how any person not entitled to vote marked his ballot: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451.

138. Unjustified threat of penalty: Re Sinclair v. Owen Sound, 8 O. W. R. 238. Procedure on charge for offence under this section; jurisdiction of Police Magistrate: R. v. Durocher, 4 O. W. N. 867, 1057, 24 O. W. R. 140, 28 O. L. R. 499.

143. Wilson v. Manes, 28 O. R. 419, 26 A. R. 398.

150. Consideration of the principles governing the application of the curative provisions of this section: Re Hickey and Orillia, 17 O. L. R. 317, especially at pp. 322-3, 330-1, 341-2. The saving virtue of this section is only effective when (1) the election was conducted according to the principles laid down in the Act, and (2) the irregularity did not affect the result. Both these elements must concur: Re Hickey and Orillia, 12 O. W. R. 433 at 443, 17 O. L. R. 317. Principle of application of section: see East Simcoe, 1 Ont. E. C. 291; R. ex rel. Warr v. Walsh, 5 O. L. R. at p. 272. Even apart from this section it is not every irregularity that voids an election: Re Hickey and Orillia, 12 O. W. R. 68, 433, 17 O. L. R. 317. Wide effect given to this

section: Pickett v. Wainfleet, 28 O. R. 464, at pp. 467-8; R. ex rel. Warr v. Walsh, 5 O. L. R. at p. 272; R. ex rel. Armour v. Peddie, 9 O. W. R. 393, 14 O. L. R. 339. Where the provisions as to the inviolability of the ballots cast are not complied with, this section cannot save the election: R. ex rel. Hewson v. Riddell, 14 O. W. R. 49. Applied to cure use of improperly worded ballot: Re Giles and Almonte, 21 O. L. R. 362. Violation of provisions as to secrecy not validated by this section: Re Hickey and Orillia, 17 O. L. R. 317. An election held without warrant is not validated by this section: R. ex rel. Bawkes v. Letherby, 17 O. L. R. 304. Marking ballots outside polling booths is an irregularity not to be cured by this section: Quigley v. Bastard, 19 O. W. R. 176, 2 O. W. N. 1047, 20 O. W. R. 223, 3 O. W. N. 170. The use of a wrong list of voters is not a curable irregularity: R. ex rel. Block v. Campbell, 18 O. L. R. 269, 13 O. W. R. 553. An error as to the time and place of nomination in respect of a question whether or not the mayor and councillors could be nominated at the same time, would come within the curative provisions of this section: R. ex rel. Warr v. Walsh, 5 O. L. R. 268. When directions to voters had not been furnished to the deputy returning officers on the voting on a local option by-law, and as there was not clear evidence of the posting up, under the direction of the council, at four or more public places, the by-law was quashed as these were not irregularities cured by this section, the fact that no harm had resulted, as far as shewn, being no answer: Re Salter and Beckwith, 4 O. L. R. 51. Objections based on formalities not observed in the taking of votes on a local option by-law, not being such as are required by the statute in express words to be observed as a condition precedent to the right to pass the by-law, were held to come within the curative provisions of this section, there being nothing to shew or suggest any intentional violation of the directions of the Act, nor any reason for believing that any disregard of the statutable formalities called for by the Act affected the result of the voting: Re Sinclair v. Owen Sound, 12 O. L. R. 488. The omission of an illiterate to take declaration is a mere irregularity of mode of

voting: Re North Gower, 24 O. W. R. 489, 25 O. W. R. 224, 4 O. W. N. 1177, 5 O. W. N. 249; and see Re Ellis and Renfrew, 23 O. L. R. 427. Onus of proving that omission to post copies of by-law, as required by former sec. 388 (2), had not affected the result: Re Begg and Dunwick, 21 O. L. R. 94, 15 O. W. R. 908, 1 O. W. N. 719 (see now sec. 263). Non-compliance with secs. 263, 264: Re Schumacher and Chesley, 21 O. L. R. 522, 1 O. W. N. 1041, 16 O. W. R. 641. Non-compliance with sec. 263 as to advertisement is not a curable defect: Re Rickey and Marlborough, 9 O. W. R. 563, 14 O. L. R. 587. Irregularities in advertisement: see sec. 263 notes. Section may be applied to cure certain irregularities in declarations under sec. 69: R. ex rel. Milligan v. Harrison, 16 O. L. R. 475, 11 O. W. R. 554. When declarations required under sec. 69 cannot be cured: R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581, 11 O. W. R. 929.

This section is applicable to contests over local option by-laws: see R. S. O. 1914, ch. 215, sec. 137. The following have been held to be within the saving provisions of this section: (1) No newspaper designated in the by-law: Re Dillon and Cardinal, 10 O. L. R. 371, and no places specifically designated for the voting: Re Coxworth and Henshall, 17 O. L. R. 431. (2) Persons allowed in the polling place who were not entitled to be there: see above cases and Re Sinclair and Owen Sound, 12 O. L. R. 488; Re Rickey and Marlborough, 14 O. L. R. 587; but see Re Hickey and Orillia, 17 O. L. R. 317. (3) Non-performance by the deputy returning officer of various duties required of him at and after the close of the poll: see above cases, esp. Re Rickey and Marlborough, 14 O. L. R. 587, and other cases *infra*. (4) Irregular voters' lists: Re Sinclair v. Owen Sound, 12 O. L. R. 488; Re Duncan and Midland, 16 O. L. R. 132. (5) Omission to enter the electors as voting: Re Sinclair and Owen Sound, 12 O. L. R. 488; Re Duncan and Midland, 16 O. L. R. 132. (6) Declarations missing or not taken. (7) Defaulters' list not supplied. (8) Certificates not furnished to deputy returning officer: (see same cases). (9) Oath of secrecy not taken: above cases

and Wynn v. Weston, 15 O. L. R. 1. (10) Number who voted not certified by deputy returning officer: (id). (11) Publication of by-law defective: above cases and Re Robinson and Beamsville, 8 O. W. R. 689, 9 O. W. R. 273.

The following have been held not to be within the curative provisions of sec. 150: (1) Omission to post directions to voters: Re Salter and Beckwith, 4 O. L. R. 51. (2) Want of posting up of copies of by-law: *Ib.*; but see Re Begg and Dunwich, 21 O L. R. 94. (3) Illegal voting, if it affects the result: Re Cleary and Nepean, 14 O. L. R. 392. (4) Want of proper publication: Re Cartwright and Napanee, 11 O. L. R. 69; Re Rickey and Marlborough, 14 O. L. R. 587. (5) Omission of time and place for summing up votes: Re Bell and Elma, 13 O. L. R. 80; Re Coxworth and Henshall, 17 O. L. R. 431; Re Kerr and Thornbury, 8 O. W. R. 451. (6) Where the principle of the inviolability of the ballot is infringed: R. ex rel. Hewson v. Riddell, 14 O. W. R. 49.

The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by former secs. 341 and 342, (see now secs. 263, 264) was the omission of an essential part and made the by-law invalid. This section did not apply to cure the defect, as an omission was more than an irregularity: Re Bell and Elma, 13 O. L. R. 80. Examples of irregularities not affecting the result and cured by the section: Re Dillon and Cardinal, 10 O. L. R. 371; Re Young and Burbrook, 31 O. R. 108; Cartwright v. Napanee, 11 O. L. R. 69; see also Re Picket and Wainfleet, 28 O. R. 464; R. ex rel. Wallerworth and Buchanan, 28 O. R. 352; R. ex rel. St. Louis and Rheaum, 26 O. R. 460. Non-compliance with literal wording of sec. 126 cured by sec. 150: R. ex rel. Armour v. Peddie, 9 O. W. R. 393, 14 O. L. R. 339. For citation of cases looking to strict compliance with all statutory provisions: see R. ex rel. Armour v. Peddie, 9 O. W. R. 393, 14 O. L. R. 339. Threat of prosecution under 3 Edw. VII., ch. 19, sec. 162, not an irregularity which can be cured under this section: Re Sinclair and Owen Sound, 8 O. W. R. 239, 12 O. L.

R. 488. No voters' lists supplied to D. R. O.—curable irregularity: Re Sinclair and Owen Sound, 8 O. W. R. 239, 12 O. L. R. 488; Re Duncan and Midland, 9 O. W. R. 826, 10 O. W. R. 345, 16 O. L. R. 132. Voters' lists containing more than the proper number of names, (see sec. 391) curable irregularity: Re Sinclair and Owen Sound, 12 O. L. R. 488, 8 O. W. R. 239; Re Duncan and Midland, 9 O. W. R. 826, 10 O. W. R. 345, 16 O. L. R. 132. Irregular appointment of D. R. O. and poll clerk: Re Duncan and Midland, 16 O. L. R. 132, 9 O. W. R. 826, 10 O. W. R. 345. Disregard of provisions of Act not affecting result: Stoddart v. Owen Sound, 27 O. L. R. 221. Curing irregularities in voters' list used at local option contest: Re Ryan and Alliston, 22 O. L. R. 200. Application of this section to cure irregularities—principle considered: Re Ellis and Renfrew, 23 O. L. R. 427; Re Sturmer and Beaverton, 24 O. L. R. 65; Re Ryan and Alliston, 22 O. L. R. 200; Re Dale and Blanchard, 21 O. L. R. 522, 1 O. W. N. 65, 14 O. W. R. 704; Re Prangley and Strathroy, 21 O. L. R. 54, 1 O. W. N. 706. Ballot not in prescribed form: Re Milne and Thorold, 3 O. W. N. 536. Irregularities: Stoddart v. Owen Sound, 4 O. W. N. 83. Incurable irregularity: Re Milne and Thorold, 25 O. L. R. 420; Re Quigley and Bastard, 24 O. L. R. 622.

152. See Mearns v. Petrolia, 28 Gr. 98. Comment on history of section: R. ex rel. Morton v. Roberts, 22 O. W. R. 50, 3 O. W. N. 1089, 26 O. L. R. 263.

153. Application of section: R. ex rel. Gardhouse v. Irwin, 4 O. W. N. 1043.

156. The proclamation without the warrant as well, is insufficient: R. ex rel. Bawkes v. Letherby, 17 O. L. R. 304, 12 O. W. R. 664. See as to time: R. ex rel. Bawkes v. Letherby, 17 O. L. R. 304, 12 O. W. R. 664.

157.—(6) Does not apply to vacancy caused by *quo warranto* proceedings: R. ex rel. Martin v. Jacques, 4. O. W. N. 1112, 24 O. W. R. 457.

PART IV.

Proceedings to Declare Seat Vacant.

161. History of section: R. ex rel. Morton v. Roberts, 22 O. W. R. 50, 3 O. W. N. 1089, 26 O. L. R. 263. Two motions by different relators to try the validity of the same election were made returnable, one before the Master in Chambers, and the other before the County Judge, who, notwithstanding objections, proceeded with the motion before him and decided that the proceedings before the Master in Chambers were collusive. It was held that a Judge of the High Court sitting in Chambers having equal and concurrent jurisdiction under the Statute could not prohibit the County Judge. *Semble*, a County Court Judge who, without knowledge of prior proceedings, had granted a fiat for like proceedings, had jurisdiction on the return thereof to enquire of the prior proceedings, were collusive and if so to disregard them: R. ex rel. Winton v. Gowanlock, 29 O. R. 435. Who may bring proceedings to unseat: R. v. Slater and Homan, 2 O. W. N. 1221, 19 O. W. R. 427. Procedure in attacking right to hold seat: R. ex rel. Morton v. Roberts, 26 O. L. R. 263. Delegation to County Judge to take evidence: see sec. 173: R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581. When the Legislature wishes to give jurisdiction to the Master in Chambers he is mentioned by name, as here: Harrison v. Mobbs, 9 O. W. R. 545.

162. Where an election was attacked for non-compliance with certain statutory formalities, it was held that the relator, by voting for one of the respondents who was in the same class as the others, acquiesced in and became a party to the irregularity and could not be heard to complain. The fact that the respondent whom the relator had voted for disclaimed office after service of the notice of motion was *nihil ad rem*: R. ex rel. McLeod v. Bathurst, 5 O. L. R. 573. Where the wrong day of the week was inserted by mistake as the day when the motion was returnable it was held sufficient and that the practice of actions in the Supreme Court is applicable to these proceedings: R.

ex rel. Roberts v. Ponsford, 3 O. L. R. 410, and see sec. 185. Laches and acquiesence of relator affects his right to move against Councillor on ground of interest under contract within section 53: R. ex rel. Hunt v. Genge, 8 O. W. R. 583. Time for application: R. ex rel. Morton v. Roberts, 22 O. W. R. 50, 3 O. W. N. 1089, 26 O. L. R. 263; R. ex rel. Froelich v. Woeller, 3 O. W. N. 828, 21 O. W. R. 672. Where relator dies, the action is at an end and no new proceeding can be taken after six weeks: R. ex rel. Warner v. Skelton, 3 O. W. N. 175. When a recognizance has been duly entered into with sureties and affidavit of justification the security is completed, but the Judge may postpone endorsing his allowance of it until objection raised. Such interlocutory procedure is a matter of discretion and not subject to appeal: R. ex rel. Walton v. Freeborn, 2 O. L. R. 165. For forms of fiat, recognizance, affidavit: see Biggar, pp. 240, 241.

163. See as to amendment of slips, etc.: Con. Rules 312 and 640; H. & L. note, p. 527, 1913 Rules 183, 521; see also R. ex rel. Roberts v. Ponsford, 3 O. L. R. 410, noted, *ante*. For form of notice of motion: see Biggar, p. 243.

164. Witnesses who can be examined: R. ex rel. Sabourin v. Berthiaume, 4 O. W. N. 1201, 24 O. W. R. 559. Con. Rule 491 (1913 Rule 228) is not applicable: R. ex rel. Beck v. Sharp, 16 O. L. R. 267.

166. A relator is not entitled to the seat if he neither objects to the disqualification of the respondent at the nomination nor gives any notice on the election day to the electors that they were throwing away their votes: R. ex rel. O'Donnell v. Broomfield, 5 O. L. R. 596; R. ex rel. Robinson v. McCarty, 5 O. L. R. 638. And where notices were put up in five out of twelve booths it was insufficient: R. ex rel. Zimmerman v. Steele, 5 O. L. R. 565.

167. It is permissible to join two or more persons in one motion only when the grounds of objection apply equally to both. Where the objections to the qualification of two aldermen were distinct, the joining of the two in one motion was held to be improper: R.

ex rel. Burnham v. Hagerman, 31 O. R. 636. This section only authorizes proceedings against more than one person in the same motion where the grounds apply equally to two or more persons elected: R. ex rel. Warner v. Skelton, 2 O. W. N. 693, 748, 18 O. W. R. 534, 23 O. L. R. 182.

169. See R. ex rel. Winton v. Gowanlock, 29 O. R. 435, *ante*, sec. 161.

173.—(1) Affidavit evidence may be supported at the trial by *viva voce* evidence, although not mentioned in the notice of motion. After the trial of such a proceeding has commenced it is discretionary with the Judge to allow a person who has made an affidavit to be cross-examined, though before commencement of the trial cross-examination may properly be had: R. ex rel. Ivison v. Irwin, 4 O. L. R. 192; see also R. ex rel. McFarlane v. Coulter, 4 O. L. R. 520. Witnesses who can be examined: R. ex rel. Sabourin v. Berthiaume, 4 O. W. N. 1201, 24 O. W. R. 559. The cross-examination of the affiants on their affidavits can only be had on leave obtained from the Judge or Master in Chambers or officer before whom the proceedings are carried on, and he must take such cross-examination himself: R. ex rel. Beck v. Sharp, 16 O. L. R. 267, 11 O. W. R. 493. Procedure as to taking down and signing evidence: R. ex rel. Sabourin v. Berthiaume, 4 O. W. N. 1201, 24 O. W. R. 559. Con. Rule 490 (1913 Rule 227) is not applicable to these proceedings: R. ex rel. Beck v. Sharp, 16 O. L. R. 267.

173.—(2) Upon an application to set aside a municipal election on the ground of bribery, all the evidence, pro and con, and not merely the evidence of the relator in support of the charge is to be taken *viva voce*. The heading may be read into the section to aid construction. Affidavits in answer to oral testimony cannot be received: R. ex rel. Carr v. Cuthbert, 1 O. L. R. 211. Evidence as to corrupt practices directed to be taken before the County Judge: R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581.

173. Form of order for trial of an issue and form of endorsement of verdict: see Biggar, pp. 249-250.

177. Forms of judgment: see Biggar, pp. 250, 251.

179. A County Judge granted a fiat for a motion to set aside the election of a township Reeve, and subsequently on the respondent's motion made an order setting aside the relator's whole proceedings from the beginning. *Quaere*, whether the County Judge could make such an order, but no appeal lay to a Judge of the High Court in Chambers, the appeal given by the section being from the County Judge's decision of a contested election and not from an order quashing the proceedings without a trial: (R. ex rel. Grant v. Coleman, 7 A. R. 619, is no longer law); R. ex rel. McFarlane v. Coulter, 4 O. L. R. 520.

182. See R. ex rel. McLeod v. Bathurst, 5 O. L. R. 573.

185. See as to applicability of Rules: R. ex rel. Beck v. Sharp, 16 O. L. R. 267, 11 O. W. R. 493.

186. R. S. O. 1914, ch. 56, sec. 146, *et seq.*, and notes; see also H. & L., p. 218.

PART V.

Bribery and Corrupt Practices.

187. See R. S. O. 1914, ch. 8, sec. 167, and notes. For application of secs. 187 to 189 to elections in respect of by-laws: see sec. 284, *post*. A cattle drover who was not a "temperance man," nor an agent of the "temperance people," who, where promoting the passage of a local option law, having a grudge against an hotelkeeper, took an active interest in the passing of the by-law by treating freely through the township with a view to influencing the electors to pass the by-law. There was no general drunkenness and it was not proved definitely that any one elector had been treated. The by-law was carried by a substantial majority. Under the circumstances such treating and conduct were not the means of passing the by-law: Re Gerow and Pickering, 12 O. L. R. 545; see also R. ex rel. Thornton v. Dewar, 26 O. R. 312; Biggar, p. 259. Promises not amounting to bribery: Re Leahy and Lakefield, 8 O. W. R. 743.

Paying a voter to act as scrutineer is not *per se* a corrupt practice. Payment of an honest debt may be a corrupt practice: R. ex rel. Fitzgerald v. Stapleford, 29 O. L. R. 133.

188. See R. S. O. 1914, ch. 8, sec. 171, and notes.

189. See R. S. O. 1914, ch. 8, sec. 173, and notes.

PART VI.

Meetings of Municipal Councils.

201. Special meetings; Good Friday: Re Schumacher and Chesley, 21 O. L. R. 522.

208. A meeting of the Council may adjourn temporarily without a formal motion to adjourn by the consent of a majority of a quorum present. Even if the adjournment announced by the Mayor was not in a particular case by the consent of a majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the Court should not in its discretion quash by-laws passed after the adjournment: Re Jones and London, 30 O. R. 383.

PART VII.

Boards of Control.

213. Section construed: Brundle v. Toronto, 2 O. W. N. 35, 16 O. W. R. 953.

PART VIII.

Officers of Municipal Corporations.

215. A member of a Municipal Council other than the head is not examinable for discovery under Con. Rule 1259, 439*a*: Davies v. The Sovereign Bank, 12 O. L. R. 557 (1913 Rule 327). The Mayor cannot by his act make city liable for illegal arrest, nor can Board of Control: Waters v. Toronto, 24 O. W. R. 746.

227. Recovery from municipality of moneys paid by Treasurer out of his own pocket: Leslie v. Malahide, 13 O. L. R. 97.

230. An assessor or collector may be appointed by resolution: Foster v. Reno, 22 O. L. R. 413. Regulations governing collectors: Arnprior and U. S. Fidelity, 4 O. W. N. 1426.

242. Comment on history of section: R. ex rel. Morton v. Roberts, 22 O. W. R. 50, 3 O. W. N. 1089, 26 O. L. R. 263. A candidate for office of alderman having in fact the necessary property qualification, misstated it in his declaration made under section 69, and as there set out it was insufficient. This declaration he supplemented by one under this section, in which he shewed sufficient property qualification. Held that it was too late after election to object to the former declaration, the election being otherwise free from objection: R. ex rel. Martin v. Watson, 11 O. L. R. 336. Variation in form of declaration: R. ex rel. Morton v. Roberts, 26 O. L. R. 263. Before whom declarations taken: R. ex rel. Milligan v. Harrison, 11 O. W. R. 678, at 680; R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929, at 930. See provisions of section 69 and notes thereto as to filing declaration.

245. Appointment of Medical Officer of Health: Warren v. Whitby, 4 O. W. N. 1029, 24 O. W. R. 317. And see R. S. O. 1914, ch. 218, sec. 35, *et seq.*

246. See London v. Bartram, 26 O. R. 161; Hellems v. St. Catharines, 25 O. R. 583.

248. "The Judge shall enquire." The Judge is *persona designata* and therefore not subject to control by writ of prohibition: Re Godson and Toronto, 16 O. R. 275, 16 A. R. 552, 18 S. C. R. 36. The Act Respecting Inquiries concerning Public Matters: see R. S. O. 1914, ch. 18. Under this section a city has power to order an enquiry by the County Court Judge into an election for members of the Council and Board of Education at which it was alleged corrupt practices had prevailed. The Supreme Court will not, in an action by a ratepayer for an injunction, interfere with the conduct of the enquiry by

the Judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc.: Re Lane and Toronto, 7 O. L. R. 423. Powers and duties of a commissioner appointed to investigate charges of misconduct: Chambers v. Winchester, 10 O. W. R. 909, 15 O. L. R. 316.

PART IX.

General Provisions Applicable to All Municipalities.

249. "Shall be exercised by by-law." The cases on this important section are collected in Biggar's Municipal Manual, p. 327-334, and arranged under the following headings: (1) Limits of operation; (2) Requisites of a valid by-law; (3) Ambiguity; (4) Certainty; (5) Reasonableness; (6) Discriminating by-laws; (7) *Ultra vires* by-laws; (8) Repugnant to law; (9) *Bona fides;* (10) By-laws not in the public interest; (11) By-laws partly good and partly bad; (12) Mistake as to jurisdiction.

Doctrine of *ultra vires* in its applicability under this section: Re Hassard and Toronto, 16 O. L. R. 500, 11 O. W. R. 684, 1088. As to exceptions to rule that municipal corporation can only act by its seal: see Leslie v. Malahide, 15 O. L. R. 4. Absence of by-law and seal; executed contract: East Gwillimbury v. King, 14 O. W. R. 122. Absence of by-law and seal; settlement of action against corporation accepted by resolution not binding: Leslie v. Malahide, 10 O. W. R. 199, 15 O. L. R. 4. By-laws are required in the exercise of legislative power. Statutory duty may be performed by resolution: Foster v. Reno, 22 O. L. R. 413. For distinction between acts which a corporation can do in the discharge of its duty to repair a highway without passing a by-law and acts for the improvement of a highway for which a by-law is necessary: see Croft v. Peterborough, 5 U. C. C. P. 141; Reid v. Hamilton, 5 U. C. C. P. 269, 287; Hislop v. McGillivray, 17 S. C. R. 479; Taylor v. Gage, 5 O. W. N. 489, and see sec. 460 and notes. For the common law regarding

by-laws of corporations, see R. v. The Coopers Company, 7 T. R. 543; R. v. Cutbush, 4 Burr. 2204; R. v. Ashwell, 12 East. 22.

250. It was formerly provided in this section that "every Council may make regulations," but by 3 Edw. VII. ch. 18, sec. 70, this was amended by inserting the words "by by-law." This was shortly after the decision: Liverpool and Milton Ry. v. Liverpool, 33 S. C. R. 180, holding that the regulations there in question could be made only by by-law: see Leslie v. Malahide, 15 O. L. R. 4; see also sec. 10, *ante*, and notes. See also Dwyre v. Ottawa, 25 A. R. 121: Biggar, p. 335, and note the present wording. Having enacted a by-law to establish a park, a municipal Council, the same body or its successors, may repeal, alter or amend as is deemed proper so long as no vested right is disturbed: Atty.-Gen. v. Toronto, 6 O. L. R. 159. By-law governing proceedings of Council disregarded: see Hefferman v. Walkerton, 6 O. L. R. 79; see dissenting judgment of Street, J., at p. 82. A committee of a municipal Council cannot, unless authorized by the Council, sell corporate property: New Glasgow v. Brown, 39 S. C. R. 586. Sale of City Hall: Parsons v. London, 20 O. W. R. 534, 25 O. L. R. 172, 3 O. W. N. 604. 21 O. W. R. 205. "Specific provisions of the Act:" see *e.g.*, sec. 293.

253. See Biggar, pp. 339-343. Motive affecting licensing power; prohibitive fee: Re Foster and Raleigh, 22 O. L. R. 26, 22 O. L. R. 342.

254. Tavern keeping is within this provision: Re McCracken and Sherborne, 23 O. L. R. 81. And Township Council cannot pass by-law under R. S. O. 1897, ch. 245, sec. 20, limiting liquor licenses to one: Re McCracken and Sherborne, 16 O. W. R. 731, 18 O. W. R. 24, 1 O. W. N. 1091, 2 O. W. N. 601, 23 O. L. R. 81; see R. S. O. 1914, ch. 215, sec. 28.

258. This section is imperative and imposes on the Mayor a ministerial statutory duty enforceable by summary order of mandamus: Kennedy v. Boles, 6 O. W. R. 837. The provision for compelling the Mayor to sign applies where the matter is one of

policy merely and not where the validity of the Council's action is in question: Re Galt, Scott v. Patterson, 17 O. L. R. 270. A mandamus will not issue to compel the Mayor to sign a contract substantially different from the terms approved by the ratepayers: Re Scott and Patterson, 12 O. W. R. 637, 17 O. L. R. 270. Production of by-law authenticated by corporate seal is *prima facie* evidence of publication and compliance with regulations: Robinson v. Gregory, 1905, 1 K. B. 534. As to production of original record in Court: see Con. Rule 479 (1913 Rule 274); see also Robinson v. Gregory, 1905, 1 K. B. 534; Wigle v. Kingsville, 28 O. R. 378.

PART X.

Voting on By-laws.

260.—(*a*) Submission to electors of question as to supply of electric power from H. E. Commission: Horrigan v. Port Arthur, 1 O. W. N. 216, 14 O. W. R. 973, 1087.

263.—(1) Fixing less number of polling places for voters on money by-laws than are required for general voting: Re Hickey and Orillia, 12 O. W. R. 68. Necessity for fixing in and by the by-law the places for taking the votes: Re Hickey and Orillia, 12 O. W. R. 433; Re Coxwell and Hensall, 12 O. W. R. 279, 936. Omission to name D. R. O.'s in local option by-law: Re McCartee and Mulmur, 32 O. R. 69. Effect of amendment of 1904: Ward v. Owen Sound, 1 O. W. N. 512, 15 O. W. R. 443. Sufficient description of polling places: Re Salter and Beckwith, 4 O. L. R. 51. Various irregularities cured by sec. 150: Re Dillon and Cardinal, 10 O. L. R. 371, and see sec. 150, notes. Second reading of by-law: see Re Kelly and Toronto Junction, 8 O. L. R. 162. Final passing: see sec. 280; see also Re Dewar and East Williams, 10 O. L. R. 463.

The Ontario Railway and Municipal Board have approved (see *post*, sec. 536), the following Forms of By-laws and notices to be passed and given:

FORM NO. 1.

By-Law No. —

A By-law to provide for taking the votes of the electors on a proposed By-law entitled (here set out the short title of the proposed By-law).

Passed the day of A.D. 19 .

Whereas a proposed By-law of the Corporation of the of entitled (here set out the short title of the proposed By-law) requires for its validity the assent of the electors, and it is expedient and necessary to pass this By-law for the purpose of enabling the electors to vote on the proposed By-law;

Be it therefore enacted by the Municipal Council of the Corporation of the of as follows:—

1. The votes of the electors of the Corporation of the of shall be taken on the said proposed By-law on the day of A.D. 19 , between the hours of nine o'clock in the forenoon and five o'clock in the afternoon at the following places, and by the following Deputy-Returning Officers, namely: (here set out the polling places and the names of the Deputy-Returning Officers).

2. On the day of A.D. 19 , at the hour of o'clock in the noon, the head of the Council of the said Corporation or some member of the said Council appointed for that purpose by resolution shall attend at in the said Municipality for the purpose of appointing, and, if requested so to do, shall appoint by writing signed by him, two persons to attend at the final summing up of the votes by the Clerk, and one person to attend at each polling place on behalf of the persons interested in and promoting the proposed By-law, and a like number on behalf of the persons interested in and opposing the proposed By-law.

3. On the day of A.D. 19 , at the hour of o'clock in the noon, at , in the said municipality, the Clerk of the said municipality shall attend and sum up the votes given for and against the proposed By-law.

NOTE.—When a proposed By-law is submitted on the day of the annual election for the Municipal

Council, the following shall be substituted for Section 1 of the foregoing By-law:—

1. The votes of the electors of the Corporation of the of shall be taken upon the said proposed By-law at the same time and at the same places as the annual election for the Municipal Council, and the Deputy-Returning Officers appointed to hold said election shall take the vote.

FORM NO. 2.

By-Law No. —

A By-law to provide for taking the votes of the electors on the following question: (here state question).

Passed the day of A.D. 19 .

Whereas it is considered desirable and expedient to obtain the opinion of the electors on the following question: (here state question), and to pass this By-law for the purpose of enabling the electors to vote on said question;

Be it therefore enacted by the Municipal Council of the Corporation of the of as follows:—

1. The votes of the electors of the Corporation of the of shall be taken on the said question on the day of A.D. 19 , between the hours of nine o'clock in the forenoon and five o'clock in the afternoon at the following places, and by the following Deputy-Returning Officers, namely: (here set out the polling places and the names of the Deputy-Returning Officers).

2. On the day of A.D. 19 , at the hour of o'clock in the noon, the head of the Council of the said Corporation or some member of said Council appointed for that purpose by resolution shall attend at in the said Municipality for the purpose of appointing, and if, requested so to do, shall appoint by writing signed by him, two persons to attend at the final summing up of the votes by the Clerk, and one person to attend at each polling place on behalf of the persons interested in and voting in the affirmative on said question, and a like number on behalf of the persons interested in and voting in the negative on said question.

3. On the day of A.D. 19 , at the hour of o'clock in the noon, at , in the said municipality, the Clerk of the said municipality shall attend and sum up the votes given in the affirmative and negative on the question.

NOTE.—When a question is submitted to obtain the opinion of the electors on the day of the annual election for the Municipal Council, the following shall be substituted for section 1 of the foregoing By-law:—

1. The votes of the duly qualified electors of the Corporation of the of shall be taken on the said question at the same time and at the same places as the annual election for the Municipal Council, and the Deputy-Returning Officers appointed to hold said election shall take the vote.

FORM NO. 3.

Notice to be published with a copy or synopsis of a proposed by-law.

NOTICE.

Take notice that the foregoing is a true copy or synopsis (as the case may be) of a proposed By-law of the Corporation of the of to be submitted to the votes of the electors on the day of A.D. 19 , between the hours of nine o'clock in the forenoon and five o'clock in the afternoon at the following places:—

(Here state the polling places).

And that the day of A.D. 19 , at o'clock in the noon at in the said municipality has been fixed for the appointment of persons to attend at the polling places, and at the final summing up of the votes by the Clerk.

And that if the assent of the electors is obtained to the said proposed By-law it will be taken into consideration by the Municipal Council of the said Corporation at a meeting thereof to be held after the expiration of one month from the date of the first publication of this notice, and that such first publication was made on the day of A.D. 19 .

Clerk.

NOTE 1.—In the case of a money By-law the notice shall contain in addition the following:—

Take notice further that a tenant who desires to vote upon said proposed By-law must deliver to the Clerk not later than the tenth day before the day appointed for taking the vote a declaration under The Canada Evidence Act, that he is a tenant whose lease extends for the time for which the debt or liability is to be created, or in which the money to be raised by the proposed By-law is payable, or for at least twenty-one years, and that he has by the lease covenanted to pay all municipal taxes in respect of the property of which he is tenant other than local improvement rates.

NOTE 2.—Where the vote is taken on the date of the annual election for the Municipal Council the first paragraph of the foregoing notice may read:—

Take notice that the foregoing is a true copy or synopsis (as the case may be) of a proposed By-law of the Corporation of the of to be submitted to the votes of the electors at the same time and at the same places as the annual election for the Municipal Council, and the Deputy-Returning Officers appointed to hold the said election shall take the vote.

FORM NO. 4.

Notice to be published with a statement of a question submitted.

NOTICE.

Take notice that the foregoing is a correct statement of the question to be submitted to the votes of the electors on the day of A.D. 19 , between the hours of nine o'clock in the forenoon and five o'clock in the afternoon at the following places:

(Here state the polling places).

And that the day of A.D. 19 , at o'clock in the noon, at , in the said municipality has been fixed for the appointment of persons to attend at the polling places and at the final summing up of the votes by the Clerk.

Clerk.

NOTE.—Where the vote is taken on the date of the annual election for the Municipal Council the first paragraph of the foregoing notice may read:—

Take notice that the foregoing is a correct statement of the question to be submitted to the votes of the electors at the same time and at the same places as the annual election for the Municipal Council, and the Deputy-Returning Officers appointed to hold the said election shall take the vote.

263.—(2) Where a municipal Council submitted a local option repealing by-law more than seven weeks after the first publication it was held invalid and the electors could demand another vote the following year on another repealing by-law: Re Vandyke and Grimsby, 14 O. W. R. 538. Day fixed for taking votes more than five weeks after first publication of proposed by-law: Re Henderson and Mono, 9 O. W. R. 599. Where no one was prejudiced and the local option by-law was passed by a few hours only within the minimum time limit the objection was not fatal: Re North Gower L. O., 24 O. W. R. 489, 25 O. W. R. 224, 5 O. W. N. 249.

263.—(4) The omission in a local option by-law of the time and place where the votes are to be summed up is an omission of an essential part and renders the by-law invalid, section 150 not applying to cure this defect, which is more than an irregularity: Re Bell and Elma, 13 O. L. R. 80.

263.—(5) A clerical change, merely substituting one equivalent for another, not a breach of this section: Re Coxworth and Hensall, 17 O. L. R. 431. "Three successive weeks" means a publication once in each of three successive periods of seven days beginning on the first day of actual publication: Re Rickey and Marlborough, 9 O. W. R. 563, 930, 14 O. L. R. 587. The word "week" is taken in its ordinary signification: Re Armour and Onondaga, 14 O. L. R. 606; Re Duncan and Midland, 16 O. L. R. 132, 9 O. W. R. 826, 10 O. W. R. 345. Sufficient and insufficient publication: Re Coe and Pickering, 24 U. C. R. 439; Re Mills and Richmond, 28 U. C. R. 333; Re Brophy and Gananoque, 26 C. P. 290; Re Mace and Frontenac, 42 U. C. R. 70; Re Armstrong and Toronto,

17 O. R. 766; Rickey v. Marlborough, 9 O. W. R. 563, 930; Re Duncan and Midland, 16 O. L. R. 132; Re Armour and Onondaga, 14 O. L. R. 606; Re Robinson and Beamsville, 8 O. W. R. 68, 9 O. W. R. 317; Re Wilson and Wardsville, 2 O. W. N. 914; Re Vaughan and Grimsby, 12 O. L. R. 211; Brooker v. Mariposa, 22 O. R. 120. Formerly the by-law was required to be "posted" as well as published. As to effect of lack of posting or irregular posting: see Re Salter and Beckwith, 4 O. L. R. 51; Re Angus and Widdifield, 24 O. L. R. 318; Re Begg and Dunwich, 21 O. L. R. 94; Re Wilson and Wardsville, 2 O. W. N. 914; Re Robinson and Beamsville, 9 O. W. R. 317. Size of type to be used: Re Leahy and Lakefield, 8 O. W. R. 744. Discretion of municipal Council in carrying out directions: Angus v. Widdifield, 2 O. W. N. 1376, 19 O. W. R. 709. As to effect of sec. 150, see notes to that section, *ante*.

263.—(7) From R. S. Man., ch. 116, sec. 376(*b*).

264. Failure to comply with the provisions of this section is fatal to the by-law: Re Kerr and Thornbury, 8 O. W. R. 451. Non-compliance with this section: Re Schumacher and Chesley, 21 O. L. R. 522, 1 O. W. N. 1041. Objection need not be taken to irregularity when it occurs. "Acquiesence" of "agents:" see Quigley v. Bastard, 3 O. W. N. 170, 20 O. W. R. 233, 24 O. L. R. 622.

266. The clerk of the municipality should treat as included in the "voters' list" persons found by the County Judge upon revising the voters' list to be entitled to vote: Re Wynn and Weston, 10 O. W. R. 1115, 15 O. L. R. 1. Farmers' sons and income voters should be included in the voters' lists: Re Young and Benbrook, 31 O. R. 108. The voters are those entitled to vote at municipal elections: Re Croft and Peterborough, 17 O. R. 522, 17 A. R. 439. Application, construction and history of section: see Re McGrath and Durham, 17 O. L. R. 514, 12 O. W. R. 149; Re Sinclair and Owen Sound, 13 O. L. R. 447, at p. 457; see also 39 S. C. R. 236. Qualification for voting on money by-law: Re Dale and Blanchard, 21 O. L. R. 497, 23 O. L. R. 69. Proper list of voters in local option contests: see *post*, sec.

268, note. See notes to secs. 56-58 and 91, *ante*, and sec. 279 *post*; see also notes to sec. 150.

267. The certificate of a County Judge as to the correctness of the voters' list should not be gone behind or the steps investigated by which he arrived at his conclusions: Re North Gower, 24 O. W. R. 489, 25 O. W. R. 224, 5 O. W. N. 249; and see Re Ryan and Alliston, 18 O. W. R. 131, 21 O. L. R. 583, 22 O. L. R. 200.

268. What is the proper list considered and result of using wrong list. Not an irregularity within section 150: R. ex rel. Black v. Campbell, 13 O. W. R. 553, 18 O. L. R. 269. Proper list of voters in local option contest and right to enquire into qualification on motion to quash by-law: Re Mitchell and Campbellford, 11 O. W. R. 941, 16 O. L. R. 578. Proper list: Re Ryan and Alliston, 21 O. L. R. 582, 22 O. L. R. 200; Re West Lorne, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451; Re Aurora Scrutiny, 28 O. L. R. 475; R. ex rel. Black v. Campbell, 18 O. L. R. 269; Carr v. North Bay, 28 O. L. R. 623, and see R. S. O. 1914, ch. 215, sec. 137 (2). See also notes to secs. 56-58 and 91, *ante*, and sec. 279 *post*.

269. The principle of multiple voting does not apply to voting on local option by-laws: Re Sinclair and Owen Sound, 12 O. L. R. 488, 13 O. L. R. 447, 39 S. C. R. 236. See *ante* secs. 99 and 138 (*g*) and notes.

270. Clerk of municipality can vote on submission of local option by-law: Re Schumacher and Chesley, 21 O. L. R. 522. Sturmer v. Beaverton, 2 O. W. N. 1116, 19 O. W. R. 255, 24 O. L. R. 65; Fitzmartin v. Newburg, 2 O. W. N. 1114, 1177, 19 O. W. R. 267, 24 O. L. R. 102. *Contra*: Re Ellis and Renfrew, 23 O. L. R. 427. As to right of clerk to vote: see also secs. 60 and 127, and notes. As to poll clerks voting: see sec. 100 and notes.

272. Omission to furnish directions to voters to D. R. O.'s rendered by law invalid: Re Salter and Beckwith, 4 O. L. R. 51.

274. See Re Sinclair and Owen Sound, notes to sec. 269, *ante*. As to right of D. R. O.'s to vote on local option by-laws: see Re Local Option Saltfleet, 16 O. L. R. 293; and see sec. 100, *ante*, notes.

275. "Electors voting on the by-law:" Re Brown and E. Flamboro', 2 O. W. N. 1000, 19 O. W. R. 35. Summation of votes: Re Armour and Onondaga, 14 O. L. R. 606.

276. For "three-fifths" majority requirement in local option contests and method of computation: see *post*, sec. 279 (3) notes, and R. S. O. 1914, ch. 215, sec. 137 (5) (6) and notes.

278. See as to agreements under former section: R. S. O. 1897, ch. 223, sec. 411, exempting industries from taxation: C. P. R. v. Carleton Place, 12 O. W. R. 567.

279.—(1) History of "scrutiny" and similar investigations under these provisions and other similar acts, together with collection of cases: Re McGrath and Durham, 12 O. W. R. 1091, 17 O. L. R. 514, at p. 523. Voting on a local option by-law is an "election" and a motion to quash the by-law is a scrutiny: Re Mitchell and Campbellford, 16 O. L. R. 578. A "scrutiny" is something more comprehensive than a recount. As to its extent and limits: see Re Local Option in Saltfleet, 16 O. L. R. 293, 11 O. W. R. 356, 545. "Scrutiny of votes" and "scrutiny of ballots" distinguished: see Re McGrath and Owen Sound, 12 O. W. R. 1091; and see Re Saltfleet, 11 O. W. R. 356, 545, 16 O. L. R. 293. "Within two weeks"—where by-law passed before the expiry of this period: see Re Coxworth and Hensall, 17 O. L. R. 431, 12 O. W. R. 279; Re Duncan and Midland, 11 O. W. R. 242. Form of petition for a scrutiny: Biggar, p. 369. Form of recognizance: p. 370. See R. S. O. 1914, ch. 6, sec. 24; ch. 7, sec. 33; ch. 8, sec. 19, and notes.

279.—(3) In proceedings on scrutiny the certified list is conclusive except as to (1) persons guilty of corrupt practices, etc., (2) becoming non-resident, etc., (3) persons disqualified under the Elections Act. This applies to proceedings to quash a local option

by-law: Re McGrath and Durham, 17 O. L. R. 514. Judge's powers of enquiry considered in regard to persons who have voted and their right to do so: Re Orangeville L. O. By-law, 20 O. L. R. 476, 1 O. W. N. 536. A County Court Judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. The Judge has no power to enquire whether rejected ballots were cast for or against the by-law: Re West Lorne, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451. Where votes are cast by persons who were residents at the time of official revision of voters' lists and who have abandoned their residence before the time of voting, and by non-residents improperly put on the list and who are non-residents at the time of voting, the Judge on a scrutiny has jurisdiction to enquire as to the validity of the votes of these persons: Re Saltfleet L O. By-law, 16 O. L. R. 293; Re West Lorne, *supra;* Re Aurora Scrutiny, 28 O. L. R. 475. A scrutiny includes jurisdiction to investigate the voter's qualification so long as it does not conflict with the finality of the lists under the Ontario Voters' Lists Act. The Judge has jurisdiction to investigate whether or not in a given case the right to vote, finally and absolutely certified by the list, was subsequently so exercised as to constitute the ballot a legal vote: Re Aurora Scrutiny, 28 O. L. R. 475. Where a voter who was on the list as resident in two wards at the time of the revision of the list and before the time of voting, changed his actual residence from one to the other property, the Judge, on scrutiny, has power to inquire into the validity of such a vote, and also where a voter voted twice: Re Aurora Scrutiny, 28 O. L. R. 475. See also Re Strathroy L. O. By-law, 1 O. W. N. 465, 15 O. W. R. 386; Re Mitchell and Campbellford, 11 O. W. R. 941; Re Weston Local Option, 9 O. W. R. 250; Re Orangeville L. O. By-law, 20 O. L. R. 476, 1 O. W. N. 536, 15 O. W. R. 564. Certifying the result of a scrutiny of ballots cast at the voting on a municipal by-law is a judicial and not a ministerial act: Re Aurora Scrutiny, 28 O. L. R. 475, 4 O. W. N. 1069. Effect of this: see Re Local Option in Saltfleet, 16

O. L. R. 293, 11 O. W. R. 356, 545. In determining the "majority" of the votes given and the "total number of electors voting" in local option elections, position of spoiled ballots and blank ballots considered: see Re Weston Local Option, 9 O. W. R. 250; Re Swan River Local Option, 3 W. L. R. 546. "Majority" in case of local option by-law means such majority as is required by statute: Re Duncan and Midland, 16 O. L. R. 132. Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law: Re West Lorne Scrutiny, 47 S. C. R. 451. As to three-fifths majority required to pass local option by-laws: see R. S. O. 1914, ch. 215, sec. 137. The Court first decides whether enough votes were illegally cast to affect the result. If so, should the Court then quash for illegality or proceed to ascertain how the bad ballots were marked? Voters alone are protected: Sturmer v. Beaverton, 2 O. W. N. 1116, 19 O. W. R. 255. Protection of persons voting from disclosing in a scrutiny, how they voted, where votes improperly cast: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 277, 26 O. L. R. 339, 47 S. C. R. 451. Motion to prohibit Judge from certifying to the result: Re Schumaker and Chesley, 17 O. W. R. 174.

279.—(5) "The Judge shall possess the like powers:" see secs. 170-173, *ante*, and notes; see also Re Aurora Scrutiny, 28 O. L. R. 475. On a scrutiny of the ballot papers cast on the voting for a bonus by-law a County Judge cannot award costs against the corporation if it be successful in upholding the by-law: Re Aldborough and Schmeltz, 32 O. R. 64.

280.—(1) Applicability to local option by-laws: Re Dewar and East Williams, 10 O. L. R. 463. Second reading without formal motion: see Re Kelly and Toronto Junction, 8 O. L. R. 162. The final passing is purely a ministerial duty; defects in the manner of the passing are of little consequence: Re Duncan and Midland, 10 O. W. R. 345, 11 O. W. R. 242, 16 O. L. R. 132; but see Re Dewar and East Williams, 10 O. L. R. 463.

280.—(3) Final passing; scrutiny intervening; three-fifths majority: Re Duncan and Midland, 16 O. L.

R. 132, 11 O. W. R. 242. Objection that by-law was passed before the two weeks allowed for scrutiny overruled: Re Coxworth and Hensall, 17 O. L. R. 431, 12 O. W. R. 279; see also Re Duncan and Midland, 11 O. W. R. 242. Third reading of by-law before the expiration of two weeks allowed for scrutiny: see Re Joyce and Pittsburg, 16 O. L. R. 380; see also as to time of passing: Re Robinson and Beamsville, 8 O. W. R. 689, 9 O. W. R. 317.

PART XI.

Quashing By-laws.

283. See formerly: R. ex rel. Mason v. Butler, 17 P. R. 382. Nine interested ratepayers combined to apply to quash a by-law, made the necessary deposit and put forward one of their number who launched the application and afterwards gave notice discontinuing. After the time for making the application had expired, the application not having been dismissed, one of the remaining ratepayers was on his application allowed to continue the proceedings in the original applicant's name: Re Ritz and New Hamburg, 4 O. L. R. 639. The Municipal Council having decided not to oppose a motion to quash a local option by-law, certain electors were allowed at their individual risk as to costs to oppose it in the Council's name: Re Salter and Beckwith, 4 O. L. R. 51. A motion to quash a by-law should be made to a Judge in Court and from his decision for or against the motion an appeal lies to a Divisional Court: 1913 Rule 492. The period of seven clear days' notice being fixed by statute cannot be shortened under Con. Rule 353 (1913 Rule 176): Re Sweetman and Gosfield, 13 P. R. 293; see also Con. Rules 349, 356 and H. & L. notes, pp. 564-5 (1913 Rules 204, 213). Irregularities not sufficient to invalidate by-law: see Dillon and Cardinal, 10 O. L. R. 371. Motion to quash a by-law for the construction of electric light works on the ground that 3 Edw. VII. ch. 19, sec. 569 (5) had not been complied with, and also upon the ground of the omission to appoint and give notice of the appointment of a day for finally considering the by-law in Council. It was held that

the jurisdiction to quash should not be exercised as the by-law might be validated by registration (under section 296, *infra*), and the irregularities had not affected the result. The jurisdiction to quash ought, generally speaking, to be exercised in every case of an illegal by-law, which cannot be validated, but in the case of one which can be validated it should be exercised only, generally speaking, when the irregularities in question affected or might have affected the passing of it: Cartwright v. Napanee, 11 O. L. R. 69. Refusal of Court in its discretion to restrain a Municipal Council from acting on a by-law for the payment of money not provided for on the face of its estimates passed against protest of minority of Council and in contravention of its procedure: Hefferman v. Walkerton, 6 O. L. R. 79. On a motion to quash a by-law authorizing the expropriation of an easement to construct a sewer, it appeared that the sewer was part of a system, but the upper end thereof, and not an outlet for any part already constructed. Held, no money having been spent under the by-law, it had not been acted on so as to prevent its being quashed: Re Davis and Toronto, 21 O. R. 243. As a general rule no councillor should vote on a matter involving his direct pecuniary interest, but no interest can disqualify a councillor from performing his duties as such that spring solely from his being a ratepayer in the municipality: Elliott v. St. Catharines, 12 O. W. R. 653, 13 O. W. R. 89. History of statutory powers to quash by-laws, and of provisions for scrutiny; cases collected: Re McGrath and Durham, 17 O. L. R. 514, at 523; Re Alexander and Milverton, 12 O. W. R. 61. Costs of motion to quash by-law where legislature has intervened to validate by-law admittedly bad: Re Alexander and Milverton, 12 O. W. R. 61. Real applicant held liable for costs: Re Sturmer and Beaverton, 20 O. W. R. 560, 21 O. W. R. 55, 390, 3 O. W. N. 613, 715, 25 O. L. R. 190, 566. See also cases collected in Biggar's Municipal Manual, pp. 375-384. Form of notice of motion to quash by-law, p. 382. Form of recognizance, p. 383.

284. Majority for local option by-law procured by bribery: Re Gerow and Pickering, 8 O. W. R. 356,

497, 12 O. L. R. 545; and see notes to secs. 187-189, and sections there referred to.

285. A by-law of a county council detached certain lands from a village municipality and added them to another municipality. The village corporation was entitled, under this section, to apply to quash the by-law: Re Southampton & Bruce, 8 O. L. R. 106, 664.

PART XII.

Money By-laws.

288.—(1) Application of section: Re Holmested and Seaforth, 2 O. W. N. 464, 17 O. W. R. 1060, Forms of debenture by-laws: see Biggar, pp. 395-399, 404, *et seq.*

288.—(3) As to alternative provisions of this sub-section and sub-sec. (4): see Forbes v. Grimsby School Board, 7 O. L. R. 137.

288.—(4) The omission to observe the provisions of 3 Edw. VII., ch. 19, sec. 685 (2), which were merely directory was not fatal to a by-law otherwise valid on its face: Ward v. Welland, 31 O. R. 303; see now R. S. O. 1914, ch. 193, sec. 40, sub-secs. (2) and (6). Non-compliance with the terms of this section in regard to equality of annual instalments, cured by registration under sec. 296: Georgetown v. Stimson, 23 O. R. 33.

288.—(7) A by-law was passed under the provisions of the Act authorizing a township corporation to raise a sum by issuing debentures to be met by special rate, to provide a bonus for a railway company, payable on its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed but remained unissued in the control of the municipality. Held that until the sale or negotiation of the debentures there was no debt on the part of the township, and the special rate was not leviable though the time fixed for the payment of some of the debentures had passed: Bogart v. King, 1 O. L. R. 496.

288.—(11) Date when by-law takes effect when date left blank: Re Caldwell and Galt, 30 O. R. 378.

289. A municipality cannot pass a by-law for the purchase of land to be presented to the Dominion Government for the site of a post office and custom house: Jones v. Port Arthur, 16 O. R. 474. Municipal corporations are within the Statutes of Mortmain: Brown v. McNab, 20 Gr. 179. Powers of corporations as to holding lands: Atty.-Gen. v. Webster, L. R. 20 Eq. 483; Re Campden Charities, 18 Ch. D. 310. See as to mortgages: Brown v. McNab, 20 Gr. 179; Township of Oxford v. Bailey, 12 Gr. 276; Belleville v. Judd, 16 C. P. 397. Right to enquire into purpose of purchase of land by a municipality: Verner v. Toronto, 21 O. W. R. 170. Contract for supply of electric light: Hogan v. Brantford, 1 O. W. N. 226.

295. Validation of municipal by-law: Re Davis & Beamsville, 2 O. W. N. 423

The Ontario Railway and Municipal Board have approved the following form of affidavit on application for approval of By-law under R. S. O. 1914, ch. 266, secs. 43, 44.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

In the matter of the Application of the Corporation of the Township of in the of for validation of its By-law No. and the debentures thereunder ($ for .

I, of the Township of in the of make oath and say:—

1. That I am the Clerk of the Council of the Municipality of the Township of in the of .

2. That the Board of Public School Trustees for School Section Number of the Township of in the of made due application, a true copy of which is hereto annexed marked "A," to the Council of the Municipality of the Township of under Section 44 of the Public Schools Act, for the issue of debentures to the amount of for the purpose of in the said

School Section and proved to the satisfaction of the Council that the proposal for such loan had been submitted by the Trustees to and sanctioned at a special meeting of the ratepayers of the said Section duly called for that purpose.

3. That on the day of A.D., 19 , the said By-law No. , providing for the issue of the said debentures, was duly passed by the said Council, and was duly signed by the Reeve and Clerk and the Corporate seal was affixed.

4. That a copy of the said By-law is annexed to this my affidavit, marked with the letter " B," and that such copy is a true copy including the signatures thereto.

5. That the said By-law being Number of the By-laws of the Municipality of the Township of was duly registered within four weeks of the passing thereof on the day of A.D., 19 , as Number in the Registry Office for the of at being the Registry Division in which the Municipality of the Township of is situate.

6. That notice of the passing of said By-law was immediately after the registration thereof published in the , a public newspaper published in the Town of in the of being the Town of the in which the said Municipality is situated, in the issues of such newspaper which were published on , being at least once a week for three successive weeks, and that a true copy of the said Notice is hereto annexed marked " C."

7. That the said By-law is in full force and effect and has not been altered or repealed, and no action, motion, or proceeding, in which the validity of the said By-law has been called in question or by which it is sought to quash the same or any part thereof, has been commenced or is pending, and no notice of any such motion, action or proceeding has been given, and I have no reason to believe that any such motion, action or proceeding will be made or taken.

8. That all the recitals in the said By-law are true in substance and in fact, and comply with Section 288 of " The Municipal Act."

9. That there is no irregularity in, or in connection with, the said By-law No. , or the proceedings had and taken in connection therewith, except

(set forth fully and specifically every irregularity for consideration by the Board):—

Sworn, etc.

(If By-law be passed under Section 43 of the Public School Act (R. S. O. 1914, ch. 266), make necessary changes in above Affidavit.)

The following is the form approved by the Board for use on applications for approval of bonus or money By-law:—(See secs. 260-296 and 395-387).

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

In the matter of the Application of the Corporation of under section 295 of "The Municipal Act, ," for validation of its By-law No. and the Debentures thereunder ($ for .

I, of the of in the of make oath and say:—

1. That I am the Municipal Clerk of the said Corporation.

2. That the Municipal Council of the said Corporation did on the day of finally pass By-law No. a true certified copy of which is hereto annexed, marked "A," providing for a poll on said (then proposed) By-law No. .

3. That a copy* of said (then proposed) By-law, together with a Notice, complying with section 263 (5) and (6) of the said Act (a true copy of which and Notice is hereto annexed marked "B,") was published once a week for three successive weeks in the issues of a newspaper published at of the dates following:—

*(If a Synopsis published, make a true copy of same, and the Notice published therewith, an Exhibit to Affidavit).

4. That the requirements of section 264 of "The Municipal Act, ," were duly complied with.

5. That the said By-law No. was adopted by the persons qualified to vote thereon at a poll duly held according to law on the day of A.D., 19 , there being valid votes in favor of and valid votes against the said By-law, the total possible valid vote being .

6. That after I had (at the time and place provided for in said By-law No.) summed up the

number of votes cast, I declared the result of the voting and did forthwith certify to the Council the result of the voting and the total number of persons entitled to vote upon the By-law, and a true copy of my Certificate is hereto annexed marked " C."

7. That a scrutiny of the votes was not applied for and after the expiration of two weeks from the declaration of the result of the voting, and within six weeks after the voting took place, the Council of the said Corporation duly passed the said By-law No. .

8. That the said By-law No. with the Notice mentioned in section 281 of the said Act, was duly promulgated by publication at least once a week for three successive weeks in the issues of a newspaper published at of the dates following:—

and that a true copy of the said By-law and Notice as so published is hereto annexed marked " D."

9. That within four weeks after the passing of the said By-law the same was duly registered on the day of 19 , in the proper Registry Office being the Registry Office for as Number in and that a Notice of such registration (a true copy of which Notice is hereto annexed marked " E "), was immediately after such registration published at least once a week for three successive weeks in the issues of newspaper, a newspaper published at aforesaid of the dates following:—

10. That the recitals in the said By-law No. are true and in compliance with section 288 of the said Act, and duly and correctly set forth:—

(*a*) The amount of the debt to be created, namely $ and in brief and general terms the object for which it is to be created, namely

(*b*) The amount of the whole rateable property of the Municipality, according to the last revised assessment roll, namely $

(*c*) The amount of the debenture debt of the Corporation, namely $ and that of the principal or interest is in arrear;

and that the said By-law provides for raising in each year, during the currency of the debentures or any

of them, a specific sum or sums sufficient to pay (give particulars here).

11. That no motion, action or proceeding is pending in which the validity of the said By-laws or either of them is called in question, or by which it is sought to quash the same, and I have no knowledge or notice of any kind of any intended motion, action or proceeding of such a nature.

12. That there is no irregularity in, or in connection with, the vote or any of the proceedings prior to the passing of either of the said By-laws or in, or in connection with, the said By-laws themselves, or either of them, or in, or in connection with, the passing, promulgation or registration of the said By-law No. except (here set forth specifically and in detail every irregularity for consideration by the Board):—

(In case By-law grants a bonus to manufacturers add:)

13. That the said By-law complies with, and does not in any way contravene any of the provisions of section 396 of "The Municipal Act, ," and the Bonus granted thereby, together with bonuses already granted, will not require an annual levy for the payment of principal and interest exceeding ten per cent. of the total amount required to be raised by taxation for the year next preceding the passing of the said By-law No. .

Sworn, etc.

The following are the approved forms for use on application for approval of By-laws passed under the Local Improvement Act, R. S. O. 1914, ch. 193.

Form "A" Works on Petition (See sec. 3).

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

In the matter of the Application, under Section 295 of "The Municipal Act, ," of the Corporation of for validation of its By-law No. , and the debentures thereunder, ($ for).

I, of the of in the County of make oath and say:—

1. That I am the Municipal Clerk of the said Corporation;

2. That a Petition for signed by at least two-thirds in number of the owners, representing at least one-half of the value of the Lots liable to be specially assessed, was on the day of 19 , lodged with me and found by me to be sufficient, and was duly certified as such on the day of , 19 , under section 16 of "The Local Improvement Act," and that a true copy of my certificate is now shown to me and marked Exhibit "A" hereto;

3. That the Council of the said Corporation did, by By-law passed on the day of by a vote of of all the members, provide that the cost of the work should be apportioned and borne as follows:

and that a copy of such By-law is now produced and shown to me and marked Exhibit "B" hereto;

4. That the said Council did, by By-law No. , passed on the day of provide for the making of the reports, statements, estimates, and special assessment roll for the said work;

5. That before passing the By-law for undertaking the work, the said Council did procure to be made a report as follows:—(Shew that Section 30 was complied with, giving all details);

6. That before a Special Assessment was imposed the said Council did procure to be made a Special Assessment Roll in which were entered (Shew that Section 31 was strictly complied with, giving details);

7. That before a Special Assessment was imposed a Sittings of the Court of Revision for the hearing of complaints against the proposed Special Assessment was duly held in accordance with Sections 33, 34, 35, 36 and 37 of "The Local Improvement Act," that Ten days' Notice of the said Sittings was duly given by publication in the newspaper published at and at least Fifteen days before the day appointed for the Sittings a Notice was mailed to the Owner of every Lot to be specially assessed, a true copy of which Notice so mailed is marked Exhibit "C" hereto, and that thereafter (such corrections having been made therein as were necessary to give effect to the decisions of the Court of Revision) I did on the day of duly certify the Special Assessment Roll in accordance

with Section 38 of "The Local Improvement Act," and that a true copy of the said Special Assessment Roll as so certified by me is now shewn to me and marked Exhibit "D" hereto:

8. That there was no appeal to a Judge of the County Court from any decision of the Court of Revision respecting the said Special Assessment Roll (or as the case may be, setting forth the facts fully);

9. That now produced and shown to me and marked Exhibits "E," hereto are By-laws Nos. of the said Council, providing respectively as follows:—

Exhibit "E" By-law No. to authorize the construction of

Exhibit "F"—By-law No. to provide for borrowing

Exhibit "G"—By-law (if any) No. to consolidate

10. That the following defects or irregularities in, or in the proceedings taken in connection with, the said Petition, Special Assessment Roll or By-laws Nos. are submitted to the said Board for consideration:—

11. That there is no other irregularity or defect in the said Petition or Special Assessment Roll, or By-laws Nos. or any of them, or in the proceedings had or taken in connection with the same, or any of them.

12. That no action or proceeding is pending in which the validity of the said By-laws or any of them is called in question, or by which it is sought to quash the same, and I have no knowledge or notice of any kind of any intended action or proceeding of such a nature.

Sworn, etc.

Form "B"—Works without petition, under Sections 5, 9 or 10 of R. S. O. 1914, ch. 193.

Use foregoing Form "A" so far as applicable; also prove Vote of Council (Secs. 5, 9, 10); and also prove publication of Notice, giving dates, name and description of newspaper (Sec. 11), and make a true copy of the Notice an Exhibit.

Form " C "—On the Initiative Plan.

Use foregoing Form " A " so far as applicable; also prove publication of Notice (Sec. 13), giving dates and name and description of newspaper, prove service of Notice, with full details (Sec. 13), and make a true copy of the Notice an Exhibit. Sate whether Petition filed against the work, and shew fully how disposed of.

296. A summary application to quash a municipal by-law is " made " when notice of the motion is served, the affidavits in support of it having been already filed. It is not necessary that the motion should be brought on for hearing within the time prescribed: Re Shaw and St. Thomas, 18 P. R. 454. When a by-law can be validated by registration the jurisdiction to quash should only be exercised when the irregularities in question affected, or might have affected the passing of it: Cartwright v. Napanee, 11 O. L. R. 69; see also Georgetown v. Stimson, 23 O. R. 23. Setting aside by-law registered under this section as being *ultra vires*: Ottawa Electric v. Ottawa, 6 O. W. R. 930, 8 O. W. R. 204. As to mode of registration of municipal by-laws: see Guthrie's decisions under the Registry Act, 1897, pp. 38, 48; and see R. S. O. 1914, ch. 124, sec. 70.

PART XIII.

Yearly Rates and Estimates.

297. See Bogart v. King, 32 O. R. 135, and 1 O. L. R. 496.

299. Right of city on incorporation, to share in county surplus: Woodstock v. Oxford, 17 O. W. R. 176, 2 O. W. N. 134, 22 O. L. R. 151.

300. In the absence of agreement to the contrary, the vendor assumes the payment of the proportion of taxes for the year up to the completion of the title: Armour, Titles, p. 164, and cases there cited.

PART XIV.

Respecting Finances.

302. The provisions of the section do not apply to debentures payable in annual instalments, there being in such a case no sinking fund to be provided: R. ex rel. Seymour v. Plant, 7 O. L. R. 467. No special appropriation is necessary in order to create a special rate applicable to the payment of principal and interest of a municipal debt. If the provisions of the Act are observed, such separate rate and the sinking fund as part of it arise as the taxes are collected, and where no such appropriation having been made, one of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to that fund, his election as reeve was set aside and he was disqualified. When without any such appropriation, so much of the year's income has been expended as to leave no more than sufficient to cover such sinking fund, the balance is impressed with that character and to apply it otherwise is a diversion within the meaning of this section: R. ex rel. Cavanagh v. Smith, 26 O. R. 632.

314. Form of debenture and debenture coupon: see Biggar, pp. 446-7.

315. Where a municipal by-law provided for the payment of interest on debentures, but not principal, and the interest had all been paid but not the principal although that was due, it was held that the effect of this section was that one payment of interest validates the debenture in respect of which it is paid, and one payment of principal validates the series in respect to which it is paid: Standard Life v. Tweed, 6 O. L. R. 653.

319. A lender is bound to enquire into the amount of taxes authorized to be levied by a municipality to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to enquire into the alleged necessity for borrowing.

A municipal council may, however, with the consent of the ratepayers raise money by debentures to repay money so unlawfully borrowed when the expenditure, although not included in the estimates, was for purposes within the general powers of the corporation: Fitzgerald v. Molsons Bank, 29 O. R. 105. The power conferred on a municipality of borrowing money to meet current expenditure is distinct from the power conferred of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed 80 per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality, apart from the expenditure for school purposes. An outlay which is not contemplated when the estimates are prepared and for which no provision as a special or possible contingency is made in the estimates for the year, cannot be treated as part of the ordinary expenditure, to meet which, a loan may be effected: Holmes v. Goderich, 5 O. L. R. 33. Costs of ratepayer suing on behalf of himself and all other ratepayers where statutory limit exceeded: see Holmes v. Goderich, 5 O. L. R. 33.

PART XV.

Acquisition of Land and Compensation.

321. Property expropriated in Eminent Domain proceedings. Measure of compensation: see Annotation 1 D. L. R. 508.

322. An expropriation by-law does not operate to create vested interests. It creates a statutory option to take the land at a price to be fixed by arbitration: Grimshaw v. Toronto, 8 O. L. R. 512. Propriety of registration of expropriation by-law, and effect: Grimshaw v. Toronto, 28 O. L. R. 512; and see R. S. O. 1914, ch. 124, sec. 70.

324. Where an expropriation by-law did not authorize entry, a trifling entry will not preclude the municipality from repealing the by-law: Guest v. Hamilton, 5 O. W. N. 310, 25 O. W. R. 274; see also Grimshaw v. Toronto, 28 O. L. R. 512.

325. Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. Distinction between such compensation and compensation for lands taken or taken and injuriously affected: see Re Leak and Toronto, 29 O. R. 685, 26 A. R. 351. As to costs: see Re Patullo and Orangeville, 31 O. R. 192, *post* sec. 344. A property on the west side of a street running north and south was "injuriously affected" by the closing of a street running from the first street in an easterly direction, opposite the property in question: Re Tate and Toronto, 10 O. L. R. 651. Damage resulting from closing highway: Re Taylor and Belle River, 15 O. W. R. 733, 1 O. W. N. 609, 17 O. W. R. 815, 2 O. W. N. 387. Matters which the arbitrator should consider as increasing or diminishing permanently or temporarily the value of land where lands expropriated for street widening: Review of authorities: Re Gibson and Toronto, 28 O. L. R. 20. Expropriation of land for highway; compensation: McLean v. Howland, 14 O. W. R. 509, 16 O. W. R. 608. Expropriation; right to lateral support: Manchester Corporation v. New Moss Colliery, 1906, 2 Ch. 546. Injury to land as a result of highway improvement where watercourses interfered with: Martin v. Middlesex, 4 O. W. N. 1540. Flooding land adjoining highway: McMulkin v. Oxford, 1 O. W. N. 410, 747, 15 O. W. R. 294, 16 O. W. R. 3. "Necessarily result:" Merritt v. Toronto, 3 O. W. N. 1550, 22 O. W. R. 710, 27 O. L. R. 1. "Due compensation:" Re Macdonald and Toronto, 27 O. L. R. 179. "Contemplated work" means work of the corporation alone. If a road is closed as part of a scheme for granting facilities to a company and the company's works enhance the value of the lands, this will not be taken into consideration: Re Brown and Owen Sound, 9 O. W. R. 727, 14 O. L. R. 627 (note changed wording of present section). Compensation for expropriation; contingent advantages: Re Gibson and Toronto, 4 O. W. N. 612. A person in possession of land as owner, and having, therefore, a title against all the world but the rightful owner, has a

prima facie right to compensation on the taking of the land under statutory powers: Perry v. Clissold, 1907, A. C. 73. An arbitrator to whom is referred a claim for compensation for injury to land through lowering the grade of a highway, has no power to direct the municipal corporation to maintain a retaining wall: Re Burnett and Durham, 31 O. R. 262. In expropriation, the value to be arrived at is the value to the owner, not the value to the expropriating body: Re Harvey and Parkdale, 16 A. R. 468; see also Re Lucas and Chesterfield Gas and Water Board, 1909, 1 K. B. 16; Re Fitzpatrick and New Liskeard, 13 O. W. R. 806. Right of compensation: Donaldson v. Dereham, 10 O. W. R. 220. Method of computing amount to be awarded where lucrative business is practically obliterated by expropriation proceedings by municipal corporation: Meyer v. Toronto, 25 O. W. R. 1. "Expropriated by the corporation," e.g., under secs. 373 (2), 398 (11) (32), 400 (11), 472, 482, 483 (9), etc. Compare expropriatory enactments in R. S. O. 1914, ch. 35, secs. 18, *et seq.*, (The Public Works Act); R. S. O. 1914, ch. 185, secs. 81, *et seq.*, (The Railway Act), etc.; and also R. S. O. 1914, ch. 178, sec 166; ch. 204, sec. 54; ch. 38, sec. 17; ch. 39, sec. 9, etc.

326. The provision limiting the time for the enforcement of claims for compensation had no retroactive effect: Re Roden and Toronto, 25 A. R. 12. Form of notice: see Biggar, p. 470.

327. See Herriman v. Owen Sound, 16 O. W. R. 98, 1 O. W. N. 759.

328. Where a municipal corporation taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of secs. 328-9, it must pay into Court the amount awarded with interest to the date of payment in, and six months' interest in advance: Re Cornwall, 30 O. R. 81, 27 A. R. 48.

PART XVI.

ARBITRATIONS.

333. In an arbitration for the purchase of an electric light plant a question arose concerning R. S. O. 1897, ch. 62, sec. 8 It seemed in that case that the arbitration was really under the Municipal Act, and if so, section 8 was not applicable, under the wording of 3 Edw. VII., ch. 19, sec. 467: Re Sturgeon Falls, 2 O. L. R. 585.

335.—(1) See Cummings v. Carleton, 25 O. R. 601, 26 O. R. 1; see Re Field Marshall and Beamsville, 11 O. L. R. 472, note to sec. 346. Form of appointment of arbitrator and notice to opposite party. Form of appointment of third arbitrator: see Biggar, pp. 480-1.

335.—(7) "Where more than two municipalities are interested:" see R. S. O. 1914, ch. 198; see Re Romney and Tilbury, 18 A. R. 477; Re Harwich and Raleigh, 20 O. R. 154. "May appoint the other arbitrator:" see Re Palgrave and McMillan, 1892, A. C. 460.

336. County Judge as arbitrator: Re Herriman and Owen Sound, 1 O. W. N. 759.

338. A member of a school board is not disqualified as arbitrator by this section: Re Sarnia and Sarnia Gas, 3 O. W. N. 117, 20 O. W. R. 204.

339. An arbitration pending before an arbitrator named under this section is not a "matter" within Con. Rule 485: see Re McPherson and Toronto, 16 P. R. 630 (1913 Rule 271). Compensation for lowering grade where there is encroachment on street: see Williams v. Cornwall, 32 O. L. R. 255. Arbitration between landowner and city and county together: see Re Cummings and Carleton, 26 O. R. 1.

340. The failure of an arbitrator to take the oath is fatal to his award, but when an award is moved against on the ground of such failure it must be clearly

shown that the applicant was not aware of the omission until after the making of the award: Re Burnett and Durham, 31 O. R. 262.

342. "Power of amendment:" see Con. Rule 304, 1913 Rule 130.

344. The power "to award payment by any of the parties to the other of the costs of the arbitration or of any portion thereof" should receive the same construction as Con. Rule 1130 (see R. S. O. 1914, ch. 56, sec. 74). The discretion given is a legal discretion and subject to the rule that when the claimant has been guilty of no misconduct, omission or neglect such as to induce the Court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation: Re Patullo and Orangeville, 31 O. R. 192. Where arbitrators made their award and directed that the costs should be paid by one party, but did not fix them or direct on what scale they should be taxed, there was no authority to tax them either on the Supreme Court or County Court scale, but, *semble*, the proper course would be to refer the award back to the arbitrators to complete it in the matter of costs. *Ib.*

345. See Re Christie and Toronto Junction, 21 A. R. 21, 25 S. C. R. 551; Re Herriman and Owen Sound, 1 O. W. N. 759, 16 O. W. R. 98. Exercise of power enabling the Court to call for additional evidence: Re Fitzpatrick and New Liskeard, 11 O. W. R. 483. And see further consideration of this case and of principle of valuation: 13 O. W. R. 806. Scope of award; city separated from county; maintenance of Court House: Re Carleton and Ottawa, 24 A. R. 409, 28 S. C. R. 606. Upon a claim for damages for injury to property through a change of grade, arbitrators found that the property had been benefited rather than injured, but allowed $100 damages and a portion of costs. On appeal the damages were increased to $1,000 with full costs. Though the Court will not usually increase such damages without cross appeal, yet where the original proceedings were by arbitration under a statute requiring the Court on appeal from the award to pronounce such judgment as the arbitrators should

have given, the statute is sufficient notice to an appellant of what the Court way do, and a cross appeal is not necessary: Re Christie and Toronto Junction, 21 A. R. 21, 28 S. C. R. 551. Where a submission to arbitration was drawn up including damages for lands taken and injuriously affected and also other matters, *e.g.*, damages for breach of contract not within the scope of the Municipal Act, and the submission made no provision for appeal, it was held that the award being one and indivisible, no appeal on the merits lay: Re Field Marshall and Beamsville, 11 O. L. R. 472. From what date time for appeal runs: Re Burnett and Durham, 31 O. R. 262; Re McLellan and Chinguacousy, 18 P. R. 246. As to appeals under Arbitrations Act: see R. S. O. 1914, ch. 65, sec. 17 and notes; see also 1913 Rules 503, 504, 492.

347. Refusal to ratify award: see Re McCall and Toronto 21 A. R. 256. Where debentures issued: Re Ussher and North Toronto, 2 O. W. N. 851. Registration of expropriation by-law and its effect: Grimshaw v. Toronto, 4 O. W. N. 1124, 28 O. L. R. 512; see R. S. O. 1914, ch. 124, sec. 70.

PART XVII.

Actions By and Against Municipal Corporations.

348. An action for damages for diverting water on the plaintiff's land by the construction of a ditch without a proper by-law authorizing the work is an action for trespass: Lawrence v. Owen Sound, 5 O. L. R. 369. Responsibility of municipal corporation for prosecution of offender against by-law: Waters v. Toronto, 5 O. W. N. 210.

349. See R. S. O. 1914, ch. 89, sec. 17.

PART XVIII.

Respecting the Administration of Justice.

350. Calling out troops: R. v. Sault Ste. Marie, 1 O. W. N 1144.

353.—(5) A police magistrate cannot require the corporation to provide facilities for the transaction of business not strictly appertaining to his office, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber is provided in any building belonging to the municipality (*e.g.* the Council Chamber), although by doing so the hours for the transaction of police business may be limited. A municipal corporation is liable to a police magistrate for a claim for stationery although extending beyond a year: Mitchell v. Pembroke, 31 O. R. 348.

354. A constable in charge of a patrol wagon is not a servant of a Board of Commissioners of Police so as to make them liable for his negligence in the performance of his duties: Winterbottom v. Police Commissioners of London, 1 O. L. R. 549, 2 O. L. R. 105.

359. On a motion to attach a constable's pay, although the constable is not a servant of the corporation, the treasurer is the proper person to serve; as to payment in advance: see Fallis v. Wilson, 13 O. L. R. 595; Wilson v. Fleming, 1 O. L. R. 599.

364. Where a constable was appointed by by-law "for one year" and was dismissed within the year without cause assigned: see Vernon v. Smith's Falls, 21 O. R. 331.

365. Responsibility of municipality for acts of police officer. Where the acts done are in the exercise of functions of general government, the officers are regarded as public officials and the doctrine of *respondeat superior* does not apply: There is no right of action against a municipality in respect of neglect by the custodian of prisoners: English and American authorities collected: Nettleton v. Prescott, 10 O. W. R. 944, 11 O. W. R. 539, 16 O. L. R. 538. Liability of municipality for act of constable: Robinson v. Morris, 19 O. L. R. 633.

377. The office of a local master in Chancery is within this section. The words "stationery and furniture" do not extend to law and text books: Re Local Offices of the High Court, 12 O. L. R. 16. Duty of

County Council in regard to office of Clerk of the Peace: Rodd v. Essex, 19 O. L. R. 659, 14 O. W. R. 953, 44 S. C. R. 137.

379. See Mitchell v. Pembroke, 31 O. R. 348, note to sec. 353 (5). "Furniture" must include everything necessary for the furnishing of the offices referred to the enactment for the purpose of transacting such business as might properly be done in such offices and includes stationery and printed forms in use in the Courts: Newsome v. Oxford, 28 O. R. 442. Compensation in respect of the use by a city separated from a county of the Court house and gaol; care and maintenance of prisoners: Re Carleton and Ottawa, 24 A. R. 409, 28 S. C. R. 606.

384. See Carleton v. Ottawa, 24 A. R. 409, 28 S. C. R. 606, noted *supra*.

386. Death through fire of prisoner in lock-up; action under Fatal Accidents Act: McKenzie v. Chilliwack, 1912, A. C. 888. Non-liability of corporation for lack of proper heating in lock-up house, resulting in illness of person confined therein; the corporation acting in such a case as deputy of the Crown: Nettleton v. Prescott, 16 O. L. R. 538, 21 O. L. R. 561.

390. This section is *intra vires*: R. v. Riddell, 3 O. W. N. 1628, 22 O. W. R. 847. A hotel is not a "public place" within this section: R. v. Cook, 4 O. W. N. 383, 23 O. W. R. 425, 27 O. L. R. 406. Where prisoner was committed to industrial farm on indeterminate sentence, this did not authorize his incarceration in the Central Prison: Re Gray, 5 O. W. N. 102. Proceedings on conviction for being found drunk in a public place: proceedings on appeal: R. v. Keenan, 4 O. W. N. 1034, 28 O. L. R. 441.

PART XIX.

Polling Sub-divisions and Polling Places.

391.—(*b*) Consideration of the object of the directions as to polling sub-divisions and places: Carr v. North Bay, 4 O. W. N. 1284, 28 O. L. R. 623. Application

of this section to local option contests: Re Hickey and Orillia, 17 O. L. R. 317.

391.—(*f*) Re Sinclair and Owen Sound, 12 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974, 13 O. L. R. 477.

391.—(*i*) Filing forthwith: Re Sturmer and Beaverton, 24 O. L. R. 65.

391.—(*k*) Application of this section to local option contests: Re Hickey and Orillia, 12 O. W. R. 433. Voters' lists containing more than the lawful number of names: see Re Sinclair and Owen Sound, 12 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974, 13 O. L. R. 447; Re Duncan and Midland, 9 O. W. R. 826, 10 O. W. R. 345.

392. It is competent for the Council not to hold a poll in each sub-division of the municipality if in its judgment it is thought expedient not to do so: Wynn v. Weston, 15 O. L. R. 1.

PART XX.

Powers of Municipal Councils.

395.—(*a*) "Bonus," Loan: The Court will not interfere to compel municipal council to collect a debt, at any rate in circumstances such as would require an honest man not to exact payment: Norfolk v. Roberts, 28 O. L. R. 593. Loan to manufacturing company to be repaid by credits for keeping men employed: where company assigns for benefit of creditors, consideration of position of equity of redemption in mortgage and attempted assignment of it to another company: Woodstock v. Woodstock Auto. Co., 5 O. W. N. 540.

395.—(*b*) Guarantee of debentures; bonus: Re Holmested v. Seaforth, 2 O. W. N. 464, 17 O. W. R. 1060.

395.—(*d*) The fact of no contract being made by a company to add to their works, increase their business or employ additional men when a by-law was passed

closing a street by way of bonus to them, did not invalidate the by-law or prove that it was in the private interest of the company and not also in the public interest: Re Inglis and Toronto, 8 O. L. R. 570, 9 O. L. R. 562.

395.—(*f*) Tax exemption as bonus: C. P. R. v. Carleton Place, 12 O. W. R. 567: Pringle v. Stratford, 20 O. L. R. 246, 1 O. W. N. 313. Exemption from taxes, school rates; commutation; repugnancy of special act to subsequent general act: Way v. St. Thomas, 12 O. L. R. 240. Bonus by way of exemption from taxation ceases when the establishment exempted ceases under liquidation to carry on business: Polson v. Owen Sound, 31 O. R. 6. Exemption by-laws shall not include school rates: see R. S. O. 1914, ch. 266, sec. 39 and notes.

396. Procedure to prevent bonus: London v. Newmarket, 20 O. W. R. 929, 3 O. W. N. 565. Bonus contract: New Hamburg v. N. H. Mfg. Co., 1 O. W. N. 495. Membership in firm having fixed assessment by contract with corporation as ground for disqualification of councillor: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929; but see now sec. 53 (2) (*c*), *ante*.

396.—(*c*) By-laws of a town granting aid to persons who were carrying on a manufacturing business in a village and who were about to remove their plant and machinery and carry on the same business in the town were illegal, notwithstanding that these persons had determined before negotiating with the town to remove from the village at all events and to such other place as should offer the largest inducement. These by-laws were quashed on an application made within three months after registration and nearly three months after they were passed, notwithstanding the industry had in the meantime established in the town and that the money was paid over: Re Markham and Aurora, 3 O. L. R. 609; and see S. C. 32 S. C. R. 457. Meaning of an industry "already established" in another municipality: Re Black and Orillia, 5 O. W. N. 67, 25 O. W. R. 17.

396.—(*e*) An agreement to grant a fixed assessment for all purposes, "including school taxes," is *ultra*

vires: R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581; see R. S. O. 1914 ch. 266, sec. 39 and notes; see also notes to sec. 395 (*f*), *supra*.

397. Aid to railway by portion of municipality: Re Blenheim, 1 O. W. N. 363, 15 O. W. R. 186. Notwithstanding the requirements as to the number of petitioners and the requirements as to value, it is sufficient if the by-law is carried at the polls by a majority of those voting upon it: Adamson v. Etobicoke, 22 O. R. 341. A municipal corporation passed a by-law authorizing the issuing of debentures to be met by special rate to provide a bonus for a railway company payable upon its compliance with conditions, for which no time limit was fixed. The debentures are executed but remained unissued. It was held that until the sale or negotiation of the debentures there was no debt on the part of the township and no rate was leviable although the time for payment of some of the debentures had passed: Bogart v. King, 1 O. L. R. 496. By-law authorizing the raising of a sum by debentures may be valid, and not provide for the construction of the railway on which the money was to be expended; effect of validating Act considered and of erroneous preamble: Dwyer v. Port Arthur, 19 A. R. 335, rev. 22 S. C. R. 241. Agreement by a railway company in consideration of a bonus to keep for all time its head office and machine shops in a town held not enforceable: see Whitby v. G. T. R., 32 O. R. 99, 1 O. L. R. 480. See Cases, Dig. Ont. Case Law, col. 5806-5823.

398.—(7) A local authority which pours offensive matter into a receptacle or channel insufficient for the purpose and so damages private property is guilty of negligence. It is no defence that the system was sufficient when constructed: Hawthorn v. Kannuluik, 1906, A. C. 105, 75 L. J. P. C. 7. Liability of municipality for overflow of waters from negligent construction of drain: Moore v. Cornwall, 4 O. W. N. 145. Liability of municipality for overflow of drains: Lamport v. Toronto, 11 O. W. R. 537. Surface water; extraordinary rainfall: James v. Bridgeburg, 9 O. W. R. 189. Injury to property through insufficiency of sewer: Gallagher v. Toronto, 9 O. W. R. 310. Non-liability of corporation in absence of

negligence for sewer backing up water into cellar of house where sewer normally sufficient; capacity of drain; *vis major*: Faulkner v. Ottawa, 10 O. W. R. 807, 41 S. C. R. 191. Insufficiency of sewer causing flooding of premises of householder: Roberts v. Port Arthur, 10 O. W. R. 111, 11 O. W. R. 642. Liability of municipality for overflow of water and injury to building; computation of damage: Rudd v. Arnprior, 11 O. W. R. 886, 13 O. W. R. 172. Nonliability for negligence of independent contractor constructing sewer and throwing out earth so as to obstruct surface drains, thereby flooding the plaintiff's property: Dorst v. Toronto, 11 O. W. R. 738, 12 O. W. R. 261. Damages; repairing drains in winter; remedy: Miernicki v. Sandwich East, 14 O. W. R. 455. See cases under Municipal Drainage Act: R. S. O. 1914, ch. 198.

398.—(15) A by-law is necessary authorizing the purchase of fire apparatus. A contract under seal of the corporation and signed by the mayor and clerk is insufficient where the fire apparatus has not been accepted: Waterous Engine Works Co. v. Palmerston, 21 O. R. 411, 19 A. R. 47, 21 S. C. R. 556.

398.—(16) Repair of highway; drainage; water course; injury to land: Smith v. Eldon, 9 O. W. R. 963. Flooding land adjoining highway: McMulkin v. Oxford, 1 O. W. N. 410, 747, 15 O. W. R. 294, 16 O. W. R. 3.

398.—(17) See R. S. O. 1914, ch. 202. The power to grant aid to free libraries is absolutely in the hands of the local municipality: see Hunt v. Palmerston, 5 O. L. R. 76.

398.—(20) A municipality built a dock and passed a by-law for the collection of wharfage fees, one item being for the loading and unloading of bricks. A quantity of bricks were unloaded from a vessel and the wharf collapsed by reason of some structural defect. It was held that the municipality had invited the use of the dock for such purposes as public docks are ordinarily used for and were liable for the loss: Thompson v. Sandwich, 1 O. L. R. 407.

398.—(29) Liability for act of man in charge of steam roller in backing it over a gas main and thereby causing fire in a building: Methodist Church Trustees v. Welland, 11 O. W. R. 429, 12 O. W. R. 153. Inspectors of sheep worried or killed by dogs: see R. S. O. 1914, ch. 246; see also as to discretion of council in regard to damages payable: Craig v. Malahide, 13 O. W. R. 686.

398.—(32) Where a by-law was passed establishing a park on Toronto Island and afterwards part of the land was leased for building lots, it was held that the corporation had not exceeded their powers in so dealing with the land. The doctrine of irrevocable dedication is not applicable in the case of a park which is established by by-law out of land belonging to the corporation as owners in fee, and the fact that the corporate action is embodied in a by-law implies its revocability: Atty.-Gen. v. Toronto, 6 O. L. R. 159. See Orillia v. Matchedash, 7 O. L. R. 387 as to property of a municipality situated in another municipality.

398.—(37) Bicycles on sidewalks: R. v. Justin, 24 O. R. 327.

399.—(6) If by the negligence of a competent and duly qualified medical man appointed by the corporation as physician to a city hospital, a patient is prematurely discharged and contagion is caused to other persons, the corporation is not liable: Evans v. Liverpool, 1906, K. B. 160, 74 L. J. K. B. 742; and see provisions of R. S. O. 1914, ch. 218.

399.—(18) Keeping "gunpowder and other combustible or dangerous materials" includes keeping certain quantities of coal oil, naphtha, benzine, etc., and is not confined to gunpowder and other substances *ejusdem generis*. Such legislation is not superseded by the Dominion Petroleum Inspection Act: Rex. v. McGregor, 4 C. L. R. 198, 5 Can. Crim. Cas. 485. Storing gunpowder; repeal of by-law; *mala fides*: Re Hamilton Powder Co. and Gloucester, 13 O. W. R. 661.

399.—(40) The section is pointed at houses where gaming or gambling is practised and the house kept for

such purpose, and will not support a by-law providing that no person should permit any game of chance or hazard with cards to be played for money within any house: Rex. v. Spegelman, 9 O. L. R. 75.

399.—(50) History of this legislation; power of municipalities considered: C. P. R. v. Falls Power Co., 10 O. W. R. 1125. A telephone company having permission by its Act to erect poles on the streets of towns and incorporated villages so as not to interfere with the public right of travel, is not relieved from liability when it plants its poles on the highway so as to become a danger to the public, even although the poles are planted under the supervision of the municipality: Bonn v. Bell Telephone Co., 30 O. R. 696. Powers of company: Bucke v. New Liskeard, 1 O. W. N. 123, 14 O. W. R. 841. Liability of township municipality for telephone pole placed by unauthorized person on highway: House v. Southwold, 3 O. W. N. 1295, 22 O. W. R. 212. Authority to erect poles and wires in streets of town without permission: City of Toronto v. Bell Telephone Co., 1905, A. C. 52. Consent of municipality to erection of telephone poles and wires: Haldimand v. Bell Tel. Co., 25 O. L. R. 467. Power to erect poles to carry power line under act of incorporation without leave of municipality: Toronto and N. Power Co. v. North Toronto, 25 O. L. R. 475, 28 T. L. R. 536, (1912) A. C. 834. Necessity for consent of municipality to erection of electric light and power poles in lanes of town; unreasonable withholding: Wakerville v. Walkerville Light and Power Co., 5 O. W. N. 429. See R. S. O. 1914, chs. 197, 204. See also ch. 178, Part XII., notes.

399.—(53) A by-law prohibiting cattle running at large but permitting milch cows, etc., to graze on public highways of the township under a license fee of $200 and a tag was held *intra vires*, and the license fee not excessive being intended to meet the expenses of carrying out the by-law and not for the purpose of raising a revenue: Ross v. East Nissouri, 1 O. L. R. 353. Cattle running at large in a municipality which had a by-law permitting it, got on Crown lands and thence to a railway and were killed in consequence of the railway not having a fence.

It was held that notwithstanding the by-law, the cattle were not properly on the Crown lands, but under the Dominion Railway Act, the railway was liable: Fensom v. C. P. R., 7 O. L. R. 254, 8 O. L. R. 688. The Pounds Act may be superseded by by-laws under sec. 399 (52) to (55); see R. S. O. 1914, ch. 247, sec. 2 and notes.

399.—(56) Arbitrators made an award permitting an extension of a sewer from one municipality to another, but no by-law had ever been passed defining the lands to be taken or the route of the sewer, and no terms or conditions were imposed by the award. It was held that the award was bad and should be set aside: Tp. of Waterloo v. Berlin, 8 O. L. R. 335. The acquisition of lands is not a condition precedent to an arbitration, but the arbitration or an agreement between the municipalities as to terms and conditions is a condition precedent to the dominant municipality exercising the right of expropriation in the servient municipality. An award in which no specific lands are mentioned which may be taken by the dominant municipality with which the necessary connection with its sewage system may be made is void for uncertainty; an award is bad which does not determine the terms and conditions upon which a proposed extension is to be made as between the municipalities: Tp. of Waterloo v. Berlin, 7 O. L .R. 64, aff., 8 O. L. R. 335. One municipality cannot extend a sewer through lands within a contiguous municipality without the consent of the latter or without taking the statutory steps, even although the lands have been purchased by the former municipality from the private owners: Hamilton v. Barton, 18 O. R. 199, 17 A. R. 346, 20 S. C. R. 173.

400.—(4) Application of by-law regulating the erection and safety of buildings: Norman v. Hamilton Bridge Co., 15 O. L. R. 457. Section discussed and system of building permits considered: Re Ryan and McCallum, 4 O. W. N. 193, 23 O. W. R. 193. Municipal regulation of building permits: see Annotation, 7 D. L. R. 422.

400.—(10) Purchase of lands outside municipal limits: Verner v. Toronto, 3 O. W. N. 586.

400.—(14) Municipal corporations are not obliged to protect property against fire: Gagnon v. Haileybury, 5 O. W. N. 435. Although municipal corporations are not bound by law to establish and manage fire departments, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein, while in the performance of their duties: Hesketh v. Toronto, 25 A. R. 449.

400.—(19) This does not empower the Council to pass a by-law requiring all buildings damaged by fire, if rebuilt or partially rebuilt, to be made fireproof at the peril of such building being removed at the expense of the owner: Quinn v. Orillia, 28 O. R. 435.

400.—(20) A by-law was passed setting aside fire limits where no wooden building could be erected and providing that any such erected might be pulled down and imposing a penalty of $50. This did not give a right of action to the owner of a contiguous property injuriously affected when a wooden building was erected within such limits. Where a particular course of action is imperative and non-performance is in the general interest punishable by penalty, an action will not lie: Tomkins v. Brockville Rink Co., 31 O. R. 124.

400.—(21) Liability of municipal corporation in respect of dangerous condition of wall left standing after a fire; liability over of owners of building: Campbell v. Cluff, 9 O. W. R. 401.

400.—(33) See Hesketh v. Toronto, 25 A. R. 449; Campbell v. Cluff, 9 O. W. R. 401.

400.—(49) See the provisions of the Traction Engines Act, R. S. O. 1914, ch. 212.

401.—(1) Power of Council to permit part of market to be used for exhibitions and meetings: dedication of market square, Toronto: Godden v. Toronto, 12 O. W. R. 708. Consideration of liability of municipality for non-repair of market stall, whereby health of occupant is injured: Wood v. Hamilton, 28 O. L. R. 214. A municipal council cannot under this provision prohibit an auctioneer from carrying on his

business in the public markets of the city in respect of any commodities which may properly be sold there: Bollander v. Ottawa, 30 O. R. 7, 27 A. R. 335.

401.—(3) Although sections 401 and 419 deal specifically with the sale of meat, a transient trader under sec. 420 (6) (7) might include a butcher or dealer in meat: Rex v. Myers, 6 O. L. R. 120.

401.—(4) See Virgo v. Toronto, 1896, A. C. 92, and see sec. 416 (1).

401.—(6) This provision must be read as limited to such articles as are marketed or exposed for sale within the limits of the municipality and does not apply to such articles as have been the subject of a complete contract of sale made beyond the municipality and the only act done within is delivery, which would be practically imposing a tax on the vendor of such articles: Rex v. Woolwatt, 11 O. L. R. 544.

406.—(5) Consideration of and objections to by-law establishing system for collection and disposal of garbage: Re Jones and Ottawa, 9 O. W. R. 323, 660. The point on which Re Jones and Ottawa, 9 O. W. R. 323, 606, turned, was narrow and technical: Re Knox and Belleville, 5 O. W. N. 237, 25 O. W. R. 201.

406.—(7) By-law regulating laundries: Pang Sing v. Chatham, 14 O. W. R. 1161, 16 O. W. R. 338. Power of municipal corporations to revoke license to carry on business: see Annotation, 9 D. L. R. 411.

406.—(10) Regulation of building line on residential streets and application to corner lots: Toronto v. Schultz, 19 O. W. R. 1013, 26 O. L. R. 554. Section considered and construed, meaning of "front," "frontage," etc.; application of restricting by-law to corner lot: Re Dinnick and McCallum, 3 O. W. N. 1061, 1463, 4 O. W. N. 687, 21 O. W. R. 897, 22 O. W. R, 546, 26 O. L. R. 551, 28 O. L. R. 52.

407.—(1) As to purchase of fire appliances: see Waterous v. Palmerston, 20 O. R. 411, 19 A. R. 47, 21 S. C. R. 556.

408.—(2) Condition undertaking by municipality in by-law to pay for wire fences erected to prevent drifts: Brohm v. Somerville, 11 O. L. R. 588. Negligence of municipality in regard to temporary side track and drift: Hogg v. Brooke, 7 O. L. R. 273.

409.—(2) A garage to be let to tenants of an apartment house is not a garage "to be used for hire or gain" within the meaning of a city by-law: Toronto v. Delaplante, 5 O. W. N. 69, 25 O. W. R. 16. "Store," "manufactory:" Toronto v. Foss, 3 O. W. N. 1426, 4 O. W. N. 597, 27 O. L. R. 264, 612. "Stores," "shops," "purpose of storage:" Re Hobbs and Toronto, 23 O. W. R. 8, 4 O. W. N. 31.

410.—(1) "Location" of apartment house: Toronto v. Williams, 3 O. W. N. 1643, 22 O. W. R. 899, 4 O. W. N. 58, 27 O. L. R. 186. Toronto v. Ford, 4 O. W. N. 1386, 24 O. W. R. 351, 717. Private temperance hotel within definition of apartment house: Coleman v. Toronto, 4 O. W. N. 1127, 1449, 24 O. W. R. 470, 754. Restriction of erection of garage: Toronto v. Wheeler, 22 O. W. R. 326, 3 O. W. N. 1424; Toronto v. Delaplante, 5 O. W. N. 69, 25 O. W. R. 16. Location of apartment house; withdrawal of permit: Toronto v. Garfunkel, 23 O. W. R. 374. Actual work on ground; private apartment house by-law: Toronto v. Stewart, 4 O. W. N. 1027, 24 O. W. R. 323.

411.—(3) Omission to employ statute labour to make a safe track through drifts: see Hogg v. Brooke, 7 O. L. R. 273, at p. 285.

411.—(5) Injury to plaintiff's lands by flooding by reason of closing up a natural watercourse: Martin v. Middlesex, 4 O. W. N. 682, 1540, 23 O. W. R. 974, 24 O. W. R. 869.

412.—(1) An auctioneer selling land requires no license: R. v. Chapman, 1 O. R. 582. An auctioneer for the sale of goods requires a license, and this includes an assignee for the benefit of creditors: R. v. Rawson, 22 O. R. 467. Before the Amending Act of 1894, a municipal corporation could not, on the ground of the applicant's bad character, refuse him an auctioneer's license: Merritt v. Toronto, 25 O.

R. 256, 22 A. R. 205. A municipal council cannot prohibit an auctioneer from carrying on his business in the public markets, in respect of any commodities which may properly be sold there: Ballander v. Ottawa, 30 O. R. 727, A. R. 335. As to auctions under the direction of the Court: see 1913 Rules 441-446. Power of municipal corporations to revoke license to carry on business: see Annotation 9 D. L. R. 411.

416.—(1) A statutory power conferred on a municipal council to make by-laws for regulating and governing a trade, does not in the absence of an express power of prohibition authorize the making of it unlawful to carry on a lawful trade in a lawful manner, and this applied where a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality—no question of nuisance having been raised: Re Virgo and Toronto, 20 A. R. 435, 22 S. C. R. 447, 1896 A. C. 88. A by-law provided that no license should be required from any pedlar of fish, farm and garden produce, fruit, coal oil, etc. A subsequent by-law fixing a license fee for fish hawkers and pedlars was not void for repugnancy: Re Virgo and Toronto, 20 A. R. 435, 22 S. C. R. 447, 1896, A. C. 88. A by-law under this section contained no exception such as is mentioned in the proviso, but enacted that "no person shall exercise the calling of a hawker, pedlar, without a license:" The by-law was held *ultra vires* and a conviction under it bad. The conviction was also bad because it did not negative the exception in the proviso and there was no power to amend it where the evidence did not shew whether or not the defendant's acts came within it: R. v. Smith, 31 O. R. 224. But where the conviction did not negative the exception in the proviso, but the evidence shewed the defendant's acts not to come therein the conviction was amended: R. v. Laforge, 12 O. L. R. 308. Prohibitory effect of a by-law to license; not disposed of on motion to quash conviction: R. v. Laforge, 12 O. L. R. 308. The onus is on the defendant to prove that he comes within the exception of the statute; *bona fide* servant of manufacturer; Magistrate not bound to accredit evidence produced: R. v. VanNorman,

19 O. L. R. 447, 14 O. W. R. 659, 1 O. W. N. 35. Definition of hawkers not intended to be exhaustive: R. v. VanNorman, 1 O. W. N. 35, 14 O. W. R. 659, 19 O. L. R. 447. County by-law regulating pedlars held not to apply to boundary road between two counties: R. ex rel. Whitesides v. Hamilton, 5 O. W. N. 58, 265, 25 O. W. R. 33.

416.—(3) A power to license vendors of ice cream does not give power to restrict hours of sale: Rossi v. Edinburgh, 1905, A. C. 21.

417.—(4) Regulation of "eating houses:" Re Campbell and Stratford, 9 O. W. R. 115, 345, 14 O. L. R. 184. Under this, council can pass a Sunday closing by-law for victualling houses. That is a reasonable restraint: Re Karry and Chatham, 20 O. L. R. 178, 1 O. W. N. 291, 1053, 15 O. W. R. 1, 16 O. W. R. 686, 21 O. L. R. 566.

419. See Rex v. Meyers, 6 O. L. R. 120, noted *ante*, sec. 401 (3). A municipal corporation passed a by-law providing that (with certain exceptions) no butcher should, without being duly licensed, sell fresh meat in the municipality. The license fee was $10, and a penalty of $50 was provided. The plaintiff after some demur took out licenses for two years, and then refused to do so, was fined and the by-law was declared invalid. In an action brought by him and the other butchers to recover back the license fees paid, it was held that the fees having been paid with a full knowledge of the facts, under claim of right without fraud or imposition, without actual interference with the butchers' business or compulsion exercised upon them, could not be recovered: Cushen v. Hamilton, 4 O. L. R. 265.

419.—(2) A by-law imposing a license fee of $200 on the sale of cigarettes was held *ultra vires* as in effect prohibitive, the evidence shewing that the fee exceeded the annual profits which any shop in the municipality could make on the sale of cigarettes: Re Talbot and Peterborough, 8 O. W. R. 274, 12 O. L. R. 358. A by-law must neither probibit nor so restrict as to create a monopoly: Rowland v. Collingwood, 16 O. L. R. 272; Talbot v. Peterborough,

12 O. L. R. 358; Re Brodie and Bowmanville, 38 U. C. R. 580.

420.—(1) Amendment of 1908 discussed, and what constitutes a proprietary club considered: R. v. Dominion Bowling and Athletic Club, 19 O. L. R. 107, 14 O. W. R. 468. "Hire or gain," "place of public entertainment or resort:" R. v. Dominion Bowling and Athletic Club, 19 O. L. R. 107. Motive as affecting licensing power: Re Foster and Raleigh, 2 O. W. N. 65, 16 O. W. R. 1012, 22 O. L. R. 26, 342.

420.—(2) "Running at large:" McNair v. Collins, 3 O. W. N. 1639, 22 O. W. R. 891, 27 O. L. R. 44; and see also Sexton v. G. T. R., 18 O. L. R. 202; Rogers v. McFarland, 19 O. L. R. 622.

420.—(3) "Hire or profit:" R. v. Dominion Bowling and Athletic Club, 17 O. L. R. 107. History of the sub-section: *Ib.* p. 123.

420.—(5) What a by-law under this section may provide: R. v. Whittaker, 24 O. R. 437.

420.—(6) A transient trader under this section may include a butcher or dealer in meat, in spite of secs. 401 (3) and 419. The by-law need not contain the words "for temporary purposes," and "assessment roll for the then municipal year." Form of conviction and nature of penalty considered: R. v. Meyers, 6 O. L. R. 120. A trading stamp arrangement was held not to contravene a by-law passed under these sub-sections as formerly constituted: R. v. Langley, 31 O. R. 295. "Persons not entered on the assessment roll:" see R. v. Applebe, 30 O. R. 623, (under a former wording). What the evidence must shew and what omissions are fatal to a conviction: see R. v. Roche, 32 O. R. 20. Provisions in by-law as to costs: see R. v. Roche, 32 O. R. 20. Persons living at hotels and there taking orders for goods to be made outside the municipality, are not transient traders: R. v. Pember, 3 O. W. N. 957, 1216, 21 O. W. R. 915. See also as to who are transient traders: R. v. Preston Co-operative, 1 O. W. N. 983.

421.—(2) "Apparently under the age of 18:" See R. v. Levy, 30 O. R. 403.

422.—(5) A by-law for licensing express wagons authorized the alteration by agreement of the rates fixed thereby. Held beyond the powers conferred by the statute: R. v. Latham, 24 O. R. 616. The authority conveyed is to license owners of livery stables, omnibuses, &c., and does not extend to licensing drivers: R. v. Butler, 22 O. R. 462. License does not permit the licensee to solicit passengers except on the premises mentioned. Form of license: see R. v. Gurr, 21 O. R. 499.

PART XXI.

Highways and Bridges.

432. The purpose of this section is to declare that certain classes of roads are public highways. It has no bearing on the question whether an actual highway laid out by a private person has been assumed for public uses: Holland v. York, 7 O. L. R. 533. By an order of quarter sessions in 1834 a highway was opened through several lots, the title to one of which was in the Crown, occupied under license. The highway was never opened, but another road following the same general direction was opened and used as a highway, fenced and improved with public money and statute labour. A patent, issued in 1904, was issued to the successor of the locatee without mentioning the road. It was held that the road had become established as a highway and could not be closed and one removing obstructions from it could not be treated as a trespasser: Fraser v. Diamond, 10 O. L. R. 90. It is essential to the validity of a by-law expropriating land for a highway that the course, boundary and width of the highway should be capable of being ascertained by the by-law itself, or by some document referred to in it. *Semble*, land for a road not having been expropriated, the mere expenditure of public money in opening it, and the performance of statute labour on it does not make it a highway: St. Vincent v. Greenfield, 15 A. R. 567. Land dedicated to the

public for the purpose of a passage becomes a highway when accepted for such purpose by the public. Dedication and acceptance are questions of fact. Authorities considered: O'Neil v. Harper, 4 O. W. N. 841, 1276, 24 O. W. R. 88, 28 O. L. R. 635. What evidence is sufficient to establish that land has been dedicated to public and accepted by municipality as a street: Sinclair v. Peters, 23 O. W. R. 441, 48 S. C. R. 57; Holland v. York, 7 O. L. R. 533. Dedication of highways; roads laid out on plan: Hay v. Bissonnette, 14 O. W. R. 279, 1 O. W. N. 287. Acceptance by municipality of private lane: Rushton v. Galley, 21 O. L. R. 135. Deposit of plan and user by the public of road shown on it as dedication and acceptance: Tottenham v. Rowley, (1912) 2 Ch. 633. Dedication of highway: Watson v. Kincardine, 11 O. W. R. 699, 13 O. W. R. 327. Evidence of dedication of lands as highway: Niagara Navigation Co. v. Niagara, 5 O. W. N. 46, 25 O. W. R. 42. Highway; dedication and user; access to harbour: G. T. R. v. Toronto (Viaduct Case), 6 O. W. R. 852, 10 O. W. R. 483, 42 S. C. R. 613. Dedication of highway: life tenant and remainderman: Farquhar v. Newbury Rural District Council, 1909, 1 Ch. 12. Acts of dedication and acceptance: Strang v. Arran, 28 O. L. R. 106. Acceptance of dedication of highway by municipality by memorandum of consent endorsed on registered plan: Re Toronto Plan M. 188, 28 O. L. R. 41. Refusal of municipality to accept dedication of highway: Pigott v. Bell, 5 O. W. N. 314. There may be a dedication to the public of a space lying between two fences including a ditch although at the time of the dedication the ditch was incapable of being used as a passageway: Chorley Corporation v. Nightengale, 1906, 2 K. B. 612. Where two adjoining owners each agreed to give 20 feet for a road and the line fence was taken down; one owner fencing so as to leave 20 feet of his land and the other fencing so as to leave 40 feet of his land. The 60 feet was graded and used as a highway. The giving of 40 feet by the second owner did not relieve the first owner of his obligation to give 20 feet, and he could not after the expenditure of public money on it and its acceptance retract the dedication: Pedlow v. Renfrew, 27 A. R. 611.

Under the Municipal and Survey Acts, by the filing of a plan and the sale of lots according to it abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair: Roche v. Ryan, 22 O. R. 107. As to registration of plans, scale, particulars, designation of lots and conditions of registration, and as to roads thereon, their width and when approval of Municipal Board required: see R. S. O. 1914, ch. 124, sec. 81 and notes. As to the position of land which is laid out in streets and lanes shewn on a registered plan and the relative rights of vendor, purchaser and the public: see Armour Titles, pp. 228, *et seq.*, and cases there cited. Alteration of registered plans and streets thereon: see R. S. O. 1914, ch. 124, sec. 86. Dedication of highways and assumption by municipality of streets on plans: Armour Titles, p. 231. When highways not assumed are closed: see R. S. O. 1914, ch. 166, sec. 44 and notes; see also Armour Titles p. 231. Non-liability of municipality to repair unassumed roads: see *post*, sec. 460 (6) and notes.

433. Although originally the soil and freehold of roads and streets may have remained in the private owner subject to the public easement (right of user), since the year 1858 at all events, they became vested in the Crown as representing the province of Ontario: Re Trent Valley Canal, 11 O. L. R. 687: see Rae v. Trim, 27 Gr. 374. Although the soil and freehold are vested in the Crown, yet the possession, control and liability are in the corporation and sidewalks are to be reckoned municipal assets: Re Southampton and Saugeen, 12 O. L. R. 214. Where the subsidence of highway through working of mine occurs, the measure of damages is the cost of restoring the highway to its original level: Wednesbury Corporation v. Lodge Holes Colliery, 1907, 1 K. B. 78.

436 Where a bridge over a river which formed the boundary between a city and a township within a county was erected by the councils of the city and county jointly, and in raising the approaches on the township side certain lands were injuriously affected, only the county could be compelled to arbi-

trate in respect of such compensation: Re Cummings and Carleton, 25 O. R. 607, 26 O. R. 1. The County Council is given exclusive jurisdiction over all bridges, by whomever built, crossing streams or rivers over 100 feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county, and is compellable to build such bridges only where necessary to connect any main public highway leading through the county. The place where the width of the stream is to be ascertained is the place where the bridge crosses, and the width is to be determined by the width of the natural channel of such stream taking it in its highest ordinary state, and (held by the Supreme Court of Canada), the width of the river attained after heavy rain and freshets each year should be taken into consideration. The width at ordinary high-water mark is not the test: New Hamburg v. Waterloo, 22 O. R. 193, 20 A. R. 1, 22 S. C. R. 296. Maintenance of bridge over stream forming boundary between local municipalities: Re Pembroke and Renfrew, 21 O. L. R. 366, 1 O. W. N. 927, 16 O. W. R. 454. Liability for repair of bridges between city and township; notice of abandonment by general road company. Liability devolves on city and county, not on township: Ottawa, etc., Road Co. v. Ottawa, 4 O. W. N. 1015, 5 O. W. N. 57, 24 O. W. R. 344, 984. "Over 100 feet in width" refers to the width of the river, not to the length of the bridge: Re Newburgh and Lennox, 10 O. W. R. 541. Measurement of stream: Re Caledonia and Haldimand, 3 O. W. N. 1654, 22 O. W. R. 961. See also Pow v. West Oxford, 11 O. W. R. 115, 13 O. W. R. 162.

442. Bridge over a river forming boundary between a city and township within a county erected by city and county jointly; county only compellable to arbitrate in respect of compensation for land damages: Re Cummings and Carleton, 25 O. R. 607, 26 O. R. 1. The word "approaches" means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass to and from the bridge on to the road, and does not include the highway to a distance of 100 feet from each end of the bridge, at all events unless the

artificial structures extend so far. In an action under Lord Campbell's Act it was held that the section did not relieve the local municipality from its statutory liability to repair, but merely gives to such municipality the right to enforce the provisions against the municipality or municipalities owning the bridge: Traversy v. Gloucester, 15 O. R. 214; see also Johnson v. Township of Nelson, 17 A. R. 16, as to time limit, etc. This section only applies to cases in which two municipalities are concerned, one having jurisdiction over the bridge and the other over the highway: Victoria v. Carden, 8 O. W. R. 1.

449. The "use by inhabitants of municipalities other than the township" need not be by the inhabitants of municipalities within the county—the point is the extensive use for travel. The road need not be a line of road extending through the municipalities referred to nor a main trunk road with branches. All that is necessary is that it should be an "important road" connected with other roads or ways forming means of communication, whereby the inhabitants of such municipalities may pass and repass over the said bridge: McNab v. Renfrew, 11 O. L. R. 180. A structure for crossing the waters of a lake with a wooden section 243 feet long spanning the waters at low water and embankments at either end 140 feet and 260 feet respectively, the whole width being covered at high water, is a bridge over 300 feet long within the meaning of this section. *Semble*, the section includes bridges crossing ravines as well as rivers, streams, ponds and lakes: Re Mud Lake Bridge, 12 O. L. R. 159. Method of computing length of bridge: Re Williamsburg and Stormont (Casselman Bridge Case), 11 O. W. R. 235, 15 O. L. R. 586. Re Maidstone and Essex, 12 O. W. R. 1190. Duty cast on county to maintain certain bridges: Re Pembroke and Renfrew, 21 O. L. R. 366. This section is not limited to bridges over rivers, streams, ponds or lakes. It does not exclude bridges crossing ravines: Victoria v. Carden, 8 O. W. R. 1. The registration of the order declaring a bridge to be a county bridge does not necessarily affect any particular land. The registration is made as a matter of public record: Guthrie, 1910, p. 23.

450. New Hamburg v. Waterloo, 22 O. R. 193, 29 A. R. 1, 22 S. C. R. 296. Duty of County Council to build, maintain and repair: Re Caledonia and Haldimand, 3 O W. N. 1654.

452. A horse escaping from the person in charge of him got on the public road, ran a long distance and reaching a drawbridge when the draw was open was drowned. There was not any gate or other protection to guard the approaches of the bridge when swung. The county constructing the bridge was not liable: Steinhoff v. Kent, 14 A. R. 12. What are " bridges over rivers " within the meaning and intention of the section: North Dorchester v. Middlesex, 16 O. R. 658. Joint jurisdiction and liability of adjoining counties; maintenance of bridge between counties: Victoria v. Peterborough, 15 A. R. 617, Cass. Dig. 558. See also Cummings v. Carleton, 25 O. R. 607, 26 O. R. 1. What is a boundary line road within the meaning of sub-sec. 2. Deviation to avoid expense of a bridge. History and meaning of boundary line legislation discussed: Fitzroy v. Carleton, 9 O. L. R. 686. Distinction between a bridge and a culvert: Dufferin v. Wellington, 10 O. W. R. 239.

453. Enforcement of agreement between municipalities as to building and maintenance of roads: E. Gwillimbury v. King, 1 O. W. N. 577. Joint jurisdiction and liability of adjoining counties: Victoria v. Peterborough, 17 A. R. 617, Cas. Dig. 558. There was formerly in these sections a provision as to boundary roads providing for joint jurisdiction " although the roadway so deviate as in some places to be wholly or in part within either of them " (the municipalities in question): see 3 Edw. VII., ch. 19, sec. 622. For recent case on " deviation " and review of authorities: see Wentworth v. West Flamboro', 23 O. L. R. 583, 26 O. L. R. 199. See now, provisions of sec. 458 *post*. The sections formerly included a provision for " opening " as well as erecting and maintaining boundary lines. As to these sections and status of private individual to sue: see Hislop v. McGillivray, 12 O. R. 749, 15 A. R. 687, 17 S. C. R. 479.

457. See also R. S. O. 1914, ch. 198, secs. 80, 82, etc. Where a Council passed a by-law authorizing drainage works including the removal of a dam, the by-law was set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force. The law was amended and the Council passed another by-law. The engineer did not again make an examination, the condition not having changed, but presented his former report, plans, etc., under which the work was done. It was held, reversing the lower Court, that the engineer's report was sufficient without the preparation of new plans and assessment: Elizabethtown v. Augusta, 2 O. L. R. 4, 22 Occ. N. 191, 32 S. C. R. 295.

458. "Deviation:" see authorities reviewed: Wentworth v. West Flamboro, 23 O. L. R. 583, 26 O. L. R. 199. See *post*, sec. 469, notes.

460.—(1) The liability of a municipality to repair a highway, whether at common law or by statute, is general. The Court will not prescribe what particular works are necessary or whether any particular work or repairs be necessary: A. G. v. Staffordshire, 1905, 1 Ch. 336. Proceedings against the corporation of a city on the charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment. Prohibition was granted to restrain a preliminary investigation before a police magistrate: R. v. London, 32 O. R. 326. This sub-sec. is not confined to claims arising out of accidents: Strang v. Arran, 28 O. L. R. 106. Statutory duty of municipalities in respect of repair of highways. Onus of proof; knowledge; *res ipsa loquitur*: Cummings v. Vancouver, 46 S. C. R. 457. The statutory duty to repair and maintain highways extends to all ordinary traffic; liability for collapse of bridge when traction engine passing over: the duty imposed by this sec. is subject to the requirements of R. S. O. 1914, ch. 212, sec. 5: Goodison Thresher Co. v. McNab, 14 O. W. R. 25, 19 O. L. R. 188, 44 S. C. R. 187; see R. S. O. 1914, ch. 212 notes, especially sec. 5. Liability of municipality for injury to children playing on streets; measure of damages for injury

resulting in death—expectation of pecuniary benefit in the future capable of being estimated: Ricketts v. Markdale, 31 O. R. 610; and see also notes to R. S. O. 1914, ch. 151, sec. 4 (1). The township corporation and not the trustees of a police village are responsible for the condition of highways within the limits of the police village: Smith v. Bertie, 4 O. W. N. 907, 28 O. L. R. 330. But see provision for remedy over, secs. 533, 464, *infra*.

Extent of obligation of municipalities to erect railings along highways: Kelly v. Carrick, 2 O. W. N. 1429, 19 O. W. R. 796. Non-repair of highway; no guard rail: Barclay v. Ancaster, 4 O. W. N. 764, 24 O. W. R. 60. Necessity for guard rail: Campbell v. Brooke, 8 O. W. R. 292. Insufficient surface indications of conditions of danger below to warn the corporation of threatened cave-in: O'Connor v. Hamilton, 8 O. L. R. 391, 10 O. L. R. 529. Cavity not properly guarded: Morrison v. Toronto, 12 O. L. R. 333. Injury to person on highway crossing railway track where city corporation had erected gates which were left open: Soulsby v. Toronto. 9 O. W. R. 871. Open excavation unguarded: Burns v. Toronto, 10 O. W. R. 723. Hole in highway caused by works undertaken by corporation: Sangster v. Goderich, 13 O. W. R. 419. Lack of safeguards in repairing pavement: Waller v. Sarnia, 23 O. W. R. 831, 4 O. W. N. 890, 24 O. W. R. 204. Non-repair of bridge; absence of railing; accident caused by horse becoming frightened in thunderstorm when crossing: McInnes v. Egremont, 5 O. L. R. 713.

The existence of things on a trap door a little more than an inch above the level of a city sidewalk does not constitute want of repair so as to make a municipal corporation liable for want of repair—at any rate as against a plaintiff who was well aware of the existence of the hinges: Ewing v. Toronto, 29 O. R. 197. Slight inequalities in the surface of a walk which may lead to an exceptional slip or fall are not to be accounted such non-repair as will make a municipality liable for negligence: Anderson v. Toronto, 11 O. W. R. 337. But see Ewing v. Hewitt, 27 A. R. 296, 299 (Burton, C. J. O.). Non-repair of highway by waterpipe protruding above the level of

sidewalk: Roach v. Port Colborne, 4 O. W. N. 1366, 28 O. L. R. 69. Depression in pavement: Anderson v. Toronto, 11 O. W. R. 337, 15 O. L. R. 643. Defect in sidewalk: Breault v. Lindsay, 10 O. W. R. 890. Sidewalk out of repair: Innis v. Havelock, 17 O. W. R. 311, 2 O. W. N. 205, 871. Loose iron lid of catch basin in sidewalk: Hobin v. Ottawa, 8 O. W. R. 101, 589. Dangerous condition of county road by reason of accumulation of ice and snow: Gallagher v. Lennox, 13 O. W. R. 227. See also Hogg v. Brooke, 7 O. L. R. 273. Obstruction at side of road causing injury to occupants of overcrowded buggy: Everitt v. Raleigh, 1 O. W. N. 717, 15 O. W. R. 855, 21 O. L. R. 91. Telephone pole as obstruction on highway: Howse v. Southwold, 3 O. W. N. 1295, 1592, 22 O. W. R. 212, 797, 27 O. L. R. 29. Heaps of dirt on highway as source of injury to bicyclist: Keech v. Smith's Falls, 11 O. W. R. 309, 15 O. L. R. 300. Want of repair: Stillwell v. Houghton, 2 O. W. N. 185, 17 O W. R. 239. A highway in a well-settled district is out of repair when a large stump is allowed to stand in the highway just at the edge of the travelled way. Contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries by an occupant of the vehicle. *Semble*, where horses run away without fault of the driver and he sustains injury by such a defect he is entitled to damages: Foley v. East Flamborough, 29 O. R. 139, 26 A. R. 43. House being moved along the highway: when an obstruction; notice and lapse of time required to make municipality liable: Rice v. Whitby, 28 O. R. 598, 25 A. R. 191. Defective sidewalk, scantlings rotten, and board missing for a week; notice of defect assumed and corporation held liable: McGarr v. Prescott, 4 O. L. R. 280. Defect in sidewalk extending beyond the true line of the street: Badams v. Toronto, 24 A. R. 8. Liability of municipality for non-repair of approach to weigh scales at side of road: O'Neil v. London, 3 O. W. N. 345, 20 O. W. R. 573. Repair of highway; drainage; watercourse: Smith v. Eldon, 9 O. W. R. 963. As to drainage: see sec. 398 (7), notes.

It is not contributory negligence to cross a busy street diagonally, but a foot passenger using the carriageway cannot expect any greater degree of

repair than will render the roadway reasonably safe for horses and vehicles: Belling v. Hamilton, 3 O. L. R. 318. Long continuance of an obstacle in a highway does not enure to the exemption of the municipality: Roach v. Port Colborne, 28 O. L. R. 69. The plaintiff's knowledge of the existence of an obstacle in a highway by which he is subsequently injured is not *per se* a defence: Roach v. Port Colborne, 28 O. L. R. 69. Quantum of damages; refusal to submit to operation; neurasthenia: Bateman v. Middlesex, 2 O. W. N. 1238, 3 O. W. N. 307, 24 O. L. R. 84. Where a motor truck was injured through the negligence of a municipality, the measure of damages was the cost of replacing to the plaintiffs the use of the truck during the period of repair: Armstrong Cartage Co. v. Peel, 24 O. W. R. 372, 4 O. W. N. 1031, 10 D. L. R. 169 See also The Argentina, 14 A. C. 519; Greta Holme (1897), A. C. 596.

Liability where act of third party intervenes: see also provisions of sub-sec. (7), and secs. 464 and 483 and notes. Telephone pole, when an obstruction, liability of corporation, liability of telephone company: Atkinson v. Chatham, 29 O. R. 518. Liability of municipality for damages through collision with telephone pole erected without statutory right: Howse v. Southwold, 3 O. W. N. 1295, 1592, 22 O. W. R. 212, 797, 3 O. W. N. 1592, 27 O. L. R. 29. Primary responsibility of municipality for fault of electric railway company, where tracks laid on highway and raised above level: Pow v. West Oxford, 11 O. W. R. 115, 13 O. W. R. 162. Municipality not liable where horse took fright at railway ties piled without the authority of the corporation on the untravelled portion of the highway, but the person piling them is responsible: O'Neil v. Windham, 24 A. R. 341. Accumulation of snow resulting from unlawful incline of overhead railway bridge; municipality liable and railway also for resulting accident: Fairbanks v. Yarmouth, 24 A. R. 273. Piling drain tiles at side of highway required in work of rebuilding a culvert which frighten plaintiff's horse—liability of committee of Council: McDonald v. Yarmouth, 29 O. R. 259; McDonald v. Dickenson, 24 A. R. 31. Use of dangerous material in repair of pavement by independent contractor: Waller v. Sarnia, 4 O. W. N.

403. Dangerous condition of highway from contractor's obstructions: Hawkins v. McGuigan, 3 O. W. N. 1064. Where a committee drove stakes in a highway to indicate where a ditch should be dug and the plaintiff was injured. Held misfeasance, and the corporation liable as the committee were within the scope of their authority: Biggar v. Crowland, 8 O. W. R. 819, 13 O. L. R. 164. Allowing piles of lumber to remain on the highway; corporation liable in case of accident: Kelly v. Whitchurch, 11 O. L. R. 155. Boulder placed on highway: McKelvin v. London, 22 O. R. 70. Milkstand built on the highway by an adjoining proprietor projecting over the highway: Where this had remained in place for three years and the corporation had taken no steps to remove it, they were held liable: Huffman v. Bayham, 26 A. R. 514. A milkstand upon the highway at the side and not upon the *via trita* is not a breach of township's duty to repair. Cases followed commented on as unsatisfactory: Colquhoun v. Fullerton, 4 O. W. N. 737, 11 D. L. R. 469, 28 O. L. R. 102. Where a highway was for a long time in bad repair and liable to be flooded at seasons, third parties put cinders on it to enable them to cross it, whereby the plaintiff was injured. The defendants should have anticipated that some such means would be adopted and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants: Holland v. York, 7 O. L. R. 533. The time limit in sub-sec. 2 applies to an action in respect of an accident occasioned by the failure to properly guard an opening made, with the corporation's permission, in the sidewalk to permit access to a cellar; it was never intended that a permission under section 483 should render the corporation liable for the acts and omissions of its licensee except subject to the requirements of section 460: Minns v. Omemee, 2 O. L. R. 579, 8 O. L. R. 508. A municipal corporation having placed a barrier around a portion of sidewalk which they were repairing, the plaintiff, going around it at night, fell into a trench dug by a gas company under an agreement for indemnity and to properly warm and protect the public. It was held that both the defendants were liable, but that the corporation should have

judgment over against the company: McIntyre v. Lindsay, 4 O. L. R. 448. Where there was an opening in the sidewalk by permission under sec. 483, and it was insufficiently guarded, the plaintiff whose eyesight was defective, fell in and was injured. The corporation was liable and the licensee liable over to them: Homewood v. Hamilton, 1 O. L. R. 266.

Actions for injuries sustained by default in keeping in repair to be tried by a Judge without the intervention of a jury: R. S. O. 1914, ch. 56, sec. 54; see same section as to venue.

460.—(2) The doing of a lawful act by the corporation on a highway in such a way as to endanger the safety of the public is misfeasance: Keech v. Smith's Falls, 15 O. L. R. 300. Municipality guilty of non-feasance of the statutory duty to keep its highways in good repair: McPhalin v. Vancouver, 45 S. C. R. 194. See also as to non-feasance and misfeasance: Brown v. Toronto, 21 O. L. R. 230, and cases cited. Pleading: see Stilwell v. Houghton, 1 O. W. N. 804. Striking out jury notice in action for non-repair of highway: James v. Toronto, 3 O. W. N. 1007. This section is not retroactive. Section 606 of the Municipal Act, 3 Edw. VII., ch. 19, provided that an action lay against a municipality in case of accident sustained by default to keep the highway in repair. By a line of decisions, that was limited to default attributable to non-feasance; cases of misfeasance were held to lie outside the statute and untouched by its preliminaries as to notice and time of suing: Glynn v. Niagara Falls, 5 O. W. N. 285.

460.—(3) "Gross negligence" means at least "great negligence"—and it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable length of time. If a sidewalk is constructed according to plans of competent engineers, the possibility of a less dangerous plan of construction is not an element to be considered. Where there was a sudden change in temperature resulting in ice forming and there was no actual notice, the corporation was not liable for an accident occurring within a comparatively short time: Ince

v. Toronto, 27 A. R. 410, 31 S. C. R. 323. Accumulation of snow on highway: see Fairbanks v. Yarmouth, 24 A. R. 273; Gallagher v. Lennox, 13 O. W. R. 227; Hogg v. Brooke, 7 O. L. R. 273. Snow and ice on sidewalk; evidence as to duration of condition—rapid climatic changes: Lynn v. Hamilton, 10 O. W. R. 329. Gross negligence in permitting accumulations of snow and ice on sidewalk: Yates v. Windsor, 3 O. W. N. 1513; 22 O. W. R. 608; Joncas v. Ottawa, 1 O. W. N. 737, 2 O. W. N. 168; Bell v. Hamilton, 1 O. W. N. 644, 784, 15 O. W. R. 747; Merritt v. Ottawa, 12 O. W. R. 561; Ludgate v. Ottawa, 8 O. W. R. 257, 865. Liability of owner, tenant and municipality where ice is caused by water from pipe from roof of building being allowed to flow over sidewalk and freeze: Organ v. Toronto, 24 O. R. 318. Steep inclines of snow at ends of crossings; crossing regarded as part of the sidewalk; "Gross" negligence considered — evidence to justify finding that corporation had not fulfilled its statutory obligation: Drennan v. Kingston, 23 A. R. 406, 27 S. C. R. 46, and see cases noted *supra*, sec. 460 (1).

460.—(4) Leizert v. Matilda, 29 O. R. 98, 26 A. R. 1, is not applicable since this sub-section was passed. What amounts to a waiver of notice by one of two municipalities jointly liable: Jones v. Stephenson, 32 O. R. 226. Meaning and construction of sub-section and its application to other than accident cases: Strang v. Arran, 4 O. W. N. 765, 28 O. L. R. 106; Cummings v. Dundas, 13 O. L. R. 384. This sub-section applies to all cases of non-repair, and is not confined to cases arising under sub-sec. (3): Aldis v. Chatham, 28 O. R. 525. The ruling of a Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, is subject to appeal. What amounts to reasonable excuse for want of notice in due time; where there is actual knowledge or verbal notice it may be regarded as an element of the excuse, but something more is required. The fact of the accident by itself is not a reasonable excuse if it is not accompanied by some disabling circumstances; being misled may be an excuse: O'Connor v. Hamilton, 8 O. L. R. 391, 10 O.

L. R. 529. See also as to what constitutes reasonable excuse: Armstrong v. Canada Atlantic Ry. Co., 2 O. L. R. 219, 4 O. L. R. 560. Appellate Court would not interfere with discretion of trial Judge in dispensing with notice of action: Drennan v. Kingston, 27 S. C. R. 46. Reasonable excuse arising from condition of mental incapacity caused by the accident: Morrison v. Toronto, 12 O. L. R. 333. An injury which, though it may involve great bodily suffering, does not physically or mentally incapacitate the patient from giving the notice or directing it to be given, was not an excuse for not giving the notice: Anderson v. Toronto, 11 O. W. R. 337, 15 O. L. R. 643. A sufficient excuse for not giving notice is that the nature of the injury is such as to cause the plaintiff to become for the time being incapable of considering his situation except as a sufferer: Morrison v. Toronto, 7 O. W. R. 547, 607, 12 O. L. R. 333. Non-repair of sidewalk; facts from which notice must be implied: Kew v. London, 9 O. W. R. 224. Want of notice to municipality: Colquhoun v. Fullerton, 4 O. W. N. 737. Non-repair of sidewalk; notice of action: Brown v. Toronto, 2 O. W. N. 982, 18 O. W. R. 996, 21 O. L. R. 230. Requirements of notice of action: Young v. Bruce, 3 O W. N. 89, 20 O. W. R. 87, 21 O. W. R. 404, 24 O. L. R. 546. The time and place of the accident should be given with reasonable particularity so as to identify the occasion: McInnes v. Egremont, 2 O. W. R. 283, 5 O. L. R. 713. Notice of action arising out of defective sidewalk—sufficient to state cause of accident, name of street, the particular side and reasonable information as to the locality. It is not necessary to mention the exact locality: McQuillan v. St. Marys, 31 O. R. 401. The particular side of the street should be indicated and the defect in plain terms: Breault v. Lindsay, 10 O. W. R. 890. Neither ignorance of the law nor verbal notice was sufficient to excuse the want of notice required by sec. 606 (3) of 3 Edw.. VII., ch. 19. Cases considered and amendment suggested: Egan v. Saltfleet, 4 O. W. N. 1384, 29 O. L. R. 116, and see sec. 460 (5). As to reasonable excuse for not giving written notice: see notes to R. S. O. 1914, ch. 146, sec. 13.

460.—(5) See notes to sec. 460 (4), *supra*. See also notes to R. S. O. 1914, ch. 146, sec. 13.

460.—(6) Duty of municipal councils in maintaining and keeping in repair roads under the jurisdiction of councils only applies to roads formally opened and used: Hislop v. McGillivray, 17 S. C. R. 479. For distinction between acts which a corporation can do in the discharge of its duty to repair a highway without passing a by-law and acts for the improvement of a highway for which a by-law is necessary: see Croft v. Peterborough, 5 U. C. C. P. 35, 141; Reid v. Hamilton, 5 U. C. C. P. 269, 287. Work of repair which requires a by-law: Taylor v. Gage, 5 O. W. N. 489. Township municipality liable for non-repair of sidewalk built by voluntary subscription and statute labour, although no control assumed nor any public money or statute labour expended with the knowledge of the council, yet they knew of the existence of the sidewalk and had opportunity and time to repair it: Madill v. Caledon, 3 O. L. R. 66, 555. Acceptance by municipality of private lane: Rushton v. Galley, 21 O. L. R. 135, 1 O. W. N. 754, 16 O. W. R. 12, 256. What is sufficient to show that a road laid out by a private person has been assumed for public use by a corporation: Holland v. York, 7 O. L. R. 533. And see sec. 432, *ante* and notes.

460.—(7) By this section introduced in 1896, no liability is now imposed on a municipal corporation for want of repair of a railway crossing by reason of its being too high a grade, and the omission to fence, the obligation therefor being, under the Railway Act, solely on the railway company: Holden v. Yarmouth, 5 O. L. R. 579. Construction of wall by railway company: Hurd v. Hamilton, 1 O. W. N. 881. Non-repair of portion of highway occupied by St. Ry. tracks; injury to person: Van Cleaf v. Hamilton St. Ry., 5 O. W. R. 278, 628; Borough of Bathurst v. MacPherson, 4 App. Cas. 256; Bull v. Shoreditch, 19 Times L. R. 64, 20 Times L. R. 254. See also McIntyre v. Lindsay, 4 O. L. R. 448, and cases referred to *ante*, sec. 460 (1), notes. See Railway Act, R. S. O. 1914, ch. 185, secs. 118 and 125, 259, 265, and notes. See as to damage claims against companies operating public utilities: R. S. O. 1914, ch. 204, sec. 51 (6) and notes, also ch. 178, Part XII.

460.—(8) In order to maintain an action for obstructing a public way the plaintiff must suffer some substantial damage peculiar to himself, beyond what is suffered by the rest of the public who use the way: Winterbottom v. Lord Derby (1867), L. R. 2 Ex. 316.

464. In an action for damages against a corporation for allowing lumber to remain on one of its streets, which had been left there wrongfully by other defendants and which fell on the plaintiff and injured him, the defendants were held not joint tort-feasors: Con. Rule 186 was not so amended by this section as to authorize an action so constituted: Baines v. Woodstock, 10 O. L. R. 694; See also Hinds v. Barrie, 6 O. L. R. 656; Rice v. Whitby, 25 A. R. 191; Homewood v. Hamilton, 1 O. L. R. 266; McKelvin v. London, 22 O. R. 70; Balzer v. Gosfield, 17 O. R. 700. A millowner having a license from a township to construct his dam so as to flood part of a highway, constructed it so negligently as to damage proprietors below; such a license is lawful and the damage being caused by the negligence of the millowner, the township was not liable. Such a case is not within this section giving a right to claim relief over: Ward v. Caledon, 19 A. R. 69. The section applies to the case of an obstruction, etc., directly and immediately placed in the highway by the corporation or person against whom the remedy over is given. It does not give the right to one township corporation to recover from an adjoining township damages recovered for an accident caused by non-repair of a road lying between the two townships which they were jointly liable to keep in repair: Sombra v. Moore, 19 A. R. 144. Where a railway raised the grade of a highway, the plaintiff's remedy as a property owner was by arbitration, and in any event the corporation could not bring in the railway under this section: Baskerville v. Ottawa, 20 A. R. 108. Where relief over is proper and party is added, procedure at trial: see Stilliway v. Toronto, 20 O. R. 98. Liability as between tenant, owner and municipality for ice on sidewalk caused by flooding from conducting pipe from gutter: Organ v. Toronto, 24 O. R. 318. Negligence of contractors for municipal building; where corporation entitled to relief over: McCann v. Toronto, 28 O. R. 650. Remedy

over against telephone company where pole not erected under municipal supervision: Bell Telephone Co. v. Chatham, 31 S. C. R. 61. A third party is a "party to the action." Where a municipality seeks relief as against a person or corporation under this section to enforce a remedy over, such person or corporation should be made a third party and not a defendant unless the plaintiff seeks some relief against the third party. It is improper to add such party both as defendant and third party: Erdman v. Walkerton, 15 P. R. 12, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352. Application of section considered: Sutton v Dundas, 17 O. L. R. 556. Non-repair, relief over: Reid v. Toronto, 1 O. W. N. 450, 699, 15 O. W. R. 353; Holmes v. St. Catharines, 14 O. W. R. 736. Unsafe condition of sidewalk taken over from township: Jackson v. Toronto, 2 O. W. N. 461, 17 O. W. R. 1007. Third party notice in view of obligation of city under agreement with Toronto Railway to keep streets in repair: Robertson v. Toronto, 12 O. W. R. 870. As to third party procedure generally: see Con. Rule 209, H. & L. notes, especially at p. 393; 1913 Rule 165, *et seq.* See sec. 460 (1) and (7) *ante* and notes.

465. Maintenance of bridge crossing stream forming boundary between local municipalities. Re Pembroke and Renfrew, 1 O. W. N. 927, 21 O. L. R. 366.

469. Deviation: Wentworth v. Flamboro', 23 O. L. R. 583, 26 O. L. R. 199. Status of private individuals to sue in regard to opening boundary lines: see Hislop v McGillivray, 12 O. R. 749, 15 A. R. 687, 17 S. C. R. 479. Deviation; construction of the amendment of 1906: Normanby v. Carrick, 8 O. W. R. 908; see *ante*, secs. 449-455, 458, and notes.

472. Application of section: Hanley v. Brantford, 16 O. W. R. 812, 1 O. W. N. 1121. History of section: Re Cameron and Hagarty, 10 O. W. R. 357. A motion to quash a by-law under this section is premature until the provisoes have been complied with: Re Cameron and Hagarty, 10 O. W. R. 357. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation. The fact of

corporate action being embodied in a by-law implies its revocability: Atty.-Gen. v. Toronto, 6 O. L. R. 159. Method of selling or disposing of lanes closed up; exchange: Re Mills and Hamilton, 9 O. W. R. 731. Jurisdiction of the council over road: see Re Taylor and Belle River, 13 O. W. R. 778, 18 O. L. R. 330. A council passed a by-law closing a street which, by reason of this section they had no power to do without the consent of the Dominion Government first obtained and recited in the by-law. They then applied for and obtained this consent and a fortnight after passed an amending by-law reciting it. Held that the power of the city was spent when the first by-law was passed, and being void it could not be validated by subsequent consent and amendment: Re Inglis and Toronto, 8 O. L. R. 570. A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country: Rae v. Trim, 17 Gr. 374. "Or part of a highway:" see Re Taylor and Belle River, 13 O. W. R. 778, 18 O. L. R. 330. Way substituted for original road allowance: McLean v. Howland, 1 O. W. N. 1036. Proceedings for closing portion of highway; damages for deprivation of access; user of highway not an original road allowance: Hanley v. Brantford, 1 O. W. N. 1121, 16 O. W. R. 812. Establishment of highways by statutory or municipal authorities: Irregularities in proceedings for the opening or closing of highways and streets: see Annotation, 9 D. L. R. 490.

473. A farm lot occupied by the owner as one farm was diagonally divided by a railway into two parcels, having a farm crossing connecting them. In addition to the road which gave access to the parcel where the residence was, there was a road giving access to the other parcel and which except for the farm crossing was the only mode of access. This latter road could not be closed up by the council unless in addition to compensation another road or way was provided: Re Martin and Moulton, 1 O. L. R. 645. The road need not, to come within this section, actually form a boundary of land, provided there is ingress or egress to and from such land

over it: Re Brown and Owen Sound, 14 O. L. R. 627. Damages for deprivation of access: see Hanley v. Brantford, 1 O. W. N. 1121, 16 O. W. R. 812.

474. Legal possession of road allowance: Re Lister and Clinton, 13 O. W. R. 582. Compensation for expropriation of land for highway: McLean v. Howland, 14 O. W. R. 509. Sufficiency of notice: Re Lister and Clinton, 13 O. W. R. 582.

475. A notice providing that any one desiring to petition against the passing of a by-law to close a road must do so within a month from the date thereof, is sufficient, per Boyd, C.: Re Martin and Moulton, 1 O. L. R. 645. 2 Edw. VII., ch. 27, sec. 16, provided that prior to the passing of a by-law authorizing an electric railway on a highway, notice must be given similar to that required by this section. This however only applied to railways within R. S. O. 1897, ch. 209, and had no application to the Toronto Railway: Toronto v. Toronto Railway, 11 O. L. R. 103. The fact that the applicant to quash a by-law had bought his land under a registered plan shewing a street 80 feet wide, did not prevent a municipality passing a by-law by which the width of the street was reduced at the part affected to 66 feet: Re Inglis and Toronto, 9 O. L. R. 562. This section prescribes the preliminaries of sale. Interests of public and of private persons in closing lane and opening new lane: Re Mills and Hamilton, 9 O. W. R. 731. Notice for selling and subsequent closing of street: Re Seguin and Hawkesbury, 4 O. W. N. 521, 1409, 23 O. W. R. 857, 24 O. W. R. 695. The Court will not go into action of council in closing road when effect is to unsettle titles in respect of a matter long settled: Pirie v. Parry Sound Lumber Co., 13 O. W. R. 319.

479. Road less than 66 feet wide; consent to plan does not involve inadvertent closing of highway: Larcher v. Sudbury, 4 O. W. N. 1289, 24 O. W. R. 659. As to registration of plans and as to roads thereon: see R. S. O. 1914, ch. 124, sec. 81, *et seq.*

481. Municipal regulation of building permits: see Annotation 8 D. L. R. 422.

483. A municipality fails in its duty to the public by creating, without notice, a dangerous condition on a boulevard, and is liable for damage resulting: Breen v. Toronto, 17 O. W. R. 41, 18 O. W. R. 522, 2 O. W. N. 87, 690. Where an area was negligently guarded and a passerby injured, the city was held liable with a remedy over to the licensee of the area: Homewood v. Hamilton, 1 O. L. R. 266. See as to application of time limit in sec. 460 to actions brought against a municipality and licensee: Minns v. Omemee, 2 O. L. R. 579, 8 O. L. R. 508. See sec. 460, *ante* and notes.

487. Overhanging branches, projecting into the street from trees growing within private owner's grounds and not interfering with the use of the highway, cannot be cut away. Where a telephone company did this with the assent, but without express resolution or by-law of the city, or notice or compensation to the owner, alleging that the branches interfered with the use of the wires of a telephone system for public purposes which they had contracted with the city to maintain, the city was liable in damages: Hodgins v. Toronto, 19 A. R. 537. Municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but the matter should not be dealt with by resolution, but by by-law: Re Allen and Napanee, 4 O. L. R. 582. See the provisions of the Tree Planting Act, R. S. O. 1914, ch. 213, and notes.

491. Removal of unauthorized approach built by plaintiff to his residence: McLeod v. Aurora, 14 O. W. R. 610. A verandah built after a street had been dedicated, and projecting some distance, is an unlawful obstruction, but where the verandah had been in existence for many years and there was no special necessity for its removal, a mandatory injunction for its removal was refused: Caldwell v. Galt, 27 A. R. 162. Injuries resulting from non-repair and obstructions on highway: see sec. 460 notes.

492. This section though in terms applying only to the sale of road allowance, would seem to imply a like

precaution in the case of an exchange: Herriman v. Pulling & Co., 8 O. W. R. 149. Closing up; conveyance of part of road allowance: Pirie v. Parry Sound Lumber Co., 11 O. W. R. 11.

493. History of the section: Pirie v. Parry Sound Lumber Co., 11 O. W. R. 11, at p. 17. New road in lieu of old road, compensation: Re Lister and Clinton, 13 O. W. R. 582, 18 O. L. R. 197. Deviation: see Wentworth v. Flamboro, 23 O. L. R. 583, 26 O. L. R. 199. What is required under this sec.: see Mills v. Freel, 23 O. W. R. 45, 3 O. W. N. 1240, 4 O. W. N. 79; see also Herriman v. Pulling & Co., 8 O. L. R. 149, noted *ante* sec. 492.

PART XXII.

Penalties and Enforcement of By-laws.

497. The provision as to summary prosecution before a justice of the peace for offences against municipal laws applies to corporations as well as individuals: R. v. Toronto Railway, 30 O. R. 214. Infraction of resolution of a board of license commissioners: see R. v. Laird, 6 O. L. R. 180, at p. 183. Conviction for selling bread under weight; power of Provincial Legislature considered; R. v. Chisholm, 9 O. W. R. 914; and see R. S. O. 1914, ch. 224, and notes.

498. Effect of clause in by-law providing that half the penalty should go to the informer: R. v. Van Norman, 19 O. L. R. 447, 1 O. W. N. 35, 14 O. W. R. 659.

PART XXIII.

Police Villages.

502. A police village is not a corporation separate from the township in which it is situated. Powers and liabilities considered: Smith v. Bertie, 28 O. L. R. 330.

533. See Smith v. Bertie, 28 O. L. R. 330, and notes to sec. 460 *ante;* see also provisions of sec. 464 *ante.*

CHAPTER 193.

The Local Improvement Act.

See Biggar, Municipal Manual, etc. (see ch. 192, head note); Notes on the Act, W. B. Wilkinson.

2.—(*j*) "Frontage" "benefited:" Murphy v. Sandwich, 17 O. W. R. 738, 2 O. W. N. 369.

2.—(*x*) This is a change in the law. Formerly (3 Edw. VII. ch. 19, sec. 668 (1)), buildings were included. See *post*, sec. 16, note.

3. Application of Local Improvement sections: McLean v. Sault Ste. Marie, 2 O. W. R. 41. The power given in sub-sec. (*i*) is now limited to extensions, as was the case before 1903. Compare the provisions of 3 Edw. VII. ch. 19, sec. 664 (3). The powers (*k*) and (*l*) are new.

For forms approved by the Ontario Railway and Municipal Board, see *post*, sec. 54, notes. These are numbered consecutively after the forms appended to the statute and are:

4. Petition for local improvement.
5. Clerk's certificate.
6. Declaration of publication.
7. Declaration of service.
8. By-law under sec. 32.
9. By-law under sec. 23.
10. Construction By-law.
11. Special Assessment Roll.
12. Debenture By-law, Sinking Fund Plan.
13. Debenture By-law, Instalment Plan.
14. Schedule attached to Debenture By-law.
15. Consolidating By-law, Sinking Fund Plan.
16. Consolidating By-law, Instalment Plan.
17. Debenture, Instalment Plan (without coupons).
18. Debenture, Instalment or Sinking Fund Plan.

For form of affidavit on application to the Ontario Railway and Municipal Board for approval of Local Improvement By-law, see R. S. O. 1914, ch. 192, sec. 295, notes; and see *post*, sec. 5, note.

4. Compare 3 Edw. VII. ch. 19, sec. 673 (1), (3), and note the express provisions of the latter part of the present section.

5. Compare the wording of 3 Edw. VII. ch. 19, sec. 673 (2*a*) as enacted by 6 Edw. VII. ch. 34,, sec. 37. The present section extends the former powers to include every case where a sewer has been or may be constructed. For form of affidavit on application to Ontario Railway and Municipal Board for approval of By-law for works without petition, see R. S. O. 1914, ch. 192, sec. 295.

8. An alderman is not disqualified from voting on a proposed by-law to construct a sewer on a certain street, merely because he owns property fronting on the street which gives him a large interest in the proposed drainage: Elliott v. St. Catharines, 12 O. W. R. 653, 13 O. W. R. 89, 18 O. L. R. 57. See Forms, sec. 54 *post*.

9 See Equity Fire Insurance Co., and Weston, 12 O. W. R. 221. The power to undertake works on two-thirds vote of all the members of the council, has been of gradual growth. The power was first given in 1890, to cities, referred to plank sidewalks, and was exerciseable by two-thirds of the members present at a meeting. In 1891 it was extended to towns. In 1901 to villages, and made to include sidewalks constructed of certain other specified materials. In 1903 extended to include sidewalks of concrete and brick. In 1906 the power was confined to a two-thirds vote of all members, and was extended to include sidewalks and pavements. In 1908 curbs were added. In 1911 the present wide powers were attained. For form of affidavit on application to the Ontario Railway and Municipal Board for approval of By-law for works without petition, see R. S. O. 1914, ch. 192, sec. 295, notes.

13. Failure to serve the owner of property fronting on a street proposed to be asphalted, was held fatal to the by-law: Hodgins v. Toronto, 14 O. W. R. 642, 1 O. W. N. 31. Publication of an advertisement in a newspaper having a large circulation in the municipality stating that the corporation

intended constructing sidewalks in certain named districts, is not sufficient notice to a property owner affected by the work. Procedure to be observed in passing by-laws for the construction of sidewalks considered; Re Hodgins and Toronto, 20 O. R. 480, 23 A. R. 80. It is a fatal objection to the validity of a local improvement by-law that notice was not given to owners as provided by this section. *Semble,* an owner may waive such notice: Re McCrae and Brussels, 7 O. L. R. 146, 8 O. L. R. 156. When a statute confers a right, privilege or immunity, the regulations, forms or conditions which it prescribes for its acquisition are imperative in the sense that non-observance of them is fatal: Goodison v. McNab, 14 O. W. R. 25, 19 O. L. R. 188; Barton v. Hamilton, 13 O. W. R. 1118; Hodgins v. Toronto, 14 O. W. R. 642, 1 O W. N. 31. Note the special provisions as to service of notice, sub-secs. (5) and (6). See *post,* sec. 54, forms of declaration of publication and declaration of service. For forms of affidavit on application to the Ontario Railway and Municipal Board for approval of By-law for works on the initiative plan, see R. S. O. 1914, ch. 192, sec. 295, notes.

16. In ascertaining whether a petition for local improvement is sufficiently signed by owners of the property intended to be benefited, taxable persons and taxable property only were to be taken into account. "Real property" included both land and buildings which formerly were both taken into account in computing the requisite proportion of value: Macdonell v. Toronto, 4 O. L. R. 315. But now see *ante,* sec. 2 (*x*). Compare 3 Edw. VII. ch. 19, secs. 668 (1), 669 (3). Clerk's certificate, *post,* sec. 54, form 5.

19. Necessity for new by-law where original estimate insufficient, status of contract under seal to pay additional amount: C. P. R. v. Chatham, 25 O. R. 465, 22 A. R. 330, 25 S. C. R. 608. Compare 3 Edw. VII. ch. 19, sec. 665 (3), 673 (1), 674 (3).

20. The power to take a guarantee dates from 1909. There was an earlier, similar provision in 1903.

21. See former section, 3 Edw. VII. ch. 19, sec. 679 (1), under which assuming cost of street intersections was optional.

22. See former section, 3 Edw. VII. ch. 19, sec. 673 (2*b*), as enacted 6 Edw. VII. ch. 40, sec. 32. See also former sec. 664 (*a*).

23. Where sidewalks were reconstructed out of the general funds under the belief that such course was justified by a special Act, the Court refused to hold the councillors personally liable as they had acted reasonably and were within the equity, at least, of 62 Vic., ch. 15, sec. 1; King v. Matthews, 5 O. L. R 228. See 3 Edw. VII. ch. 19, sec. 678, and also sec. 680 (now omitted).

24. See 3 Edw. VII. ch. 19, sec. 673 (6).

26. Where a sewer is being constructed as a local improvement and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear and what portion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of each class, and not according to the benefits received by lots of that class *inter se*. Such an improvement and assessment must be carried out under the provisions of a special by-law: Re Robertson and Chatham, 30 O. R. 158, 26 A. R. 554.

27. A general by-law may be passed providing the means of ascertaining and determining what real property will be immediately benefited by any proposed work or assessment, the whole cost of which is to be assessed on that property, but such a general by-law is not sufficient in the case of local improvements or construction of bridges, the whole cost of which the council deem it inequitable to raise by local special assessment: Fleming v. Toronto, 20 O. R. 547, 19 A. R. 318. General by-law; irregularity in compliance with: Canada Company v. Mitchell, 8 O. L. R. 482. Special by-law required where special classes of frontages to be considered: see Re Robertson and Chatham, 30 O. R. 158, 26 A. R. 554; see also Re Dundas Street Bridges, 8 O. L. R. 52. See 3 Edw. VII. ch. 19, secs. 674 (1), (2), 675, 675 (*b*).

30. See *post,* sec. 54, form 11, Special Assessment Roll.

36. See 3 Edw. VII. ch. 19, sec. 671 (5), 671 (8), the latter part of which is omitted.

39. After the County Court Judge had, on appeal by an owner, given his decision on a day subsequent to the argument, it was too late to obtain an order for prohibition against him: Re Robertson and Chatham, 30 O. R. 158, 26 A. R. 554. By-law passed upon petition for construction of bridges as local improvement; Court of Revision declared engineer's assessment invalid. Held that the County Judge could properly entertain an appeal from the Court of Revision at the instance of the city and the Assessment Commissioner: Re Dundas Street Bridges, 8 O. L. R. 52.

40. See Ward v. Welland, 31 O. R. 303. Compare 3 Edw. VII. ch. 19, sec. 679 (2). See notes to R. S. O. 1914, Ch. 192, sec. 188.

41. Form of by-law consolidating several issues of local improvement debentures, see *post,* sec. 54. Compare 3 Edw. VII. ch. 19, sec. 433.

44. Where work was done, clerk not having complied with provisions of general by-law: see Canada Company v. Mitchell, 8 O. L. R. 482. Debt created on the security of a special rate: Re Blenheim, 1 O. W. N. 363, 15 O. W. R. 186.

45. What the legislature contemplated was that the initial cost of construction of the local improvement should be borne by the owners of the property benefited, but that they should not be responsible for keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work the cost of so doing should be defrayed by the owners of the property benefiting by the work of reconstruction. This duty is imposed on the municipality for the benefit of those at whose expense the improvement has been made, and is not to be confounded with the general duty to repair which is a duty towards the public. The duty ends when it becomes necessary to reconstruct the work or improvement. When practical men would say it was worn out and not

worth repairing, no order for repair can be made: Re Medland and Toronto, 31 O. R. 243.

46. Compare 3 Edw. VII. ch. 19, sec. 666 (2).

48. Compare 3 Edw. VII. ch. 19, sec. 684 (1), (2).

53. Local improvements are a charge on land: Armour, Titles, p. 165. For discussion of this section and mutual rights of vendor and purchaser in regard to local improvements: see Armour, Titles, pp. 168-170, and cases cited. This section though applicable *quantum valeat* to a vendor before conveyance, does not relieve him from liability to remove a charge for local improvement rates where he is bound to convey free from incumbrances, notwithstanding the purchaser's agreement to assume "all taxes, rates and assessments wherewith the lands may be rated or charged," from and after the day fixed for the completion of the sale: Re Taylor and Martyn, 9 O. W. R. 666, 14 O. L. R. 132.

54. The following Forms have been approved of by The Ontario Railway and Municipal Board, under the authority of sec. 54 of the Act:

FORM 4.

PETITION FOR LOCAL IMPROVEMENT.

To the Council of the Corporation of the of .

The Petition of the Undersigned, owners of lands abutting directly on the work hereinafter referred to.

Sheweth as Follows:—

1. That it is expedient to construct a sidewalk feet wide or such other width as the Council may deem best upon the side of street from to .

Or 1. That it is expedient to construct a curbing upon the side of street from to .

Or 1. That it is expedient to construct a sewer on street from to .

(*Where the circumstances require, the following may be added*): That such sewer, if deemed advisable, may be constructed of a larger capacity than

is required for the purpose of the abutting land in order to afford an outlet for the sewage of lands not abutting directly on the work, subject to the provisions of the Act as to assessing the non-abutting lands for a fair and just proportion of the cost of the work.

Or 1. That it is expedient to pave with from to .

Or 1.—(1) That it is expedient to alter the grade of street from to by (*describe character of work as cutting and filling, or as the case may be*) so that the same may be reduced to a grade not exceeding (*Where the circumstances require the following may be added*):—

(2) That your petitioners submit, subject to the opinion of the Council, that such change in the grade will benefit the Municipality at large, and will specially benefit lands in the vicinity of the work other than those abutting directly thereon, and it would therefore be inequitable to charge all the cost thereof on the lands abutting directly upon the work.

(NOTE.—*These clauses relating to the changing of the grade of a street with such changes as may be necessary, will apply to the opening, widening, extending, grading, diverting or improving of a street or the construction of a bridge.*)

2. That such work be constructed as a local improvement under the provisions of The Local Improvement Sections of The Municipal Act.

YOUR PETITIONERS THEREFORE PRAY:—

That the said (*insert here description of work as sidewalk, or curbing, etc.*) may be constructed as a local improvement as aforesaid.

Dated this day of 19 .

Signature of Petitioner.	Street, Number or Lot, or Other Description of Land Owned by Petitioner.	Post Office Address of Petitioner.

FORM 5.

CLERK'S CERTIFICATE.

TO THE COUNCIL OF THE CORPORATION OF THE of .

I, Clerk of the of do hereby certify.

That the annexed (*or* within) petition of and others praying for the construction of upon (or in) street from to as a local improvement lodged with me on the day of 19 , is sufficient.

Dated this day of , 19 .

..... Clerk.

FORM 6.

DECLARATION OF PUBLICATION.

I, of the of , in the County of , DO SOLEMNLY DECLARE:

1. A true copy of the notice hereto annexed was published in the newspaper published at on the day of , 19 . (*If published more than once insert* " and on the days of , 19 .".

AND I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of The Canada Evidence Act.

Declared before me, etc.

FORM 7.

DECLARATION OF SERVICE.

I, of the of , in the County of DO SOLEMNLY DECLARE:

1. I served a true copy of the notice hereto annexed on the owners whose names appear in Column 1 of Schedule 1 on the dates mentioned in Column 2, and in the manner mentioned in Column 3.

2. The owners whose names appear in Schedule 2, were not served for the reasons set opposite their respective names.

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is

of the same force and effect as if made under oath and by virtue of The Canada Evidence Act.

Declared before me, etc.

SCHEDULE 1.

Column 1.	Column 2.	Column 3.
Name of Owner	Date of Service.	How served.

SCHEDULE 2.

Column 1.	Column 2.
Name of Owner.	Reasons for Not Serving.

FORM 8.

PROCEDURE BY-LAW No. (*See Sec. 32*).

BY-LAW to provide for proceedings to be taken for the construction of a work undertaken as a Local Improvement.

WHEREAS it is expedient to provide for the making of the reports, statements, estimates and special assessment roll required in the case of a work undertaken as a Local Improvement under The Local Improvement Act.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:

1. In this by-law "the Act" shall mean The Local Improvement Act.

2. The interpretation section of the Act shall apply to this by-law.

3. A duly qualified engineer, or some officer of this Corporation or some other person, competent to perform the duties of an Engineer under the Act, hereinafter called the "Engineer," shall be appointed to perform all services which under the Act

may be performed by an Engineer, and he shall make all reports, statements and estimates and the special assessment roll required in the case of a work undertaken.

4. The Clerk shall give to the Engineer such information and assistance as may reasonably be required of him.

5. Upon the Council acquiring power to undertake a work, the Engineer shall forthwith make the report, statements and estimates respecting such work required by the Act, and deliver the same to the Clerk, who shall submit them to the Council at the next meeting thereof.

6. Upon the completion of the work the Engineer shall make a special assessment roll for the cost of the work, and deliver the same to the Clerk. He shall also make a statement showing under appropriate heads the actual cost of the work. The Clerk, Treasurer and Assessment Commissioner shall assist the Engineer in making such statement and when it is completed the Treasurer, or in his absence the Clerk, shall verify the same by his certificate, and the Statement shall be delivered to the Chairman of the Court of Revision.

7. Upon receiving the Special Assessment Roll, the Clerk shall notify the Chairman of the Court of Revision, who shall, without delay, call sittings of the Court for the hearing of complaints against the proposed special assessment, and shall notify the Clerk of the time and place at which sittings will be held.

8. The Clerk shall prepare and serve or cause to be served and published all notices required by the Act to be served or published, and shall prepare the affidavits and other evidence of the service and publication thereof, and keep the same on file in his office, and he shall also prepare all such certificates, papers and documents as may be required and shall see that all the requirements of the Act respecting the proceedings for or in connection with the construction of the work are complied with.

Passed this day of 19 .

Mayor (or Reeve).

Clerk. { Seal of Corporation }

FORM 9.

BY-LAW No. . (*See Sec. 23*).

BY-LAW to provide for the payment by the Corporation of part of the cost of certain works constructed as local improvements otherwise chargeable upon the lands abutting directly upon the works.

WHEREAS it is expedient that part of the cost of every work of any of the classes or descriptions hereinafter mentioned, constructed as a local improvement which otherwise would be chargeable upon lands abutting directly on the work shall be paid by the Corporation.

AND WHEREAS there is not in force in this municipality any by-law passed with the assent of the Municipal electors providing that all works of any of the classes or descriptions hereinafter mentioned shall be undertaken as local improvements and not otherwise.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:—

1. The interpretation section of The Local Improvement Act shall apply to this by-law.

2. The Corporation shall pay per cent. of that part of the cost of every granolithic, stone, cement, asphalt or brick sidewalk; if pavements and curbings are to be provided for add "and of every pavement and curbing constructed as a local improvement which otherwise would be chargeable upon the lands abutting directly on the work."

3. This by-law shall apply to such works only as are undertaken after the passing hereof.

Passed by a vote of three-fourths of all the members of the Council this day of 19 .

Mayor (or Reeve).
Clerk. { Seal of Corporation }

FORM 10.

CONSTRUCTION BY-LAW No. .

BY-LAW to authorize the construction of on Street from to as a Local Improvement under the provisions of The Local Improvement Act.

[*If on Petition insert this recital.*]

WHEREAS and others have petitioned the Council to construct, as a local improvement, the work hereinafter described, and the Clerk has certified that the petition is sufficient and it is expedient to grant the prayer of the petition in manner hereinafter provided.

[*Or if on the Initiative insert this recital.*]

WHEREAS notice of the intention of the Council to undertake the construction as a local improvement of the work hereinafter described, has been duly given by publication of the notice and by service of it upon the owners of the lots liable to be specially assessed, and the publication and service of such notice has been proved by a statutory declaration filed with the Clerk, and no petition against the work signed by a majority of the owners, representing at least one-half the value of the lots which are liable to be specially assessed, has been presented.

[*Or if on two-thirds vote of Council insert this recital.*]

WHEREAS it is expedient that the construction of the work hereinafter described shall be undertaken as a local improvement and notice of the intention of the Council to undertake such work has been duly published.

[*Or where private drain connections are to be constructed as a separate work, insert this recital.*]

WHEREAS a sewer has been constructed upon Street from to and it is expedient to construct as a local improvement private drain connections from the sewer to the street line on the side of the street (*if connections are to be constructed on both sides insert* " or both sides of the street ") connecting the sewer with the lots abutting thereon specified in Schedule 1, and notice of the intention of the Council to undertake the construction of such private drain connections has been duly given.

[*Or if work is to be constructed on sanitary grounds, insert this recital.*]

WHEREAS the Provincial Board of Health (*or*) the Local Board of Health of this Municipality (*as the case may be*) has recommended the construction (*or* the enlargement *or* the extension) of a (the) sewer on Street from to and it is therefore necessary and desirable in the

public interest on sanitary grounds to construct (*or* enlarge *or* extend) such sewer according to such recommendation as a local improvement.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:

1. That a be constructed on Street from to as a local improvement under the provisions of The Local Improvement Act.

Or 1. That a pavement feet wide, be constructed on Street, from to as a local improvement under the provisions of The Local Improvement Act. (*See sec. 4*).

NOTE.—(If the Council determines to construct as part of the work a water main, a gas main, private drain connections, and alterations or renewals of water service pipes and stop cocks and of gas connections, or any or either of such works, set out the additional work to be undertaken, and set out in a schedule the lots to be specially assessed for such additional work.)

Or 1. That private drain connections be constructed as a local improvement, under the provisions of The Local Improvement Act applicable to such a work, from the sewer on Street, from to to the street line on both sides (*or if on one side only insert* "on the side"), of the street, connecting the sewer with the lots abutting on that part of the street specified in Schedule 1.

Or 1. That a sewer (*describe kind of sewer and its dimensions*) be constructed as a local improvement, under the provisions of The Local Improvement Act, on Street, from to (*if the Council so determines add*): with private connections to the line of the street connecting such sewer with the lots specified in Schedule 1.

Or 1.—(1) That it is determined and declared, this by-law being passed by a vote of two-thirds of all the members of the Council, that it is desirable that the construction of a on Street, from to should be undertaken as a local improvement under the provisions of The Local Improvement Act.

(2) That as above determined and declared a be constructed on Street, from to as a local improvement under the provisions of The Local Improvement Act.

2. The Engineer of the Corporation (*or insert name of person appointed as Engineer of the work*), do forthwith make such plans, profiles and specifications and furnish such information as may be necessary for the making of a contract for the execution of the work.

3. The work shall be carried on and executed under the superintendence and according to the directions and orders of such Engineer.

4. The Mayor (or Reeve) and Clerk are authorized to cause a contract for the construction of the work to be made and entered into with some person or persons, firm or Corporation, subject to the approval of this Council to be declared by resolution.

5. The Treasurer may (subject to the approval of the Council), agree with any bank or person for temporary advances of money to meet the cost of the work pending the completion of it.

6. The special assessment shall be paid by annual instalments (this period must be within the lifetime of the work).

7. The debentures to be issued for the loan to be effected to pay for the cost of the work when completed shall bear interest at per cent. per annum and be made payable within years on the instalment plan (*or if on the sinking fund plan insert* " on the sinking fund plan "), and in settling the sum to be raised annually to pay the debt the rate of interest on investments shall not be estimated at more than four per cent. per annum.

8. Any person whose lot is specially assessed may commute for a payment in cash the special rates imposed thereon, by paying the portion of the cost of construction assessed upon such lot, without the interest, forthwith after the Special Assessment Roll has been certified by the Clerk, and at any time thereafter by the payment of such sum as when invested at four per cent. per annum will provide an annuity sufficient to pay the special rates for the unexpired portion of the term as they fall due.

Passed this day of , 19 .

Clerk.

Mayor (or Reeve).

{ Seal of Corporation }

FORM 11.

SPECIAL ASSESSMENT ROLL.

For the cost of a (*description of work*) on the side of Street, from to constructed as a local improvement.

Name of Owner.	Street.	Side of street.	Lot assessed.	Number of feet to be assessed.	Cost per foot frontage of work.	Cost per foot frontage of private drain connections.	Cost per foot frontage of water mains.	Cost per foot frontage of alterations, or renewals of water service pipes and stopcocks.	Cost per foot frontage of gas mains.	Cost per foot frontage of alterations or renewals of gas connections.	Total cost per foot frontage with which each lot is assessed.	Number of instalments by which assessment is payable.
Lots abutting on works.												
Exempt Lots, the Assessment upon which is payable by Corporation.												
Lots not abutting upon the work.												

I, Clerk of the of do hereby certify that the foregoing Special Assessment Roll is correct.

Dated day of 19 .

Clerk.

(NOTE.—*For convenience the following may be added after the signature of the clerk.*)

WORK UNDERTAKEN:—

CONSTRUCTION of a (*describe work*) on the side of Street, from to .

Total cost of the work .....$

The Corporation's portion of the cost is.$

The Owners' portion of the cost of the work is .....$
The part of the Owners' portion of the cost specially assessed upon the lots abutting directly on the work is .....$
The part of the Owners' portion of the cost specially assessed upon land not abutting directly on the work is.$

The special assessment is to be paid in instalments.

The debentures are to bear interest at per cent. per annum.

FORM 12.

DEBENTURE BY-LAW. SINKING FUND PLAN.

BY-LAW No. .

By-law to provide for borrowing $ upon debentures to pay for the construction of a on Street, from to .

AND WHEREAS the total cost of the work is $ passed on the day of 19 , a has been constructed on Street, from to as a local improvement under the provisions of The Local Improvement Act.

AND WHEREAS the total cost of the work is $ of which $ is the Corporation's portion of the cost, and $ is the owners' portion of the cost, for which a Special Assessment Roll has been duly made and certified.

AND WHEREAS the estimated lifetime of the work is years.

AND WHEREAS it is necessary to borrow the said sum of $ on the credit of the Corporation and to issue debentures therefor payable within years from the time of the issue thereof, and bearing interest at the rate of per cent. per annum, which is the amount of the debt intended to be created by this by-law.

AND WHEREAS it will be necessary to raise annually $ for the payment of the debt, and $ for the payment of the interest thereon, making in all $ to be raised annually for the payment of the debt and interest, of which $ is required to pay the Corporation's portion of the

cost and the interest thereon, and $ is required to pay the owners' portion of the cost and the interest thereon.

AND WHEREAS the amount of the whole rateable property of the municipality according to the last revised assessment roll is $.

AND WHEREAS the amount of the existing debenture debt of the Corporation (exclusive of local improvement debts, secured by special rates or assessments) is $ and no part of the principal or interest is in arrear.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:—

1. That for the purpose aforesaid there shall be borrowed on the credit of the Corporation at large the sum of dollars ($) and debentures shall be issued therefor in sums of not less than $100 each, which shall have coupons attached thereto for the payment of the interest.

2. The debentures shall all bear the same date and shall be issued within two years after the day on which this By-law is passed and may bear any date within such two years and shall be payable within years after the time when the same are issued.

3. The debentures shall bear interest at the rate of per cent. per annum payable yearly, and as to both principal and interest may be expressed in Canadian Currency or Sterling money of Great Britain at the rate of one pound sterling for each four dollars and eighty-six and two-third cents, and may be payable at any place or places in Canada or Great Britain.

4. The (Mayor *or* Reeve) of the Coporation shall sign and issue the debentures and interest coupons, and the same shall also be signed by the Treasurer of the Corporation, and the debentures shall be sealed with the seal of the Corporation.

**In the case of a city it is unnecessary that the coupons be signed by the Mayor.*

5. During years, the currency of the debentures, $ shall be raised annually to form a sinking fund for the payment of the debt, and $ shall be raised annually for the payment of the interest thereon, making in all $ to be raised annually for the payment of the debt and interest, as follows:—

The sum of $ shall be raised annually for the payment of the Corporation's portion of the cost and the interest thereon, and shall be levied and raised annually by a special rate sufficient therefor over and above all other rates on all the rateable property in the municipality at the same time and in the same manner as other rates.

☞*If the rate per foot frontage is the same on all the lots, insert the following clause*:—

For the payment of the owners' portion of the cost and the interest thereon, the special assessment set forth in the said special Assessment Roll is hereby imposed upon the lands liable therefor as therein set forth; which said special assessment with a sum sufficient to cover interest thereon at the rate aforesaid shall be payable in equal annual instalments of $ each, and for that purpose an equal annual special rate of cents per foot frontage is hereby imposed upon each lot entered in the said special Assessment Roll, according to the assessed frontage thereof, over and above all other rates and taxes, which said special rate shall be collected annually by the collector of taxes for the Corporation at the same time and in the same manner as other rates.

6. All money arising from the said special rates or from the commutation thereof not immediately required for the payment of interest shall be invested as required by law.

7. The debentures may contain any clause providing for the registration thereof authorized by any statute relating to Municipal debentures in force at the time of the issue thereof.

8. The amount of the loan authorized by this by-law may be consolidated with the amount of any loans authorized by other local improvement by-laws, by including the same with such other loans in a consolidating by-law authorizing the borrowing of, the aggregate thereof as one loan and the issue of debentures for such loan in one consecutive issue pursuant to the provisions of the statute in that behalf.

9. This by-law shall take effect on the day of the final passing thereof.

Passed this day of , 19 .

Mayor (or Reeve).

Clerk. { Seal of Corporation }

FORM 13.

DEBENTURE BY-LAW. INSTALMENT PLAN.

By-law No. .

By-law to provide for borrowing $ upon debentures to pay for the construction of a on the side of Street from to .

Whereas, pursuant to construction By-law No. passed on the day of , 19 , a has been constructed on Street, from to as a local improvement under the provisions of The Local Improvement Act.

And whereas the total cost of the work is $, of which $ is The Corporation's portion of the cost, and $ is the owners' portion of the cost, for which a Special Assessment Roll has been duly made and certified.

And whereas the estimated lifetime of the work is years.

And whereas it is necessary to borrow the said sum of $ on the credit of the Corporation and to issue debentures therefor bearing interest at the rate of per cent. per annum, which is the amount of the debt intended to be created by this by-law.

And whereas it is expedient to make the principal of the said debt repayable in yearly sums during the period of years, of such amounts respectively that the aggregate amount payable for principal and interest in any year shall be equal as nearly as may be to the amount so payable for principal and interest in each of the other years.

And whereas it will be necessary to raise annually the sum of $ during the period of years to pay the said yearly sums of principal and interest as they become due, of which $ is required to pay the Corporation's portion of the cost and the interest thereon, and $ is required to pay the owners' portion of the cost and the interest thereon.

And whereas the amount of the whole rateable property of the Municipality, according to the last revised assessment roll, is $.

And whereas the amount of the existing debenture debt of the Corporation (exclusive of local

improvement debts, secured by special rates or assessments) is $ and no part of the principal or interest is in arrear.

THEREFORE, the Municipal Council of the Corporation of the of enacts as follows:—

1. That for the purpose aforesaid there shall be borrowed on the credit of the Corporation at large the sum of dollars ($), and debentures shall be issued therefor in sums of not less than $100 each, bearing interest at the rate of per cent. per annum, and having coupons attached thereto for the payment of the interest.

2. The debentures shall all bear the same date and shall be issued within two years after the day on which this By-law is passed, and may bear any date within such two years, and shall be payable in annual instalments during the years next after the time when the same are issued, and the respective amounts of principal and interest payable in each of such years shall be as follows:—

No.	Principal	Interest	Total
	$	$	$
1			
2			
3			

3. The debentures as to both prinicpal and interest may be expressed in Canadian currency or Sterling money of Great Britain, at the rate of one pound sterling for each four dollars and eighty-six and two-thirds cents, and may be payable at any place or places in Canada or Great Britain.

4. The (Mayor *or* Reeve) of the Corporation shall sign and issue the debentures and interest coupons, and the same shall also be signed by the Treasurer of the Corporation, and the debentures shall be sealed with the seal of the Corporation.

☞*In the case of a city it is unnecessary that the coupons be signed by the Mayor.*

5. During years, the currency of the debentures, the sum of $ shall be raised

annually for the payment of the debt and interest, as follows:—

The sum of $ shall be raised annually for the payment of the Corporation's portion of the cost and the interest thereon, and shall be levied and raised annually by a special rate sufficient therefor, over and above all other rates, on all the rateable property in the municipality, at the same time and in the same manner as other rates.

☞*If the rate per foot frontage is the same on all the lots, insert the following clause*:

For the payment of the owners' portion of the cost and the interest thereon, the special assessment set forth in the said special Assessment Roll is hereby imposed upon the lands liable therefor as therein set forth; which said special assessment, with a sum sufficient to cover interest thereon at the rate aforesaid shall be payable in equal annual instalments of $ each, and for that purpose an equal annual special rate of cents per foot frontage is hereby imposed upon each lot entered in the said special Assessment Roll, according to the assessed frontage thereof, over and above all other rates and taxes, which said special rate shall be collected annually by the collector of taxes for the Corporation, at the same time and in the same manner as other rates.

☞*If the rate per foot frontage is not the same on all the lots, insert the following clause instead of the next preceding one:—*

For the payment of the owners' portion of the cost and the interest thereon, the special assessment set forth in the said Special Assessment Roll is hereby imposed upon the lands liable therefor as therein set forth; which said special assessment, with a sum sufficient to cover interest thereon at the rate aforesaid, shall be payable in equal annual instalments of $ each, and for that purpose the special annual rates per foot frontage set forth in Schedule 1 hereto attached, are hereby imposed upon the lots entered in the said special Assessment Roll, according to the assessed frontage thereof, over and above all other rates and taxes, and the said special rates shall be collected annually by the collector of taxes for the Corporation at the same time and in the same manner as other rates.

6. The debentures may contain any clause providing for the registration thereof, authorized by any statute relating to Municipal debentures in force at the time of the issue thereof.

7. The amount of the loan authorized by this by-law may be consolidated with the amount of any loans authorized by other local improvement by-laws, by including the same with such other loans in a consolidating by-law authorizing the borrowing of the aggregate thereof as one loan, and the issue of debentures for such loan in one consecutive issue, pursuant to the provisions of the statute in that behalf.

8. This by-law shall take effect on the day of the final passing thereof.

Passed this day of , 19 .

Mayor (or Reeve).

Clerk. { Seal of Corporation }

FORM 14.

SCHEDULE I.

Attached to Debenture By-law No. .

This form is to be used in connection with both forms of debenture by-laws if the rate per foot frontage is not the same on all the lots.

Name of Owner.	Street.	Side of Street.	Lot assessed.	Number of feet assessed.	Total cost per foot frontage with which each lot is assessed.	Amount to be paid annually to pay debt and interest.	Annual rate per foot frontage.
Lots abutting on work.							
Exempt Lots, the Assessment upon which is payable by the Corporation.							
Lots not abutting upon the work.							

FORM 15.

CONSOLIDATING BY-LAW—SINKING FUND PLAN.

BY-LAW No. .

By-law to consolidate the sums authorized to be borrowed by certain local improvement by-laws into one sum of $, and to borrow the same by the issue of debentures therefor.

WHEREAS the Municipal Council of the Corporation of the of has passed the by-laws hereinafter mentioned providing for borrowing money by the issue of debentures to pay for the construction of certain works, as local improvements, therein referred to, namely:—

No. of By-law.	When Passed.	Nature of Work.	Situation of Work.	Amount of Loan.

AND WHEREAS the aggregate of the sums authorized by the said by-laws to be borrowed is the sum of dollars ($), and it is desirable to consolidate the said sum into one sum of $, and to issue debentures therefor in one consecutive issue, which is the amount of the debt intended to be created by this by-law.

AND WHEREAS all of the said by-laws provide that the debentures to be issued thereunder shall be payable within years after the time when the same are issued and shall bear interest at the rate of per cent. per annum, payable yearly.

AND WHEREAS the amount of the whole rateable property of the Municipality according to the last revised assessment roll is $.

AND WHEREAS the amount of the existing debenture debt of the municipality, exclusive of local improvement debts secured by special rates or assessments, is $, and no part of the principal or interest is in arrear.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:—

1. The sums authorized by the said by-laws to be borrowed are hereby consolidated into one sum of $.

2. For the purpose aforesaid there shall be borrowed on the credit of the Corporation at large the sum of dollars ($), and debentures shall be issued therefor in one consecutive issue in sums of not less than $100 each, which shall have coupons attached thereto for the payment of the interest.

3. The debentures shall all bear the same date and shall be issued within two years after the day on which the earliest of the said by-laws was passed, and may bear any date within such two years and shall be payable within years after the time when the same are issued.

4. The debentures shall bear interest at the rate of per cent. per annum, payable yearly, and as to both principal and interest may be expressed in Canadian Currency or Sterling money of Great Britain at the rate of one pound Sterling for each four dollars and eighty-six and two-thirds cents, and may be payable at any place or places in Canada or Great Britain.

5. The Mayor (*or* Reeve) of the Corporation shall sign and issue the debentures and interest coupons and the same shall also be signed by the Treasurer of the Corporation, and the debentures shall be sealed with the seal of the Corporation.

***In the case of a city it is unnecessary that the coupons be signed by the Mayor.*

6. The money to be borrowed as aforesaid shall be apportioned, crediting each work with the amount of the loan provided for by the by-law relating thereto as above set forth.

7. This by-law shall come into force and take effect on the day of the final passing thereof.

Passed this day of , 19 .

Mayor (or Reeve).
Clerk. { Seal of Corporation. }

FORM 16.

CONSOLIDATING BY-LAW—INSTALMENT PLAN.

BY-LAW No. .

By-law to consolidate the sums authorized to be borrowed by certain local improvement by-laws into one sum of $, and to borrow the same by the issue of debentures therefor.

WHEREAS the Municipal Council of the Corporation of the of has passed the by-laws hereinafter mentioned providing for borrowing money by the issue of debentures to pay for the construction of certain works, as local improvements, therein referred to, namely:—

No. of By-law.	When Passed.	Nature of Work.	Situation of Work.	Amount of Loan.

AND WHEREAS the aggregate of the sums authorized by the said by-laws to be borrowed is the sum of dollars ($), and it is desirable to consolidate the said sums into one sum of $ and to issue debentures therefor in one consecutive issue, which is the amount of the debt intended to be created by this by-law.

AND WHEREAS all of the said by-laws provide that the debentures to be issued thereunder shall bear interest at the rate of per cent. per annum, and that the principal of the debt shall be repayable in yearly sums during the period of years, of such amounts respectively that the aggregate amount payable for principal and interest in any year shall be equal, as nearly as may be, to the amount so payable in each of the other years.

AND WHEREAS the amount of the whole rateable property of the Municipality according to the last revised assessment roll is $.

AND WHEREAS the amount of the existing debenture debt of the Municipality, exclusive of local improvement debts secured by special rates or assessments, is $, and no part of the principal or interest is in arrear.

THEREFORE the Municipal Council of the Corporation of the of enacts as follows:—

1. The sums authorized by the said by-laws to be borrowed are hereby consolidated into one sum of $.

2. For the purpose aforesaid there shall be borrowed on the credit of the Corporation at large the sum of dollars ($), and debentures shall be issued therefor in one consecutive issue in sums of not less than $100 each, bearing interest at the rate of per cent. per annum, and having coupons attached thereto for the payment of the interest.

3. The debentures shall bear the same date and shall be issued within two years after the day on which the earliest of the said by-laws was passed, and may bear any date within such two years, and shall be payable in annual instalments during the years next after the time when the same are issued, and the respective amounts of principal and interest payable in each of such years shall be as follows:—

No.	Principal	Interest	Total
1			
2			
3			

4. The debentures as to both principal and interest, may be expressed in Canadian currency or Sterling money of Great Britain, at the rate of one pound sterling for each four dollars and eighty-six and two-thirds cents, and may be payable at any place or places in Canada or Great Britain.

5. The Mayor (*or* Reeve) of the Corporation shall sign and issue the debentures and interest coupons and the same shall also be signed by the Treasurer of the Corporation, and the debentures shall be sealed with the seal of the Corporation.

☞*In the case of a city it is unnecessary that the coupons be signed by the Mayor.*

6. The money to be borrowed as aforesaid shall be apportioned, crediting each work with the amount

of the loan provided for by the by-law relating thereto as above set forth.

7. This by-law shall come into force and take effect on the day of the final passing thereof.

Passed this day of , 19 .

Mayor (or Reeve).
Clerk.
{ Seal of Corporation. }

FORM 17.

DEBENTURE—INSTALMENT PLAN.
(*Without Coupons*).

No. . $.

Canada, Province of Ontario of

Debenture.

The Corporation of the of hereby promises to pay to the Bearer the sum of Dollars and cents of lawful money of Canada, at the office of the in the on the day of , 19 .

This debenture, or any interest therein, shall not, after a certificate of ownership has been endorsed thereon by the Treasurer of this Municipal Corporation, be transferable, except by entry, by the Treasurer or his Deputy, in the Debenture Registry Book of the said Corporation at the of .

Dated at this day of one thousand nine hundred and .

In testimony whereof and under the authority of By-law No. of the Municipal Council of the Corporation of the passed on the day of , 19 , this debenture is sealed with the Seal of the Corporation and signed by the and Treasurer thereof.

Treasurer.
Mayor (or Reeve).
{ Seal of Corporation. }

FORM 18.

DEBENTURE—INSTALMENT OR SINKING FUND PLAN.

No. . $.

Canada, Province of Ontario, of

Debenture.

The Corporation of the of hereby promises to pay to the Bearer the sum of Dollars and cents of lawful money of

Canada, at the Office of the in the on the day of , 19 , and to pay interest thereon in the meantime at the rate of per centum per annum, yearly on the day of and of in each year to the Bearer of the annexed Coupons upon presentation thereof at the said Office, as they become due.

This Debenture, or any interest therein, shall not, after a certificate of ownership has been endorsed thereon by the Treasurer of this Municipal Corporation, be transferable, except by entry, by the Treasurer or his Deputy, in the Debenture Registry Book of the said Corporation at the of .

Dated at this day of one thousand nine hundred and .

In testimony whereof and under the authority of By-law No. of the Municipal Council of the Corporation of the duly passed on the day of , 19 , this debenture is sealed with the Seal of the said Corporation and signed by the and Treasurer thereof.

Treasurer.
Mayor (or Reeve) { Seal of Corporation. }

Debenture No. .

By-Law No. . Coupon No. .

The Corporation of the will pay to the Bearer at the Office of the Ontario, on the day of , 19 , the sum of $, interest due on that day on the above debenture.

$.

.....*Mayor,*

.....*Treasurer.*

Form of affidavit on application to Board for approval of Local Improvement By-law, where works undertaken on petition and without petition, see R. S. O. 1914, ch. 192, sec. 295, notes.

CHAPTER 194.

THE CITY AND SUBURBS PLANS ACT.

1. Does not apply to plans in existence on May 14, 1912: Toronto v. Hill, 24 O. W. R. 388, 4 O. W. N. 1076.

4. Construction of secs. 4, 6, and 7: Re Can. Building and Loan and Hamilton, 4 O. W. N. 1185, 24 O. W. R. 858.

7. The Railway and Municipal Board are not bound to approve of the plans of a sub-division even though the city corporation have not filed their objections within 21 days: Re Canadian, etc., Association v. Hamilton, 4 O. W. N. 1185, 24 O. W. R. 858.

CHAPTER 195.

THE ASSESSMENT ACT.

Refer to: Weir, The Law of Assessment (Can.); Cooley, Taxation, Local Assessments and Tax Titles; Black, Tax Titles; Taylor on Titles (Ont.).

2.—(*h*) Consideration of this sub-section: Belleville Bridge Co. v. Ameliasburg, 10 O. W. R. 988, 15 O. L. R. 174. Assessment where land not liable: R. H. Y. C. v. Jarvis, 2 O. W. N. 357, 17 O. W. R. 700. Timber licenses are not real property and are not assessable: Re Shier Lumber Co., 14 O. L. R. 210, 9 O. W. R. 605. The mains and pipes of the Toronto Gas Company laid under the public streets were held assessable under the Act of 1892, as appurtenant to the land owned by the company for the purposes of its business: Consumers Gas v. Toronto, 26 O. R. 727, 23 A. R. 551, 27 S. C. R. 453. As also were the rails, poles and wires of the Toronto Railway Company used in operating their electric railway. Re Toronto Railway, 25 A. R. 135.

See also Re Bell Telephone, 25 A. R. 351; Re C. P. R. Telegraph, 34 C. L. J. 789; Re London St. Ry., 27 A. R. 83. Structures, "storage battery:" Ottawa Electric v. Ottawa, 7 O. W. R. 481.

2.—(*p*) See Re Voters' List of Carleton Place, 3 O. L. R. 223.

5. Taxes; exemption: See Annotation, 11 D. L. R. 66.

5.—(1) The plaintiffs had a license to use, and were using, a right of way through Queen Victoria Niagara Falls Park. The company was held liable to taxation for the roadbed, as an occupant is assessed in respect of property, but the property itself being in the Crown was exempt: Niagara Falls Park and River Ry. Co. v. Niagara, 31 O. R. 29; see also Regina v. County of Wellington, 17 O. R. 615, 17 A. R. 421; Quirt v. The Queen, 19 S. C. R. 510; Quebec v. The Queen, 2 Ex. C. R. 450.

5.—(2) A disused cemetery is exempt from taxation: R. C. Diocese of S. Ste. Marie v. S. Ste. Marie, 2 O. W. N. 1178, 19 O. W. R. 364, 24 O. L. R. 35.

5.—(3) See Haynes v. Copeland, 18 C. P. 150; Harris v. Whitby, 34 C. L. J. 240.

5.—(4) Letting rooms; educational building; liability for taxes: Re Notre Dame and Ottawa, 21 O. W. R. 394, 3 O. W. N. 693. Benevolent association: Ottawa Y. M. C. A. v. Ottawa, 1 O. W. N. 603, 15 O. W. R. 666. Exemption of convent and school: Re Ottawa and Grey Nuns, 5 O. W. N. 380. Exemption of Y. M. C. A. building where bed rooms rented to members and meals supplied: Ottawa Y. M. C. A. v. Ottawa, 5 O. W. N. 383, 387.

5.—(5) What is a public hospital: Struthers v. Sudbury, 30 A. R. 116, 27 A. R. 217.

5.—(6) See Belleville Bridge Co. v. Ameliasburg, 10 O. W. R. 591, 988, 15 O. L. R. 174.

5.—(7) City property when occupied by a tenant other than a servant or officer of the corporation occupy-

ing the premises for the purposes thereof, is subject to taxation and such tax is a tenant's tax payable by him and not in any event payable by the landlord as between him and the tenant unless by express agreement: C. P. R. v. Toronto, 4 O. L. R. 134. Property acquired by a town under special Act as a power house and site situate 19 miles away in a neighbouring township municipality is exempt from taxation: Re Orillia and Matchedash, 7 O. L. R. 389.

5.—(15) Taxation of income of Dominion Government Officials: Abbott v. Saint John, 40 S. C. R. 597. The exemption of this sub-section did not extend to income allowed under the Dominion Superannuation Act: Bucke v. London, 10 O. L. R. 628. Note that the word "Imperial" has been omitted in the present wording.

5.—(17) "Fixed machinery;" gas and oil appliances: see Canadian Oil Fields v. Oil Springs, 8 O. W. R. 480. As to valuation and assessment of rails, poles, wires and plant of electric companies: see sec. 44 notes.

5.—(18) When a city granted a company exemption from taxation and all other municipal rates on the income of the company, the income of a person from dividends upon shares of the capital stock of the company was not exempt from municipal taxation by the city: Goodwin v. Ottawa, 12 O. L. R. 236. The Assessment Act does not confer upon the shareholders of a company, which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company (except as under sec. 10 (8)): Goodwin v. Ottawa, 12 O. L. R. 236.

10.—(1) For a business to be assessable, the land used or occupied for the purpose of the business must be land subject to taxation: Re Shier Lumber Co., 14 O. L. R. 210, 9 O. W. R. 605.

10.—(1*c*) Liability of an express company for business assessment—wharf and premises of steamboat company: Dominion Express v. Niagara, 10 O. W. R. 513, 15 O. L. R. 78; Dominion Express Co. v. Alliston, 14 O. W. R. 196.

10.—(1*e*) It is a question of fact to be determined on the evidence whether a person is carrying on the business of a retail merchant dealing in more than five branches of retail trade: Re Knox Assessment, 12 O. W. R. 499, 17 O. L. R. 175, 13 O. W. R. 823, 18 O. L. R. 645.

10.—(1*j*) Effect of local option by-law on assessment of hotel properties and business assessment: Re Rattenbury and Clinton, 4 O. W. N. 1607, 24 O. W. R. 910. Business assessment; offices of mining and industrial companies: Re Coniagas Mines, 13 O. W. R. 55; and see sec. 40 (6) *post*.

10.—(1*k*) Business assessment of electric railway: Sandwich Ry. v. Windsor, 21 O. W. R. 44, 3 O. W. N. 575. Assessment of rails, poles, wires and plant of electric companies: see notes to sec. 44.

10.—(2) Liability of a non-proprietary club for business assessment: Rideau Club v. Ottawa, 8 O. W. R. 106, 10 O. W. R. 519, 12 O. L. R. 275, 15 O. L. R. 118.

10.—(6) Wharf and premises of steamboat company: see Dominion Express v. Niagara, 15 O. L. R. 78.

10.—(8) The Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment on their dividends from their stock in the company except as set out in this sub-section: Goodwin v. Ottawa, 12 O. L. R. 236. Income on reserve fund provided by insurance company to meet unforeseen liabilities, not liable to taxation: Economical Mutual v. Berlin, 20 O. W. R. 349.

11. Income assessment; dividends on shares in Ottawa Electric Co.; agreements between company and city; exemptions: Goodwin v. Ottawa, 7 O. W. R. 204, 8 O. W. R. 77, 12 O. L. R. 236. The net interest and dividends received by the Canada Life from investments of their reserve fund form part of their taxable income, although to the extent of 90 per cent. divisible as profits among participating shareholders and not

subject to control or disposition by the company: Re Canada Life, 25 A. R. 312; Confederation Life v. Toronto, 24 O. R. 643, 22 A. R. 166.

17. Place of business: Watt v. City of London, 19 A. R. 675, 22 S. C. R. 300.

13.—(1) The income derived from property vested in trustees is regarded as their own income and is subject to assessment though the trustees have no personal interest in it. Its ultimate disposition is immaterial. The obligation of the trustees to pay it to the beneficiaries is not a debt to be offset against it: Re McMaster Estate, 2 O. L. R. 474; see sec. 37 (12).

14. Method of assessing a telephone company: see Re Bell Telephone Co. and Hamilton, 25 A. R. 351. Local telephone company's assessment: Re North Huron Telephone Co. and Turnberry, 17 O. W. R. 273, 2 O. W. N. 187. "All branch and party lines," (sub-sec. (8)): Re Turnberry and North Huron Telephone Co., 4 O. W. N. 598.

20. Delivery of incorrect income statement: Atty. Gen. v. Till, 1910 A. C. 50.

22. Effect of non-compliance with this sec.: Sturgeon Falls v. Imperial Land Co., 4 O. W. N. 178, 23 O. W. R. 170. A purchaser who has gone into possession under an agreement to purchase and made part payment, is an owner: Sawers v. Toronto, 2 O. L. R. 717; and see *post* sec. 109 notes. Vague and indefinite description of lands: Russell v. Toronto, 9 O. W. R. 288, 11 O. W. R. 23, 15 O. L. R. 484; Carter v. Hunter, 9 O. W. R. 58, 13 O. L. R. 310. In describing lands for assessment "the north east part," even with the acreage is an ambiguous description: Re Jenkins and Enniskillen, 25 O. R. 399. Sufficient particulars: R. H. Y. C. v. Jarvis, 2 O. W. N. 357, 17 O. W. R. 700.

22.—(1*d*) An assessment of lots as "water lots 436 x 660" is invalid as not indentifying them. An assessment of lots *en bloc* after they have been subdivided by a registered plan and without shewing

the known owner against whom particular parcels are assessable, is invalid: Wildman v. Tait, 32 O. R. 274, 2 O. L. R. 307. Where an assessment was too vague a subsequent tax sale was set aside: Carter v. Hunter, 13 O. L. R. 310. Particulars of description of land to be sold for taxes: Sturgeon Falls v. Imp. Land Co., 2 O. W. N. 1433, 19 O. W. R. 757, 1011; and see secs, 127, 141 *post.*

26. Manhood suffrage voters: Re Adolphustown Voters' List, 12 O. W. R. 827, 17 O. L. R. 312.

37.—(4) See Blakey v. Smith, 1 O. W. N. 340, 15 O. W. R. 62, 20 O. L. R. 279.

37.—(11) The rating of the husband provided by this sub-section is not a joint rating: R. ex rel. Milligan v. Harrison, 16 O. L. R. 475.

37.—(12) See Re McMaster Estate, 2 O. L. R. 474, note to sec. 13 (1).

38. See Niagara Falls Park & R. R. Co. v. Niagara, 31 O. R. 29; Chatham v. C. P. R., 37 C. L. J. 791; G. T. R. v. Port Perry, 34 C. L. J. 239.

39. Property of the Crown; lease: Niagara Falls Park Ry. v. Niagara Falls, 31 O. R. 29; Ottawa Electric v. Ottawa, 7 O. W. R. 481. The holder of a timber license on Crown lands has no interest in the lands: Re Shier Lumber Co., 14 O. L. R. 210, 9 O. W. R. 605; see notes to sec 5 (1) *ante,* and sec. 46 *post.*

40.—(1) See Re Bell Telephone and the City of Hamilton, 25 A. R. 351; and see also Kirkpatrick v. Cornwall, 2 O. L. R. 113.

40.—(3) Where farm lands were not benefited by certain improvements: Re Giles and Wellington, 30 O. R. 610.

40.—(4) Mining lands were assessed as agricultural lands under this section. The assessor also assessed the buildings and mining plant as such, and, adding the two latter together entered them on the roll

as the assessed value of the buildings. This was held to be an attempt to evade the Act, and the assessment of the plant was illegal. The illegality being established, the Court had jurisdiction to deal with the matter outside of the machinery provided by the Act: Canadian Oil Fields v. Oil Springs, 8 O. W. R. 480, 13 O. L. R. 405. Canadian Oil Fields v. Oil Springs, 13 O. L. R. 405, commented on and interpretation placed by Boyd, C., preferred to that of Divisional Court: Re Bruce Mines (Court of Appeal), 20 O. L. R. 315, 1 O. W. N. 369, 15 O. W. R. 253. All buildings which add to the value of the land for any purpose and not merely buildings which add to its agricultural value are to be assessed: Re Bruce Mines, 20 O. L. R. 315, 1 O. W. N. 369, 15 O. W. R. 253.

40.—(6) "Income derived from the mine:" Re Coniagas Mines and Cobalt, 10 O. W. R. 1007, 15 O. L. R. 386.

41. Application of this section: Belleville Bridge Co. v. Ameliasburg, 10 O. W. R. 591, 988, 15 O. L. R. 174; Niagara Falls Park, etc., Co. v. Niagara, 31 O. R. 29.

44. Electric cars, apparatus and plant of a tramway company are not assessable as real estate: Toronto Railway v. Toronto, 1904, A. C. 809. The proper mode of assessment in a city divided into wards would be to value the concern as a whole and then apportion rateably to the words so much of the value as falls to that part of the concern territorially situated in each locality: Re Con. Gas v. Toronto, 26 O. R. 722. Assessment of pipe line of company for transmitting crude petroleum: Re Canadian Oil Fields and Enniskillen, 7 O. L. R. 101. Assessment of rails, ties, poles, wires, pipes, mains, conduits, sub- and superstructures on public streets belonging to street railway, gas and electric light companies: Toronto Ry. *et al.* v. Toronto *et al.*, 6 O. L. R. 187. Method of assessing electric light company: see Re Toronto Electric Light, 3 O. L. R. 620. Method of assessing street railway: see Re London Street Ry., 27 A. R. 83.

46. Liability of International railway bridge to assessment as to part in Ontario: New York & O. Ry. Co. v. Cornwall, 5 O. W. N. 304. In assessing that part of a bridge crossing the Niagara River lying within a township of Canada, regard could not be had to its value in proportion to the value of the franchise or of the whole bridge or to the cost of construction, but only to the actual cash price obtainable for the land and materials situate within the township: Re Queenston Heights Bridge, 1 O. L. R. 114. Assessment of toll bridge over navigable water: Belleville Bridge Co. v. Ameliasburg, 10 O. W. R. 571, 988, 15 O. L. R. 174; Re International Bridge Co. v. Bridgeburg, 7 O. W. R. 497, 12 O. L. R. 314.

48. Assessment of railway property: Re C. P. R. and Steelton, 22 O. W. R. 94, 3 O. W. N. 1199.

49. Section considered: Gast v. Moore, 27 O. L. R. 515.

56. Construction of the phrase "may be adopted by the Council of the following year." Overwhelmingly strong reasons might justify the Court in giving "may" the force of "must:" Re Dwyer and Port Arthur, 21 O. R. 175.

57. Appeal from assessment: Re Fort Frances Assessment, 4 O. W. N. 600, 27 O. L. R. 622.

62. Functions of Court of Revision: N. Y. & O. Ry. v. Cornwall, 5 O. W. N. 304. While the direction of the statute that the members of the Court of Revision are to be sworn should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void: Re McCrae and Brussels, 8 O. L. R. 156.

66. Voters' list, where the provisions of this section and sec. 69 (20) are not complied with: Re Dale and Blanchard, 1 O. W. N. 729, 1018, 2 O. W. N. 574, 16 O. W. R. 86, 349, 18 O. W. R. 360, 21 O. L. R. 497, 23 O. L. R. 69. Courts of Revision are not obliged to hear counsel in support of an appeal against an assessment of property: Re Roseback and Carlyle, 23 O. R. 37.

69.—(1) Functions of Court of Revision: N. Y. & O. Ry. v. Cornwall, 5 O. W. N. 304.

69.—(10) As to necessity for personal notice: see Vivian v. McKim, 23 O. R. 561.

69.—(20) Voters' list where provisions of this subsection and sec. 66 are not complied with: Re Dale and Blanchard, 21 O. L. R. 497, 23 O. L. R. 69.

70. Finality of this roll where person rated as a freeholder is not so in fact: Re Dale and Blanchard, 21 O. L. R. 497, 23 O. L. R. 69. Finality of roll; property qualification of reeve: R. ex rel. Ingoldsby v. Spiers, 13 O. W. R. 611. Where the plaintiffs were illegally assessed and paid the taxes under protest, they were held entitled to maintain an action to recover them: Watt v. London, 19 A. R. 675, 22 S. C. R. 300. Finality of the roll: Burford v. Burford, 18 O. R. 546.

72. Procedure on appeal; formerly could be taken only by municipal corporation: Re British Mortgage Loan Co., 29 O. R. 641; Re Dundas Street Bridges, 8 O. L. R. 52. What constitutes good service of notice of appeal; time for service: see Scott *et al.* v. Listowel, 12 P. R. 77.

74. See Re London Street Railway, 27 A. R. 83.

79. When jurisdiction to assess attaches, the judgment of the County Judge is conclusive: Canadian Oil Fields v. Oil Springs, 8 O. W. R. 480, 13 O. L. R. 405. The decision of a County Judge on a question of assessment is final when he is dealing with property which is assessable at all: Confederation Life v. Toronto, 22 A. R. 166.

80.—(1) Where rights of a class may be involved: Goodwin v. Ottawa, 12 O. L. R. 603. Assessment appeal: Re Coniagas and Cobalt, 15 O. L. R. 386. The amount of assessment made by the assessor is the determining factor to entitle to an appeal—not the amount fixed by the Court of Revision: Re Coniagas Mines and Cobalt, 20 O. L. R. 323, 1 O. W. N. 371, 15 O. W. R. 258.

80.—(6) Section considered: Waterloo v. Berlin, 28 O. L. R. 206. Appeals; functions of Supreme Court and Ontario Railway and Municipal Board: N. Y. & O. Ry. v. Cornwall, 5 O. W. N. 304. Question whether certain buildings were assessable is question of law: Re Bruce Mines, 20 O. L. R. 315, 15 O. W. R. 253, 1 O. W. N. 369. An appeal from the decision of the Board on an appeal thereto from a Court of Revision lies only on a question of law: Re S. H. Knox & Co. Assessment, 18 O. L. R. 645. It is desirable in appeals under this section that if the Railway and Municipal Board pass upon questions of law, they should so state in their reasons for judgment: Re Niagara Falls and N. F. Suspension Bridge Co., 9 O. W. R. 865. Question of value is question of fact and no appeal lies: Re Coniagas and Cobalt, 20 O. L. R. 322, 15 O. W. R. 258, 1 O. W. R. 371. Former jurisdiction of Court of Revision and Courts exercising appellate jurisdiction (before 6 Edw. VII., ch. 31, sec. 51): see Toronto R. W. Co. v. Toronto, 1905, A. C. 809; Re International Bridge Co. v. Bridgeburg, 12 O. L. R. 314.

81. Uniformity of decision: Re Shier Lumber Co., 14 O. L. R. 210, 9 O. W. R. 605. Rights of a class: see Goodwin v. Ottawa, 12 O. L. R. 603. Case stated; question of general application; consideration leading Court to answer or decline to answer questions: Re Norfolk Voters' Lists, 15 O. L. R. 108, 10 O. W. R. 743; Re Ontario Medical Act, 13 O. L. R. 501, 8 O. W. R. 766; Re Knox Assessment, 12 O. W. R. 499, 17 O. L. R. 175, 13 O. W. R. 823, 18 O. L. R. 645; Re C. P. R. and Steelton, 3 O. W. N. 1199, 22 O. W. R. 94; Re Fort Frances Assessment, 27 O. L. R. 622.

83. Application: Murphy v. Sandwich, 17 O. W. R. 738, 2 O. W. N. 367.

87.—(8) The date fixed beyond which judgment shall not be deferred is imperative: Re Nottawasaga and Simcoe, 4 O. L. R. 1, reversing 3 O. L. R. 169; see also 3 O. L. R. 171.

91. As to Burlington Beach: Wentworth v. Saltfleet, 2 O. W. N. 339, 17 O. W. R. 649.

92. See Re Nottawasaga and Simcoe, 3 O. L. R. 171, 169, 4 O. L. R. 1.

94. Taxes a lien not requiring registration to preserve priority and as between vendor and purchaser they are an incumbrance: see Armour Titles, pp. 162-5. Business tax not a lien: see *ante* sec. 10 (10). Effect of the lien given by this section: Sturgeon Falls and Imp. Land Co., 4 O. W. N. 178, 23 O. W. R. 170. Statement of law before 1st January, 1895. This section not retroactive: Jasperson v. Romney, 12 O. W. R. 575, 734.

95. Formerly, taxes were recoverable by action only when not recoverable in any special manner provided by the Act. Effect where company in liquidation: see Re Ottawa Porcelain, &c., Co., 31 O. R. 679.

97. Taxes payable by landlord, where no stipulation in lease: Rule otherwise in England: Fitzgerald v. Mandas, 21 O. L. R. 312. The landlord is the real ratepayer: Dove v. Dove, 1868, 18 C. P. 424; Rochford v. Brown, 3 O. W. N. 343, 20 O. W. R. 591, 25 O. L. R. 206. Corporation tenant: see C. P. R. v. Toronto, 4 O. L. R. 134. A tenant is not at liberty to deduct from the rent and compel the landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy: Meehan v. Pears, 30 O. R. 433. Landlord and tenant; right of landlord and of collector to distrain: Campbell v. Wallaceburg, 14 O. W. R. 473.

98. See Trenton v. Dyer, 24 S. C. R. 474, note to sec. 100. The delivery of the roll is imperative equally in the case of municipal and provincial taxes. *Ib.*

99. Where a township by-law provided for the raising by issue and sale of debentures of a bonus to a railway company, and for the levying of an annual rate to pay the debentures, it was the duty of the township clerk without further authorization to insert in the collector's rolls the amount with which each ratepayer was chargeable: Bogart v. King, 32 O. R. 135. Local improvement rates grouped with

other taxes and included in the collector's roll are "taxes" in its broad sense and may be collected or realized by uniform statutory process: Sawers v. Toronto, 2 O. L. R. 717.

100. The provision as to delivery of the roll to the collector is imperative and its non-delivery a sufficient answer to a suit against the collector for failure to collect the taxes: Trenton v. Dyer, 24 S. C. R. 474; see Lewis v. Brady, 17 O. R. 377. Certificate not in conformity with the section: Tiny v. Archer, 12 O. W. R. 255.

101. See Carter v. Hunter, 9 O. W. R. 58, 13 O. L. R. 310. The entries referred to are imperative. Where the amount of the taxes for the year was entered in one sum in the roll transmitted to the treasurer, a tax sale founded thereon was held invalid: Love v. Webster, 26 O. R. 453.

103. See Sawers v. Toronto, 2 O. L. R. 717. As to what may constitute a good appointment of collector: see Lewis v. Brady, 17 O. R. 377.

104. Notice: Russell v. Toronto: 9 O. W. R. 288, 11 O. W. R. 23, 15 O. L. R. 484. It is essential to the validity of a good demand or notice that it should contain a schedule specifying the different rates, etc.: McKinnon v. McTague, 1 O. L. R. 233; see also McDermott v. Trachsel, 26 O. R. 218; see sec. 110 *infra*.

104.—(2) In line 1 after "towns" insert "townships:" 4 Geo. V. ch. 2, Schedule (33).

106. Section considered: Gast v. Moore, 27 O. L. R. 515. The duties of the collector are imperative: Donovan v. Hogan, 15 A. R. 432. (See now secs. 110, 117, *infra*). Donovan v. Hogan is now of doubtful authority: Burrows v. Campbell, 23 O. W. R. 271, 24 O. W. R. 190; see *post* sec. 178, notes.

109. The plaintiff agreed with mortgagees in possession to purchase lands of which they were to obtain a final order of foreclosure and in the meantime he should manage it as their agent. The plaintiff was

not assessed nor had the taxes been charged against his name. Held he was not an "owner" within sub-sec. 1 (3), and such taxes could not be levied on his goods: Lloyd v. Walker, 4 O. L. R. 112. A purchaser in possession under an agreement for sale unexecuted by the vendor, and which provides for the payment of taxes by the purchaser, is an "owner:" Sawers v. Toronto, 2 O. L. R. 717, 4 O. L. R. 624. Goods purchased from the mortgagee of the owner or person assessed are not goods whereof title is claimed by purchase from the owner or person assessed, and cannot be levied on for taxes in respect of premises owned by the mortgagor of the goods: Horsman v. Toronto, 31 O. R. 301. There is nothing to warrant a collector seizing for arrears of taxes, goods which being under distraint by a landlord, are *in custodia legis*. Where subsequent rent accrued during the joint possession of the landlord and the collector, the landlord was held to have priority also in respect of another distress made by him for subsequent rent: Kingston v. Rogers, 31 O. R. 119. A warrant of distress specifying two bailiffs is unobjectionable: Sawers v. Toronto, 2 O. L. R. 717. Where one bailiff entered and seized and afterwards withdrew by reason of mis-statements of the owner, it was competent for another bailiff to return forthwith and continue the first lawful taking: Sawers v. Toronto, 2 O. L. R. 717. Goods which are not in possession of the person assessed in respect of them cannot be distrained for taxes assessed against them. Goods which had been mortgaged were, when seized, in possession of the bailiff of the mortgagee who had taken possession on default. It was held that the bailiff being in possession had a right to bring action for illegal distress: Donahue v. Campbell, 2 O. L. R. 124. Right of assessor to seize; landlord and tenant: Campbell v. Wallaceburg, 14 O. W. R. 473. The person taxed can recover for excessive distress: Bradley v. Gainsboro, 9 O. W. R. 397, 819. Even where no special damage is proved: Black v. Coleman, 29 C. P. 507. In the absence of definition of "owner," Court will not hold that locatee is liable for taxes unpaid by former locatee: Patteson v. Emo, 28 O. L. R. 228. Claim of title to goods seized for taxes: Foster v. Reno, 22 O. L. R.

413. Distress by *de facto* officer of municipality: Foster v. Reno, 2 O. W. N. 351, 4 O. W. N. 807, 17 O. W. R. 707, 22 O. L. R. 413. As to sub-sec. 3; see Norris v. Toronto, 24 O. R. 297. Whether the collector "had good reason to believe" (sub-sec. 6) is one for the Judge or jury, the onus being on the collector to prove that he had: McKinnon v. McTague, 1 O. L. R. 233.

118. The Court of Revision is obliged to receive and decide upon a petition for the remission of taxes, notwithstanding that the municipality has not passed a by-law on the subject: Re Norris, 28 O. R. 636.

119. This enactment and the results of failure to comply with its provisions considered: Jasperson v. Romney, 12 O. W. R. 575, 734. The provisions providing for what the account of the collector shall shew on delivery of the roll to the treasurer and requiring the clerk to be furnished with notice, are imperative: Caston v. Toronto, 30 O. R. 16, 26 A. R. 459, 30 S. C. R. 390. Where there is sufficient property available for distress on land assessed during all the time in which the collector for the year has the roll, the taxes thereon cannot be legally returned to the treasurer and cannot be legally placed on the collector's roll for a subsequent year: Caston v. Toronto, 30 O. R. 16, 26 A. R. 459. See also Wildman v. Tait, 32 O. R. 274. Where the requirements as to the duties of the clerk, collector, assessor and treasurer with reference to the list of lands to be sold, have not been complied with, the defects are not cured by secs. 177 and 178, but, to the extent to which the assessments are valid, a purchaser has his lien under sec. 187: Wildman v. Tait, 32 O. R. 274, 2 O. L. R. 307; see also Boland v. Toronto, 32 O. R. 358; see also sec. 141 and secs. 177, 178 *post* and notes.

127. See Caston v. Toronto, 30 O. R. 16, 26 A. R. 459, 30 S. C. R. 390; Wildman v. Tait, 32 O. R. 274, 2 O. L. R. 307; Boland v. Toronto, 32 O. R. 358; and notes to sec. 119 *ante*. A sale had taken place to the defendants who had erected buildings on the land, and the proceedings had been substantially regular except that the clerk had omitted to

furnish the treasurer with a true copy of the list with the assessor's return certified by the clerk, (see sec. 128). It was held that the onus lay on the plaintiffs and that as the taxes had been legally imposed, the omission worked no injury to the plaintiff who had all notices and delays. In other respects the sale was valid, and it was held that as the action was brought after three years the defendants could rely on the provisions of sections 172 and 173: Kennan v. Turner, 5 O. L. R. 560. The provisions of the Act are imperative, and where two lots sold were not included in the lists furnished by the clerk, a subsequent tax sale was set aside: Carter v. Hunter, 13 O. L. R. 310. As to descriptions: see *ante*, sec. 22 (1*d*) and note. See also notes to sec. 177 *post*.

128. Sale of occupied and improved lands as vacant land: Radford v. Disher, 12 O. W. R. 207; Blakey v. Smith, 1 O. W. N. 340, 14 O. W. R. 241, 15 O. W. R. 62, 20 O. L. R. 279. The Legislature intended that the owners, if known, would be notified by the assessor of their danger whether or not he found the lands occupied or built on: Mackenzie v. Wadson, 9 O. W. R. 26. Failure of assessor to notify owner is fatal to validity of tax sale: Deverill v. Coe, 11 O. R. 222; Mackenzie v. Wadson, 9 O. W. R. 26. *Quære* whether the requirement in this section requiring the clerk to furnish to the treasurer a copy of the list certified by him under the seal of the corporation is so essential that non-compliance with it would render invalid a tax sale attacked before the statutory limitation came into operation: Kennan v. Turner, 5 O. L. R. 560; see also Love v. Webster, 26 O. R. 453, and cases referred to in notes to secs. 119, 127, 177.

141. As to placing arrears on collectors' roll where there was sufficient distress: see Caston v. Toronto, 30 O. R. 16, 26 A. R. 459, 30 S. C. R. 390, note to sec. 119, *ante*. Where there was a direct breach of this section, a subsequent tax sale was set aside: Carter v. Hunter, 13 O. L. R. 310. The omission of the treasurer to furnish to the clerk a list of lands liable to be sold for taxes is a fatal objection to the validity of a tax sale: Ruttan v. Burk, 7 O. L. R. 56. See *post* sec. 177, notes.

142. The lands must be distinguished as patented or unpatented. This is a compulsory provision: Hall v. Hill, 2 E. and A. 568, 22 U. C. R. 578; Scott v. Stuart, 18 O. R. 211; Kempt v. Parkyn, 28 C. P. 123; Haisley v. Somers, 13 O. R. 600. Where there were irregularities in the warrant, a substantial compliance with the Act was held sufficient: Church v. Fenton, 4 A. R. 159, 5 S. C. R. 239. It is not necessary that the treasurer should keep his accounts of taxes due according to the statute in order to validate the sale: Cotter v. Sutherland, 18 C. P. 357. Strict proof should be required of the legality of the tax and its actual imposition, but in matters concerning its collection, unnecessary or unreasonable rigour in carrying out the clauses of the statute should not be exacted from the officials entrusted therewith: Cotter v. Sutherland, 18 C. P. 357; Fitzgerald v. Wilson, 8 O. R. 559; see Dig. Ont. Case Law, col. 307-332.

147. As to descriptions: see *ante*, sec. 22 (1*d*) and notes.

149. Advertising: see Williams v. Taylor, 13 C. P. 219; Cotter v. Sutherland, 18 C. P. 357. Misdescription in roll and advertisement: Booth v. Girthwood, 32 U. C. R. 23. Where the advertisement was of a character to damp the sale, the sale was not "fairly conducted:" Scott v. Stuart, 18 O. R. 211. A county municipality is not liable for the cost of advertising the County Treasurer's list of land for taxes. The County Treasurer does not act as an officer of the corporation in regard to tax sales. He is merely *persona designata* on behalf of the local municipalities, and a creditor must look to him personally: Warwick v. Simcoe, 36 C. L. J. 461; see also as regards cities and towns: Bank of Commerce v. Toronto Junction, 3 O. L. R. 309. Advertisement: Russell v. Toronto, 15 O. L. R. 484; Toronto v. Russell, 1908, A. C. 493. Irregularity in publication of advertisement: Sutherland v. Sutherland, 22 O. W. R. 296, 3 O. W. N. 1368.

154. Sale of occupied and improved land as vacant land: Radford v. Disher, 12 O. W. R. 207. "Notice in writing" of intention of municipality to purchase: Cartwright v. Toronto, 4 O. W. N. 863. Power and

right to purchase in view of this section: see Russell v. Toronto, 9 O. W. R. 288, 11 O. W. R. 23, 15 O. L. R. 484. Effect of validating Act: Russell v. Toronto, 15 O. L. R. 484, (1908) A. C. 493. The procurement by the corporation of men to make bids at the sale is not an irregularity. The failure to give notice may be effectually waived by the acts and conduct of the owner in arrear: Toronto v. Russell, (1908) A. C. 493. As regards property bought under this section the municipal corporation is in the position of a trustee and is amenable to the like jurisdiction of the Court. A lower tender was not allowed to be accepted: Phillips v. Belleville, 9 O. L. R. 732. See also Ray v. Kilgour, 9 O. W. R. 641.

158. As to the application of the powers of the Superintendent-General of Indian Affairs: see R. S. C. 51, secs. 58-60; Richards v. Collins, 3 O. W. N. 1479, 22 O. W. R. 592.

160. Seizure of locatee's goods for taxes unpaid by former locatee: Pattison v. Emo, 28 O. L. R. 228.

163. Description of lands sold. There is nothing requiring the assessor to define the land assessed as the land sold for taxes: Tiny v. Archer, 12 O. W. R. 255.

171. Section construed: Errekkila v. McGovern, 4 O. W. N. 195, 27 O. L. R. 498. "Known" address, subsec. (2); section considered: Gast v. Moore, 27 O. L. R. 515. Mandamus to compel treasurer to make searches, and with corporation to execute deed: Dawson v. Sault Ste. Marie, 15 O. W. R. 230. As to protection of persons enjoying easement over lands sold for taxes: Essery v. Bell, 13 O. W. R. 395, 18 O. L. R. 76.

173. The title acquired by the purchase of land sold under statutory authority for non-payment of taxes and not redeemed with the statutory period, is an absolute title entitling the holder at any time afterwards to perfect it by a deed of sale from the treasurer under the Act: McConnell v. Beatty, 1908, A. C. 82; reported also 11 O. W. R. 1. Sale of Crown lands for arrears of taxes; purchaser entitled to

treasurer's deed: McConnell v. Beatty, 1908, A. C. 82. Provision for registration of tax deeds within eighteen months: see R. S. O. 1914, ch. 124, sec. 78.

177. The change in wording from R. S. O. 224, sec. 208 to 4 Edw. VII., ch. 23, sec. 172, commented on and its effect considered: Blakey v. Smith, 20 O. L. R. 279, 1 O. W. N. 340, 14 O. W. R. 241, 15 O. W. R. 62. If there is no valid assessment, no taxes can be legally imposed, and a sale based on such taxes is invalid: Blakey v. Smith, 20 O. L. R. 279, 1 O. W. N. 340, 14 O. W. R. 241, 15 O. W. R. 62. Scope of the curative effect of this section: see Laird v. Neelin, 10 O. W. R. 429. It was at one time thought to apply to cure defects notwithstanding non-compliance with the provisions of the requirements of sections 127 *et seq*; but this position is not tenable since Ruttan v. Burk, 7 O. L. R. 56. As to its application to cure non-compliance with section 141: see cases collected, Laird v. Neelin, 10 O. W. R. 429 at p. 431. Setting aside tax sale for want of notice (see sec. 171 (2)): Gast v. Moore, 4 O. W. N. 525, 23 O. W. R. 577, 27 O. L. R. 515. Lack of notice under sec. 128 as ground of invalidity: Mackenzie v. Wadson, 9 O. W. R. 26; Deverill v. Coe, 11 O. R. 222. Omissions and irregularities: Kennan v. Turner, 5 O. L. R. 560, 2 O. W. R. 239; Boland v. Toronto, 32 O. R. 358. Failure to observe requirements of the Act as ground of attack on tax deed: Fisher v. Parry Sound Lumber Co., 6 O. W. R. 381, 7 O. W. R. 55. Conduct of tax sale; execution and delivery of tax deed; irregularities: Errikkila v. McGovern, 4 O. W. N. 195, 518, 27 O. L. R. 498. Grounds for attacking tax deeds: see secs. 104, 119, 128, 154, 173, and notes.

"Fairly and openly:" Sutherland v. Sutherland, 22 O. W. R. 296, 3 O. W. N. 1368. Where the advertisement was of a character to damp the sale, the sale was not "fairly conducted:" Scott v. Stuart, 18 O. R. 211; and see notes to sec. 149, *ante*. The onus of proof that there were taxes in arrear for which land might be rightly sold is upon the person claiming under the sale for taxes: Hislop v. Joss, 3 O. L. R. 281. Onus of proof of invalidity of tax title: Kennan v. Turner, 5 O. L. R. 560, 2 O. W. R. 239: Mackenzie v. Wadson, 9 O. W. R. 26. The onus of

proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough: Essery v. Bell, 18 O. L. R. 76. The sale of the servient lands for taxes does not extinguish the title to an easement thereover: Essery v. Bell, 13 O. W. R. 395, 18 O. L. R. 76. Effect of statutory curative provision on contract of sale: Re National Trust and Ewing, 2 O. W. N. 801, 18 O. W. R. 770. A tax deed must, to retain its priority under the Registry Act, be registered within eighteen months: R. S. O. 1914, ch. 124, sec. 28; Armour Titles, p. 163.

Construction of Statutes validating tax sales. Validation of tax sales in Toronto up to and including the one held in 1902: see 3 Edw., ch. 86, sec. 8, and see Russell v. Toronto, 9 O. W. R. 288, 11 O. W. R. 23, 15 O. L. R. 484, 1908, A. C. 493. Consideration of validating statute affecting tax sales in Toronto: 3 Edw. VII., ch. 86, sec. 8: Right to redeem lands purchased by city: Cartwright v. Toronto, 4 O. W. N. 863, 29 O. L. R. 73. Construction and consideration of acts validating tax sales in Toronto: 6 Edw. VII., ch. 99, sec. 9, 7 Edw. VII., ch. 97, sec. 9; Radford v. Disher, 12 O. W. R. 207; Blakely v. Smith, 20 O. L. R. 279. Act validating tax sales in Port Arthur: 2 Edw. VII., ch. 49. Construction: Ray v. Kilgour, 9 O. W. R. 641. Port Arthur validating Act: 10 Edw., ch. 124; Errikkila v. McGovern, 27 O. L. R. 498.

178. Where it appeared that as far as the County Treasurer was concerned, all the steps taken by him in regard to the sale were regular, and that the sale had taken place for taxes actually in arrear, followed by a deed which had not been questioned within two years, the sale and deed were not afterwards impeachable, although it was not clear on the evidence whether the clerk and assessor had or had not properly complied with the requirements of the Act: Smith v. Midland Ry., 4 O. R. 494. Where the action was brought after three years, the proceedings on the sale were substantially regular with one exception, the taxes had been legally imposed and the plaintiffs had had all notices and delays, the defendants were entitled to rely on these sections

(177, 178) as a defence: Kennan v. Turner, 5 O. L. R. 560. Where two years have elapsed without the deed being questioned, it is not necessary to give evidence that the lands were duly advertised: Wapels v. Ball, 29 C. P. 403. Where a sale was invalid for failure to set out why the taxes had not been collected, and for other irregularities, it was held that these sections (177-178) did not cure the invalidity: Boland v. Toronto, 32 O. R. 358; see also Wildman v. Tait, 32 O. R. 274, 2 O. L. R. 307; Love v. Webster, 26 O. R. 453. The limitation sections are no protection to a tax purchaser where there has been no list furnished by the treasurer to the clerk of lands liable to be sold for taxes under sec. 127; Ruttan v. Burk, 7 O. L. R. 56; see also Whelan v. Ryan, 20 S. C. R. 65. "Two years" runs from the date of the tax deed, not from the date of the auction sale: Sutherland v. Sutherland, 3 O. W. N. 1368, 22 O. W. R. 296. "The time of sale" means the time of the delivery of the tax deed: Errikkila v. McGovern, 17 O. L. R. 498. Section considered: Burrows v. Campbell, 23 O. W. R. 271, 24 O. W. R. 190, 4 O. W. N. 249. And see also Donovan v. Hogan, 15 A. R. 342, which is now of doubtful authority: Burrows v. Campbell, 24 O. W. R. 190.

180. This was formerly R. S. O. 1897, ch. 224, sec. 211, repealed by 2 Edw. VII., ch. 1, sched., and now revived. *Cf.* 32 Henry VII., ch. 9, the Act "Against Maintenance and Embracery and Byeing of Titles." Where a lot contained 82 acres and the northerly 50 acres were sold for taxes in 1868 and in 1871 there was sold "the whole of southerly part containing 10 acres being the part not sold in 1868," it was held that this was not a sale of 10 acres which could be located by the Court "in such manner as is best for the owner," but was a sale of the whole unsold portion and could not be attacked by a purchaser from the owner after the time of the tax sale, who then had a mere right of entry. Application and effect of section considered: Hyatt v. Mills, 19 A. R. 329; see Ruttan v. Burk, 7 O. L. R. 56.

181. Lien of purchaser at tax sale for improvements and money expended: Richard v. Collins, 4 O. W. N. 375, 23 O. W. R. 499, 27 O. L. R. 390.

186.—(2) Pre-requisite for application of this section is finding notice not given: Richards v. Collins, 27 O. L. R. 390.

187. This section giving a purchaser a lien for the purchase money and ten per cent. has no application where the taxes have not been legally imposed or where there are no taxes in arrear: Wildman v. Tait, 2 O. L. R. 307; Carter v. Hunter, 13 O. L. R. 310.

191. A treasurer of a town has no authority to bind the municipal corporation to pay the cost of advertising his list of land for sale for arrears of taxes. He is a *persona designata* and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor for such advertisements must look to him personally: Bank of Commerce v. Toronto Junction, 3 O. L. R. 309; Warwick v. Simcoe, 36 C. L. J. 461.

193. Former procedure in respect of tax sales in districts: see R. S. O. 1897, ch. 23, sec. 23, etc. See also Beatty v. McConnell, 6 O. W. R. 822, 7 O. W. R. 11, 8 O. W. R. 916 (C. A.), 11 O. W. R. 1 (P. C.); also 1908, A. C. 82.

195. Consideration of this section in view of the Separate Schools Act, R. S. O. 1914, ch. 270, sec. 67 (5): Re Therriault and Cochrane, 5 O. W. N. 26, 24 O. W. R. 964.

202. Appointment of collector may be by resolution: Foster v. Reno, 2 O. W. N. 351, 4 O. W. N. 807, 17 O. W. R. 707, 22 O. L. R. 413.

CHAPTER 196.

The Statute Labour Act.

CHAPTER 197.

The Municipal Franchises Act.

3. Contract for supply of electric light: Date of contract: Hogan v. Brantford, 1 O. W. N. 226, 14 O. W. R. 1117. Injunction may be granted if agreement has not received the required assent of the electors: Abbott v. Trenton, 14 O. W. R. 1101, 1 O. W. N. 218. Unreasonable withholding by municipality of consent to erection of electric light and power poles in lanes: Walkerville v. Walkerville Light and Power Co., 5 O. W. N. 429. Pleadings; cause of action: see Hogan v. Brantford, 14 O. W. R. 1117, 1 O. W. N. 216. See provisions of R. S. O. 1914, ch. 192, sec. 399 (50), 408 (4), and notes.

CHAPTER 198.

The Municipal Drainage Act.

Refer to: Proctor, The Drainage Acts of Ontario; Clarke and Scully, Ontario Drainage Cases.

1. This Act has not abrogated the fundamental principle underlying the Acts respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners, which rests on the maxim: *qui sentit commodum sentire debet et onus*: Sunderland v. Romney, 30 S. C. R. 495. In drainage matters the policy of the Legislature is to leave the management largely in the hands of the localities, and the Court should refrain from interference unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights: Re Stephens and Moore, 25 O. R. 600.

2.—(*i*) Owner: see note to sec. 3 (1).

3.—(1) The assessment roll is conclusive as to the status of the persons mentioned in it and evidence is not admissible to shew that a person entered on the roll as an owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error: Warwick v. Brooke, 1 O. L. R. 433. History and analysis of section: Warwick v. Brooke, 1 O. L. R. 433; and see *post*, sec. 21. The "last revised assessment roll," which governs the status of petitioners is the roll in force at the time the petition is adopted by the Council and referred to the engineer for enquiry and report and not the roll in force at the time the by-law is finally passed: Challoner v. Lobo, 32 O. R. 247, rev., 1 O. L. R. 136, 32 S. C. R. 505. Since 1906 it is no longer necessary that the petition should be signed by a majority of the owners whose lands are found by the engineer who makes the report, to be benefited, but it is still as necessary as ever that the petition should describe a real drainage area which should bear a reasonable proportion to the size and extent of the scheme: Re Duane and Finch, 12 O. W. R. 144. Majority of owners benefited: Assessment for outlet: Fairbairn v. Sandwich South, 8 O. W. R. 925. Petition: Rochester v. Mersea, 2 O. L. R. 435; Orford v. Aldborough, 3 O. W. N. 1517, 27 O. L. R. 107.

3.—(2) Because in the course of construction of a drainage work, banks are formed with the spoil cast from the dredge, the work is not one within this sub-section, which relates to the reclamation of wet or submerged lands: Sutherland v. Romney, 26 A. R. 495, 30 S. C. R. 495.

3.—(3) Lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately or by means of another drain or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water: Orford v. Howard, 27 A. R. 223. This section wider than the former Act: Township of Orford v. Aldborough, 3 O. W. N. 1517, 22 O. W. R. 853, 27 O. L. R. 107.

3.—(5) Injuring liability: Huntley v. March, 14 O. W. R. 1033, 1 O. W. N. 190. "Outlet:" Re Jenkins and Enniskillen, 25 O. R. 399.

5. Taking the prescribed oath is an essential prerequisite to the exercise of jurisdiction by the engineer under section 77: Colchester v. Gosfield, 27 A. R. 281.

8. Tender based on erroneous estimate of engineer as to measurements and quantity of work; contract held not binding: McKillop v. Pidgeon and Foley, 11 O. W. R. 401. Engineer may delegate clerical work not involving the exercise of judicial discretion: Moore v. March, 13 O. W. R. 692; Robertson v. North Easthope, 15 O. R. 423; Elizabethtown v. Augusta, 2 O. L. R. 4, 32 S. C. R. 295. Proper charges for clerical assistance for engineer: Moore v. March, 13 O. W. R. 694.

9.—(9) The power to extend time is a limited power to extend for good cause and not upon dilatoriness on the engineer's part: Re McKenna and Osgoode, 13 O. L. R. 471.

9.—(10) Undue delay impugning validity of report: Re McKenna and Osgoode, 8 O. W. R. 713, 13 O. L. R. 471.

16. The written request is an essential prerequisite to the jurisdiction of the County Court Judge. There is no appeal: Moore v. March, 13 O. W. R. 692, 14 O. W. R. 1194, 20 O. L. R. 67.

19. Before the report, plans and assessment of the engineer have been adopted by the Council, it can refer them back to him for further consideration and for amendment, but after they have been adopted, it cannot of its own motion change or amend them, and if the drainage scheme is carried out with a material change the municipality are not protected and are liable to make good any damages resulting from the work: Priest v. Flos, 1 O. L. R. 78.

20. Power of withdrawal from petition, and how exercised: Gibson v. North Easthope, 21 A. R. 504, 24 S. C. R. 707. Insufficient petition; prohibition: Anderson v. Colchester North, 21 O. R. 476.

26. It was held that a petition is an indispensable preliminary, and the fact of the by-law not having been

quashed within the period limited would not prevent its being treated as invalid. On appeal, a Divisional Court was equally divided: Anderdon v. Colchester North, 21 O. R. 476. A summary application to quash a by-law is " made " when notice of the motion is served and the affidavits in support of it filed—although the motion is not made returnable until after the prescribed period: Re Sweetnam and Gosfield, 13 P. R. 293; Re Shaw and St. Thomas, 18 P. R. 454. A Council passed a provisional by-law, and on the matter coming up before the Court of Revision, it was found that the petition had not been signed by sufficient owners. The Council without new petition or report altered the report, reduced the size and cost of works and passed a by-law for the construction of the work as altered in three townships. Held that this by-law was void: McCulloch v. Caledonia, 25 A. R. 417; Raleigh v. Williams, 1893, A. C. 540, at p. 550.

44. *Quære* whether an appeal lies under this section to the County Judge at the instance of the municipality: see Re Dundas St. Bridges, 8 O. L. R. 52.

48. Construction of section: After the expiration of 30 days the Judge is *functus officio*: Rowland v. McCallum, 1 O. W. N. 319, 2 O. W. N. 365, 17 O. W. R. 557, 735, 22 O. L. R. 418.

60. See Jenkins v. Enniskillen, 25 O. R. 399, note to sec. 63.

63 Although a Township Council is not powerless in regard to the report of its engineer, it is contrary to the spirit and meaning of the Act that two adjoining Councils should agree on a drainage scheme and the proportion of its cost to be borne by each, and that the engineer of one of them should be instructed to make a report carrying out the scheme and charging each municipality with the sum agreed on. Such a course would interfere with the independent judgment of the engineer and pledge each township in advance not to appeal, to the possible detriment of the owners assessed: Re Jenkins and Enniskillen, 25 O. R. 399. What is an " outlet:" Re Jenkins and Enniskillen, 25 O. R. 399. Where a drain constructed or improved by one municipality affords

an outlet either immediately or by means of another drain or natural watercourse for waters flowing from lands in an adjoining municipality, the municipality that has constructed or improved the outlet can assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has power to decide all questions relating to the assessment: Per Hagarty, C.J.O., and Burton, J.A. Osler and Maclennan, JJ.A., however, held that the section does not extend to original watercourses which have been deepened or enlarged, but only to drains properly so called: The Court was divided: Re Harwich and Raleigh, 21 A. R. 677; see Re Orford and Howard, 18 A. R. 496. In Broughton v. Grey, 27 S. C. R. 495, the Supreme Court held that the section does not include original watercourses which have been deepened or enlarged. See also Stephen v. McGillivray, 18 A. R. 516. The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively. And if the benefit is disproved, the attempted charge fails: Re Romney and Tilbury, 18 A. R. 477.

66. Where a sum amply sufficient to complete drainage works has been paid over to the initiating municipality and was misapplied in a manner not authorized by the by-law, the municipality cannot afterwards by another by-law, levy from the contributors to the fund so paid any further sum to replace the sum wasted: Sombra v. Chatham, 28 S. C. R. 1. Right of owner in adjoining municipality proposed to be made a contributor to bring action to prevent passing of by-law by initiating municipality: Broughton v. Grey, 27 S. C. R. 495. Liability of subservient townships to pay interest: March v. Huntley, 17 O. W. R. 731.

67. Where benefit to municipality sought to be charged cannot be proved the attempted charge fails: Re Romney and Tilbury, 18 A. R. 477; see note to sec. 63, *ante*. Where in a drainage scheme initiated by one township, several are brought in, each of these is interested only in its own assessment, as against

the initiating township, and not in the assessments of each other: Re Romney and Tilbury West, 18 A. R. 477. See secs. 63, 72, notes.

69 The by-law referred to in this section is one which provides for the completion of the work so as to render it efficient, although there may have been some deviations and variations and even additions to the work as originally planned, *e.g.* where it was found that stone portals were needed and the outlet to a lake deepened: Re Suskey and Romney, 22 O. R. 664.

71. Where the drain was an old one constructed out of general funds and out of repair, the Court declined to quash a by-law assessing certain property for its maintenance and repair, although there were some irregularities. The policy is that the Court should leave the matters in the hands of the localities, unless there has been manifest excess of jurisdiction or disregard of personal rights: Re Stephens and Moore, 25 O. R. 600. What is maintenance work, Re Johnston and Tilbury East, 25 O. L. R. 242. Repair of old drain: Anderton v. Malden, 4 O. W. N. 327, 23 O. W. R. 320.

72. See Broughton v. Grey, 26 O. R. 694, 23 A. R. 601, 27 S. C. R. 495. Where in a drainage scheme initiated by one township, assessments are made against more than one other, each township is interested only in the question of its own assessment, and the arbitration provided for is between each township and the initiating township not a joint arbitration: Re Romney & Tilbury West, 18 A. R. 477. See note to sec. 63; and see Re Harwich and Raleigh, 20 O. R. 154; Re Orford and Howard, 18 A. R. 496.

73. Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits and cannot call upon other minor municipalities to contribute to the expense of repairs. The Drainage Referee has jurisdiction to set aside a by-law attempting this: Re Mersea and Rochester, 22 A. R. 110.

74. Upon certain repairs to drainage work becoming necessary, one of the townships directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under sections 72 or 75 to vary the assessment. It was held that this was a proper mode of apportionment and that the Drainage Referee had no power to vary an apportionment made under such circumstances: Chatham v. Dover, 8 O. L. R. 132.

77. Taking the oath prescribed in section 5 is an essential prerequisite to the exercise of jurisdiction by the engineer under this section: Colchester v. Gosfield, 27 A. R. 281. While an appeal to the Drainage Referee is pending, the initiating municipality cannot refer back the report to the engineer for amendment. *Ib.* A drainage scheme cannot be upheld if the engineer does not make sufficient outlet for the water dealt with: Re Raleigh and Harwich, 26 A. R. 313. Any municipality whose duty it is to maintain any part of a drainage work may without being set in motion by a complainant, initiate repair and extension proceedings although nearly all the cost is assessable against adjoining townships: Caradoc v. Ekfrid, 24 A. R. 576. Where the engineer of the initiating township assessed lands in the adjoining townships for an improved outlet on the principle that all lands in the drainage area were liable therefor, no matter how remote, and though the original outlet was sufficient for their drainage or cultivation, his report was set aside: *Ib.* A township which has constructed a drain within its boundaries, connected with a drain constructed as an independent work in another township, has power without the petition of the ratepayers to provide for the necessary repairs of both drains and to assess the adjoining municipality with its proportion of the cost: Re Stonehouse and Plympton, 24 A. R. 416; see also Elizabethtown v. Augusta, 32 S. C. R. 295. This section applied only to drains artificially constructed and did not apply to the improvement or repair of an ordinary watercourse: Re Rochester v. Mersea, 2 O. L. R. 435; Sutherland v. Romney, 30 S. C. R. 495; but now see sub-sec. 2 (1906). Formerly the cost of widening

and deepening a natural watercourse constituted a charge on the general funds of the township: Sutherland v. Romney, 30 S. C. R. 495. Where part of a drainage work to which the section applies is out of repair, it is not necessary before initiating proceedings for the improvement of the drain under the section for the initiating township to repair the portion of the existing drain which it is bound to repair. Both classes of work may be provided for in the same by-law, the engineer estimating and assessing separately the cost of each class: Re Rochester and Mersea, 2 O. L. R. 435. See also Orford v. Howard, 27 A. R. 223. Old section 75 was materially amended after Sutherland Innes v. Romney, 30 S. C. R. 495, and Orford v. Howard, 27 A. R. 223. (See 6 Edw. VII., ch. 37, sec. 9). History of section and decisions: see Orford v. Aldborough, 3 O. W. N. 1517, 22 O. W. R. 853, 27 O. L. R. 107. Proceedings under this section: Re Dover and Chatham, 1 O. W. N. 327, 15 O. W. R. 156. Mandate of engineer: Gibson v. West Luther, 20 O. W. R. 405. Where report of engineer is a condition precedent: scope of section considered: Johnston v. Tilbury East, 3 O. W. N. 405, 25 O. L. R. 242. Repairing upon report: Re Orford and Aldborough, 27 O. L. R. 107.

80. It is the claimant's duty to shew that proper notice has been given if a mandamus is asked for, and objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice: What is sufficient notice: McKim v. East Luther, 1 O. L. R. 89. A complainant is entitled to recover damages for injury to or depreciation in value of land caused by failure to keep drain in repair, but not for depreciation in value based on the insufficiency of the drain as originally made: McKim v. East Luther, 1 O. L. R. 89. Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shewn that even if the drain had been in repair, the same injury would have resulted: Mackenzie v. West Flamborough, 26 A. R. 198. Any ratepayer whose property has been assessed for the maintenance and repair of a drain is

a person injuriously affected by its want of repair although he can shew no actual loss. He can be awarded a mandamus to compel repair unless the municipality can shew that even if the drain were repaired it would be useless to the complainant's property: Stephens v. Moore, 25 A. R. 42. To entitle a complainant to a mandamus the notice while not technical in form must be so clear and precise that the municipality can decide whether the complaint is well grounded or frivolous. A letter referring to defects and suggesting steps to be taken but not calling on the municipality to do the work is not sufficient. The notice by which proceedings are initiated in Court is not the notice meant by this section: Crawford v. Ellice, 26 A. R. 484; Chrysler v. Sarnia, 15 O. R. 180. While the section requires notice to be given of a mandamus, it did not preclude an action for damages without such notice. An action for damages lies at the suit of any person who can shew that he has sustained damage from the non-performance of the statutory duty to repair. Damages are recoverable when a drain is not kept so as to be able to carry off the water it was originally constructed to carry. The liability does not extend to injury caused by negligent construction of another drain by the municipality under its statutory powers: Raleigh v. Williams, 1893, A. C. 540. As to notice of claims for damages, see subsec. 2. The provision for mandamus to maintain a drain does not extend to a drain never fully made and completed. Where lands were flooded in such a case it was not an injury for which the plaintiff township could maintain an action for damages even though a general nuisance was occasioned. Their only pecuniary compensation was for roads washed away: Sombra v. Chatham, 21 S. C. R. 305. Prohibition: see Anderson v. Colchester North, 21 O. R. 476. Injunction to restrain municipality from continuing improperly constructed drainage works: McGarvey v. Strathroy, 10 A. R. 631; Van Egmond v. Seaforth, 6 O. R. 699; Malott v. Mersea, 9 O. R. 611. And to restrain misapplication of moneys assessed for drainage purposes: Smith v. Raleigh, 3 O. R. 405. Claim for damages for flooding lands met by answer of compensating benefit on the whole: see Northwood v. Raleigh, 3 O. R. 347. Where two

drains were constructed, the second running into the first below the plaintiff's land, and the first was allowed to become choked and flooded the plaintiff's land, the plaintiff was entitled to a mandamus: White v. Gosfield, 2 O. R. 287, 10 A. R. 555. A municipality was held liable for damages for bringing sewage matter and anthrax germs on the plaintiff's farm. The authority under the Act to construct drains is only to do so in such a way as not to cause a nuisance or injure others. The municipality were not relieved from liability by shewing that they had forbidden the tannery from which the anthrax germs had come draining into the sewer, because they had the power of stopping the connection and had not exercised it: Measure of damage in such a case: Weber v. Berlin, 8 O. L. R. 302; see also Bradley v. Raleigh, 10 O. L. R. 201. A municipality is not now liable for damages caused by non-repair of drainage works unless and until a notice specifying the non-repair is served on it: Cullerton v. Logan, 25 O. W. R. 254. An action can be brought for continuing damage, even though two years have elapsed since the inception of it: Cullerton v. Logan, 25 O. W. R. 254; Wigle v. Gosfield, 7 O. L. R. 32. A corporation cannot take advantage of the limitations in this Act, where to do so they must set up that a contract entered into with the owner of lands damaged by flooding is unsealed: McBain v. Cavan, 5 O. W. N. 544. Mandamus: see Con. Rules, 1080, *et seq.;* H. & L. notes, pp. 1293-1302; 1913 Rules 622, *et seq.* See notes to sec. 98 *post;* and also see R. S. O. 1914, ch. 192, sec. 457, notes.

85. Removal of artificial obstruction: Elizabethtown v. Augusta, 32 S. C. R. 295.

88. The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and where such by-laws have been registered in accordance with the provisions of the Act they cannot be set aside even if originally *ultra vires*: Sutherland v. Romney, 26 A. R. 495; see R. S. O. 1914, ch. 43, also ch. 192, sec. 281.

89. Lawful assessment: Re Johnston and Tilbury East, 25 O. L. R. 242.

90. Assumption of award drain. Enlargement of scheme by Council: Fairbairn v. Sandwich South, 8 O. W. R. 925.

93. Before the amendment of 1906: see McClure v. Brooke, 4 O. L. R. 97, 5 O. L. R. 59.

94. A Drainage Referee cannot, upon the admission of the initiating township that the report appealed from is defective, refer it back against the wishes of the appealing townships to the engineer for amendment: Adelaide v. Metcalfe, 27 A. R. 92. A referee had no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by the by-law, the only remedy, if any, being by appeal against the project proposed by the by-law: Hiles v. Ellice, 20 A. R. 225, 23 S. C. R. 429. A drainage referee set aside a by-law of a minor municipality charging other minor municipalities with the expense of repairs within their own limits. On appeal the Court of appeal was evenly divided as to whether he had jurisdiction: Re Mersea, 22 A. R. 110. The drainage referee has jurisdiction with the consent of the engineer, upon evidence given, to amend the engineer's report by charging against the municipalities for injuring liability assessments erroneously charged against them by the engineer for outlet liability: Re Rochester and Mersea, 25 A. R. 474. The Drainage Referee is not an Official Referee under the Judicature Act, unless specially so appointed: McClure v. Brooke, 5 O. L. R. 59. See R. S. O. 1914, ch. 56, sec. 86; ch. 65, secs. 10-14.

95. An order assuming to refer back a report is not an interlocutory order and an appeal to the Court of Appeal lies against it: Adelaide v. Metcalfe, 27 A. R. 92.

98. A municipal corporation having constructed a drain without a by-law for the particular portion passing through private property whereby noxious matter was brought down and deposited, was held liable for damages in spite of the fact that there were excavations on the land, but for which the noxious matter might have passed off. It was no answer

that the drain was used by others as well as the Corporation: Close v. Woodstock, 23 O. R. 99. Action is maintainable for injury occasioned by municipal drain and embankment being out of repair or from their not being kept in such a state as to carry off, in relief of the plaintiff's lands, all the water which the drain was capable of carrying off as originally constructed. So far as injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain, the action was not maintainable: Raleigh v. Williams, 1893, A. C. 540. Necessity of notice: Raleigh v. Williams, 1893, A. C. 540. (See *ante* sec. 80, and notes). Proceedings to attack by-law for absence of petition and non-observance of formalities: Alexander v. Howard, 14 O. R. 22. Negligent construction of drains and discharging surface water doing damage: Derinzy v. Ottawa, 15 A. R. 712; Reeves v. Toronto, 21 U. C. R. 157. Where the damage is caused by the act of private parties; liability of corporation: McConkey v. Brockville, 11 O. R. 322; Welsh v. St. Catharines, 13 O. R. 369. Injunction: Malott v. Mersea, 9 O. R. 611; Van Egmond v. Seaforth, 6 O. R. 599; see notes to sec 80 *ante*. Was damage caused by negligent construction or *vis major*: McArthur v. Collingwood, 9 O. R. 368. No damage for doing a lawful act unless in a negligent manner: Preston v. Camden, 14 A. R. 85. Unlawful act; compensating benefit: Northwood v. Raleigh, 3 O. R. 347. A tenant may recover damages suffered during his occupation from construction of drainage work, his rights resting on the same foundation as those of a freeholder: Hiles v. Ellice, 23 S. C. R. 429. Where a scheme of drainage work under a valid by-law proves defective and the work has not been properly performed, the municipality is not liable to persons whose lands are damaged as tort-feasors, but are liable under the Act for damage done in the construction or consequent thereto: Hiles v. Ellice, 20 A. R. 225, 23 S. C. R. 429. The plaintiffs were at liberty to take proceedings under this section as often as damages should arise in the future until a remedy should be provided to prevent their recurrence: Wigle v. Gosfield, 7 O. L. R. 302. Persons

whose lands are injuriously affected by the non-operation or imperfect or negligent operation of pumping machinery constructed under the Act are entitled to damages. Where damages were recovered for neglect to efficiently operate a pumping plant, one-half was assessed on the general funds of the township and one-half on the area benefited: Bradley v. Raleigh, 10 O. L. R. 201; see also Weber v. Berlin, 8 O. L. R. 302. An action for damages incurred before the division of a township in respect of drainage works, part of the area of which was in each township, must be brought against both townships and not against the one where the plaintiff's land lies: Wigle v. Gosfield South, 1 O. L. R. 519. Where a drain was completed and a township subsequently divided into two, the plaintiff's claim for damages was against both new townships jointly, and was confined to damages which had arisen within two years: Wigle v. Gosfield, 7 O. L. R. 302. The provision in the former section requiring notice was held directory and not imperative. A notice that the claim was for damages sustained " by reason of the enlargement and construction " of the drain in question, is sufficient to support a claim for damages for interference because of the drain, to part of the claimant's farm: Thackeray v. Raleigh, 25 A. R. 226. Compensation for damages by water overflowing on lands: McLaughlan v. Plympton, 18 O. L. R. 417, 2 O. W. N. 845. Action against municipal corporation for turning water on plaintiff's land: McMulkin v. Oxford, 15 O. W. R. 294, 1 O. W. N. 410. This section deals only with cases of damages occasioned to others by reason of the construction of the drainage works and does not refer to the claim of a contractor or workman to be paid for work performed: Bank of Ottawa v. Roxborough, 18 O. L. R. 511. The claim of a civil engineer for a balance due him for preparing plans, estimates, etc., for draining certain lands, does not fall within this provision: Moore v. March, 14 O. W. R. 1066, 1 O. W. N. 206, and see further, 14 O. W. R. 1194, 1 O. W. N. 38. Purview and intention of amendment of 1901: Burke v. Tilbury North, 13 O. L. R. 225, 8 O. L. R. 457, 862; Bank of Ottawa v. Roxborough, 11 O. W. R. 320, 1106. Matters not to be brought before the referee:

Wigle v. Gosfield, 3 O. W. N. 708, 21 O. W. R. 483, 25 O. L. R. 646. The tariff made applicable by sec. 119 only refers to actions which ought properly to be instituted by notice under this section and not to actions which might properly be brought notwithstanding the Drainage Act, *e.g.*, claims under the former sec. 94: McCullough v. Caledonia, 19 P. R. 115. Costs of proceedings under sec. 98 on County Court scale: see Moke v. Osnabruck, 19 P. R. 117; Fewster v. Raleigh, 31 C. L. J. 287; see sec 119. Attacking validity of petition: see also notes to sec. 26; Mandamus, see notes to sec. 80. Costs in drainage cases: see H. & L. notes, p. 1014.

99. Comment on this section and on cases of flooding land within and not within provisions of Municipal Drainage Act: Wigle v. Gosfield. 3 O. W. N. 708, 21 O. W. R. 483, 25 O. L. R. 646. As to construction of sewers by local municipalities and damages arising: see R. S. O. 1914, ch. 192, sec. 398 (7) and notes. Former sec. 94 provided for reference of certain matters to the Referee. For consideration of this, see Sage v. West Oxford, 22 O. R. 679.

101. The assessment of damages and costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of: Re McClure and Brooke, 11 O. L. R. 115.

103. A Drainage Referee in trying an action may proceed partly on view but in doing so must follow strictly the provisions of the Act and not make the view without appointment or notice to the parties. If he do proceed however, his finding, though based partly on view, may be upheld if the evidence supports it: McKim v. East Luther, 1 O. L. R. 89.

112. Where actions were begun in the High Court and were referred at the trial to the Drainage Referee, and upon appeal from his report an order was made for taxation and payment of costs, it was held that these were costs taxable in the usual way in which costs of actions are taxed and subject to the same right of appeal: Crooks v. Ellice, 16 P.

R. 553. Costs in drainage cases: see H. & L. notes, p. 1014.

116. Appeals: see R. S. O. 1914, ch. 56, secs. 26 (2), (m). The rules of the High Court are applied as far as possible to reports of the Drainage Referees, and Christmas vacation is excluded from the computation of the month within which an appeal is to be made: Re Raleigh and Harwich, 18 P. R. 73. Appeal from Drainage Referee: Re Bright and Sarnia, 4 O. W. N. 1535, 24 O. W. R. 817.

119. The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Act initiated before him, should, if awarded either party, be taxed on the scale applicable to appeals in cases begun in the High Court: Re Metcalfe and Adelaide, 19 P. R. 188, 2 O. L. R. 103. The tariff made applicable by this section refers only to actions which ought properly to be instituted by notice under sec. 98 and not to actions which might properly be brought notwithstanding the Drainage Act: McCullough v. Caledonia, 19 P. R. 115. Costs of proceedings under sec. 98; see Moke v. Osnabruch, 19 P. R. 117; Fewster v. Raleigh, 31 C. L. J. 287.

CHAPTER 199.

The Municipal Arbitrations Act.

2. Powers of official arbitrator: see R. S. O. 1914, ch. 56, sec. 86; ch. 65, secs. 10-14; ch. 192, sec. 332, *et seq.* Where a submission to arbitration under this Act was silent as to costs, it was held that this section applied and empowered the Arbitrator to deal with them. He having awarded costs to the claimant, the Court refused to interfere: Dalton v. Toronto, 12 O. L. R. 582.

5. An award for compensation to a land owner for lands injuriously affected is an award which does not

require adoption by the council, but is subject to appeal to the High Court. Where it is not shewn that such an award has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail: Re McLellan and Chinguacousy, 18 P. R. 246.

7. Time within which appeal must be launched: Re Ketchum and Ottawa, 4 O. W. N. 828, 24 O. W. R. 113. Practice as to appeals laid down here governs appeals in respect of an award of compensation to a land owner for lands injuriously affected by work done by a municipal corporation: Re McLellan and Chinguacousy, 18 P. R. 246; see R. S. O. 1914, ch. 56, secs. 23 (2), (f).

CHAPTER 200.

The Municipal and School Accounts Audit Act.

16. A person appointed by the Provincial Auditor under this Act to audit the accounts of a municipality has no action against the municipality for his fees until three months after the amount has been determined by the Provincial Auditor with "the approval of the Attorney-General or other minister," as provided in sec. 16. The approval by the Attorney-General of a tariff according to which fees were made up and allowed by the Provincial Auditor is not sufficient: Williamson v. Elizabethtown, 8 O. L. R. 181.

CHAPTER 201.

The Firemen's Exemption Act.

CHAPTER 202.

THE PUBLIC LIBRARIES ACT.

3. See R. S. O. 1914, ch. 192, sec. 398 (17), notes.

12. When a public body is requested to perform a statutory duty the practice in England is to move for a prerogative writ of mandamus. Here, under the provisions governing applications of a summary nature, where an application was made in an action to compel a city to levy a special rate for library purposes, the affidavits were directed to be resworn and intituled in an application—not in an action—for a prerogative writ: Toronto Pub. Lib. Board v. Toronto, 19 P. R. 329. Where a mechanics' institute was converted into a public library, and a board organized under this Act, a grant for the purchase of a site was made by by-law without the assent of the electors either to the appointment of the board or the grant. The by-law was held valid, notwithstanding former sec. 18 R. S. O. 1897, ch. 232, which it was held, might have its full and legitimate scope by being applied to the raising of ways and means by the requisitionary powers entrusted: Hunt v. Palmerston, 5 O. L. R. 76. The power to grant aid to free libraries is absolutely in the hands of the local municipality under the general provisions of the Municipal Act: Hunt v. Palmerston, 5 O. L. R. 76; see R. S. O 1914, ch. 192, sec. 398 (17).

CHAPTER 203.

The Public Parks Act.

2. Application of this Act to City of Ottawa: see 2 Edw. VII., ch. 54; see Re Jones and Ottawa, 9 O. W. R. 323.

3. A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to the want of repair of such building, at all events where knowledge of the want of repair is not shewn: Schmidt v. Berlin, 26 O. R. 54; see Graham v. Commissioners of Queen Victoria Niagara Falls Park, 28 O. R. 1. The liability, if any, on the part of the city in regard to park roads does not extend beyond keeping the roadway in repair and free from dangerous pitfalls and obstructions of which they have or may be deemed to have notice: Marshall v. Industrial Exhibition, 1 O. L. R. 319. The principles which determine liability for negligence are to be drawn from cases as to the permissive use of premises rather than those of invitation to use and come upon the property of another: Moore v. Toronto, 26 O. R. 59 (n). A municipality owes no duty to maintain, or efficiently maintain, a gate at a railway crossing at a park entrance in respect of persons driving through the park and desiring to pass over the railway to a highway: Soulsby v. Toronto, 15 O. L. R. 13. There is no liability on the part of the Park Commissioners at Niagara Falls to the public using the highways by reason of the absence or insufficiency of a railing or barrier at the edge of a cliff, there being no statutory liability in that behalf imposed on them. This quite irrespective of the Commissioners being servants of the Crown: Graham v. Commissioners for Queen Victoria Niagara Falls Park, 28 O. R. 1.

11. Under this, a corporation can pass a by-law preventing public preaching in a park on the Sabbath day. Such a by-law is not unreasonable, violates no

constitutional rights and is not bad for uncertainty as to the day of the week intended: Re Cribbin and Toronto, 21 O. R. 325.

12. Consideration of this section in the light of the Mortmain Acts: see Re Battershall, 10 O. W. R. 933.

13. Where a municipality takes proceedings under the Act to form a board of park management for doing the various matters authorized, including the purchase by the board of the lands required, such board becomes the statutory agent of the municipality and the municipality, not the board, must pay for the lands: McVicar v. Port Arthur, 26 O. R. 391.

18. Park Commissioners in the exercise of their *bona fide* discretion have the right to enter into contracts for the purchase of park lands, and the city, so long as the statutory limit is not exceeded, is bound to provide the purchase money, (Osler and Maclennan, JJ.A., dissenting): Ottawa v. Keefer, 23 A. R. 386. The purchase money for park lands may be raised by a special issue of debentures or may be paid out of the general funds of the municipality, which is liable to pay whether the debentures specially issued have been sold or not: McVicar v. Port Arthur, 26 O. R. 391

CHAPTER 204.

The Public Utilities Act.

3. Submission to electors of by-law to sell water power: Abbott v. Trenton, 1. O. W. N. 218, 14 O. W. R. 1101; see also Smith v. Hamilton, 13 O. W. R. 66. Property acquired by the corporation of a town, under special Act, situate in a neighbouring township, consisting of land, machinery and plant of electric light and power works, is exempt from taxation by the township corporation: Orillia v. Matchedash, 7 O. L. R. 389. Acquiring water rights; arbitration: see Re Fieldmarshall and Beamsville, 11 O. L. R. 472.

10. See Atty. Gen. for Canada v. Toronto, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514; note to sec. 26 *post*.

13. In actions by consumers of water against a municipal corporation for not providing a proper supply of pure water, and allowing the water supplied to become impregnated with sand, damaging the plaintiff's elevators, there is no right of action in the plaintiff by reason of any statutory obligation on the part of the defendants—the relation is rather that of licensor and licensee: Scottish Land Co. v. Toronto, 29 O. R. 459, 26 A. R. 345.

18. Assent of electors to by-law: see Smith v. Hamilton, 13 O. W. R. 66. By-law for construction of electric light works: Cartwright v. Napanee, 11 O. L. R. 61; and see R. S. O. 1914, ch. 205.

19. In line 1 for " requires " read " acquire:" 4 Geo. V. ch. 2, Schedule (34).

26. A corporation passed a by-law providing for 50 per cent reduction on water rates paid within first two months of the half year " save and except in the case of government and other institutions which are exempt from city taxes in which case the said provisions as to discount shall not apply." Held that the post office and customs house were within

the by-law; that the price paid as water rates was not taxes but the price of water sold; that the by-law was not invalid as discriminating against the Crown, but held by the Supreme Court, that the rates imposed must be uniform and that the by-law was invalid as regards such exception: Atty. Gen. for Canada v. Toronto, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514. The rates must be uniform to all consumers save as provided by express legislative authority: Atty. Gen. of Canada v. Toronto, 23 S. C. R. 514; Hamilton Distillery v. Hamilton, 10 O. L. R. 280, 12 O. L. R. 75. Right of ratepayer to compel municipal corporation to collect water rates: Norfolk v. Roberts, 4 O. W. N. 1231.

29. Date of commencement: Glynn v. Niagara Falls, 5 O. W. N. 285.

33. Where lands were acquired, as expressed in the deed of conveyance, for water works purposes and certain special conditions, but no provision that the lands should not be put to any other use and no condition making the grant void upon the happening of any subsequent event, it was held that the corporation took the lands in fee, unincumbered by any restriction and under this section, could dispose of them: McLean v. St. Thomas, 23 O. R. 114.

34. Liability of municipality in respect of plant in charge of board of commissioners; statutory agent: Young v. Gravenhurst, 17 O. W. R. 491, 19 O. W. R. 925, 2 O. W. N. 262, 3 O. W. N. 10, 22 O. L. R. 291, 24 O. L. R. 467; Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93. Substantial compliance with the statute: Brown v. Weir, 3 O. W. N. 385, 20 O. W. R. 665. Members of municipal light commission can be examined under Con. Rule 439 (*a*), 1913 Rule 327: Young v. Gravenhurst, 22 O. L. R. 291, 24 O. L. R. 467.

36. Liability of municipality for body created by this statute: Young v. Gravenhurst, 22 O. L. R. 291, 24 O. L. R. 469. Disqualification of commissioner. R. ex rel. Gardhouse v. Irwin, 4 O. W. N. 1043, 1097, 24 O. W. R. 466.

38. Salary: Barclay v. Whitby, 11 O. W. R. 209.

51. See the Municipal Franchises Act, R. S. O. 1914, ch. 197. Duty cast on public utility corporation in breaking up a street not to cause escape of gas which may be dangerous: Ballentine v. Ontario Pipe Line Co., 12 O. W. R. 273, 16 O. L. R. 654. Nuisance to adjoining property caused in exercise of powers of public ultility corporation: Hopkin v. Hamilton Electric, 2 O. L. R. 240, 4 O. L. R. 258. Liability of corporation and gas company where accident happened through non-repair of street, due to trench dug by gas company: McIntyre v. Lindsay, 4 O. L. R. 448.

Powers of company to place poles and wires on highway: Bucke v. New Liskeard, 1 O. W. N. 123. Power to erect poles for electric wires in streets under Act of Incorporation; position of municipality: Toronto and N. Power Co. v. North Toronto, 1912, A. C. 834. See Municipal Franchises Act, R. S. O. 1914, ch. 197. See also ch. 192, sec. 399 (50), (51), notes.

There is an absolute duty cast on municipal corporation by 3 Edw. VII., ch. 19, sec. 606, R. S. O. 1914, ch. 192, sec. 460, to keep highways in repair, and they cannot divest themselves of it by requiring public utility corporations to assume it. Such a company may have a right to dig up the highway, but in giving that authority the municipality does not free itself from its statutory liability: McIntyre v. Lindsay, 4 O. L. R. 448; Stilliway v. Toronto, 20 O. R. 98. Liability of company operating a public utility: It must exercise its powers in respect of its works so as not to commit a nuisance: Hopkin v. Hamilton Electric, 2 O. L. R. 240, 4 O. L. R. 258; Gareau v. Montreal St. Ry., 31 S. C. R. 463; as to railways see: London and Brighton Ry. v. Truman, 11 App. Cas. 45; Rapier v. London Tramways, 1893, 2 Ch. 588. See R. S. O. 1914, ch. 192, sec. 460 (7), and cases noted there. See also ch. 178, Part XII., and notes.

Municipality operating water works is liable for negligence of its servants in the performance of their duties: Shaw v. Winnipeg, 19 Man. L. R. 234; Hesketh v. Toronto, 25 A. R. 449; Garbutt v. Winnipeg, 18 M. R. 345. A municipality is not bound to undertake such works as supplying electric power for light

or other purposes, but in doing so, it is in the same position to its customers and others, and under the same obligation as to care as a private individual or ordinary company so contracting: Young v. Gravenhurst, 22 O. L. R. 291, 24 O. L. R. 467. The degree of care and skill required is commensurate with the danger, and it is no excuse to say that the system is old: Young v. Gravenhurst, 22 O. L. R. 291, 24 O. L. R. 467; Royal Electric Co. v. Hévé, 32 S. C. R. 462, and see *ante*, R. S. O. 1914, ch. 146, sec. 3, note "Electricity and Electric Wires."

53. Gas company supplying natural gas: Harmer v. Brantford Gas Co. 13 O. W. R. 873.

54. Measure of damages where property take in eminent domain proceeding: 1 D. L. R. 508. Acquisition of land without consent of owner under Railway Act: see R. S. O. 1914, ch. 185, secs. 81 *et seq.*, and notes to these sections. See also Expropriation Act, R. S. C. 143, and the expropriation sections of Dominion Railway Act, R. S. C. 37, sec. 172 *et seq.* Right of expropriation by timber slide companies, see R. S. O. 1914, ch. 181, and especially secs. 23 and 26. Expropriation under this Act, see secs. 5 (4) (municipal waterworks); sec. 19 (municipal utility works other than waterworks); sec. 54 (conditions precedent to public utility company expropriating). As to expropriation and compensation under the Municipal Act, see R. S. O. 1914, ch. 192, sec. 321 *et seq.* Powers of companies operating public utilities to expropriate lands without owner's consent: see R. S. O. 178, sec. 166.

59.—(1) The provisions of secs. 445 and 446 of R. S. O. 223, apply to awards made under this section: Re Cornwall, 30 O. R. 18; see now R. S. O. 1914, ch. 192, secs. 328, 329. There was no power of expropriation conferred under the Conmee Act: (see 3 Edw. VII., ch. 19, sec. 566); Sarnia Gas Co. v. Sarnia, 22 O. W. R. 558, 3 O. W. N. 1455. (See same case, 5 O. W. N. 532).

59.—(2) By agreement between the city of Kingston and the company, the city was to have the option of acquiring "the works, plant, appliances and property

of the company." The arbitrators rightly did not include anything for earning power or franchise. Also there being an agreement and not an expropriation the 10 per cent. clause had no application: Re Kingston, 3 O. L. R. 637. Omission to serve notice on the mortgagees of arbitration proceedings and in which the award was less than their claim, does not entitle the company to have the award referred back and the mortgagees made parties. In such an arbitration the arbitrators simply are to value the existing property of the company at the sum it would cost to erect the works and purchase the property, allowing for wear and tear and perhaps for necessary experimental outlay. They are not to make any allowance for future profits or for taking away the right to supply water at a profit. Interest is allowable on the outlay during construction but not after completion while the revenue is less than the expenditure: Re Cornwall, 29 O. R. 350; see also (S. C.) 27 A. R. 48.

59.—(4) Upon the making of the award and passing the by-law for raising the amount of it, the corporation are entitled to possession. The 6 months referred to in sub-sec. (6) must have elapsed before action can be brought to recover possession by the company: Re Cornwall, 29 O. R. 605, and see (S. C.) 27 A. R. 48.

CHAPTER 205.

The Municipal Electric Contracts Act.

2. See R. S. O. 1914, ch. 192, sec. 260, *et seq.* Contract for supply of electric light: Hogan v. Brantford, 1 O. W. N. 226, 14 O. W. R. 1117. Assent of electors: see Smith v. Hamilton, 13 O. W. R. 66.

CHAPTER 206.

THE HIGHWAY TRAVEL ACT.

2. See also R. S. O. 1914, chs. 207, 212 and notes.

3. Not allowing free passage for overtaking vehicle: Nuttall v. Pickering, 1913, 1 K. B. 14. Obstruction of highway by automobile: McIntyre v. Coate, 13 O. W. R. 1101, 19 O. L. R. 9.

5. See the provisions of the Traction Engines Act, R. S. O. 1914, ch. 212.

7. See Criminal Code, sec. 285.

14. Mattei v. Gillies, 16 O. L. R. 588, 11 O. W. R. 1083.

CHAPTER 207.

THE MOTOR VEHICLES ACT.

Refer to Babbit on Motor Cars; Huddy on Automobiles; Law relating to Automobiles: see article 41, Can. Law Journal, p. 820; "Recent Motor Car Decisions" (Law Times): see 45 Can. Law Journal, p. 427.

1. See R. S. O. 1914, chs. 206, 212 and notes.

6. Section considered: Marshall v. Gowans, 24 O. L. R. 522. What amounts to violation of this provision: Wynne v. Dalby, 4 O. W. N. 1330, 5 O. W. N. 487, 29 O. L. R. 62. Violation by driver of this section; liability of owners: Bernstein v. Lynch, 4 O. W. N. 1005, 28 O. L. R. 435. Failure to give statutory warning: Maitland v. Mackenzie, 4 O. W. N. 1059. The rule that persons lawfully using a highway are entitled to rely on the warnings required by statute (as, *e.g.*, from railway engines)

is applicable where the statute requires from motor vehicles warning by light or by sound: T. G. T. Corporation v. Dunn, 15 W. L. R. 314.

7. Onus: Mitchell v. Heintzman, 4 O. W. N. 636, 23 O. W. R. 763.

8. Using motor without light or number: Printz v. Sewell, 1912, 2 K. B. 511.

10. Speed limit: Fisher v. Murphy, 3 O. W. N. 150, 20 O. W. R. 201; Verrall v. Dom. Automobile Co., 20 O. W. R. 178. 3 O. W. N. 108, 24 O L. R. 551.

11. Driving at excessive speed; evidence of identity: Beresford v. St. Albans, 22 T. L. R. 1. Opinion as to speed; stop watch: Plancq v. Marks, 22 T. L. R. 432. Reckless driving of motor car: Tronghton v. Manning, 20 Cox C. C. 861, 21 T. L. R. 408. Speed limit in park; sufficient notice: Musgrave v. Kennison, 20 Cox C. C. 874, 21 T. L. R. 600. Evidence as to traffic usually on the road: Elwes v. Hopkins, 1906, 2 K. B. 1.

15. Evidence to go to jury as to violation of this section: Wynne v. Dalby, 29 O. L. R. 62, 4 O. W. N. 1330, 5 O. W. N. 487.

16. It is manifest from this section that the legislature consider an automobile while in motion likely to frighten horses: McIntyre v. Coote, 13 O. W. R. 1098, 19 O. L. R. 9. Injury to traveller on highway; frightening horse; failure to reduce speed: Smith v. Brenner, 12 O. W. R. 9, 1197. Injury to bicyclist by motor car: Haverstick v. Emory, 8 O. W. R. 528.

19. Liability of " owner " where unpaid vendor retains legal title and purchaser in possession and control: Wynne v. Dalby, 29 O. L. R. 62, 4 O. W. N. 1330, 5 O. W. N. 487. The meaning of the statute is that the owner of a motor vehicle is liable in damages for any damage done by his vehicle in violation of the Act or regulation of the Lieutenant Governor in Council: Lowery v. Thompson, 5 O. W. N. 240; see also Verrall v. Dom. Auto. Co., 24

O. L. R. 551. Chauffeur making unauthorized detour; master's responsibility for violation of Act: Smith v. Brenner, 12 O. W. R. 9, 1197. The owner of a motor for which a permit is issued is responsible, not only in regard to fines and penalties imposed by the Act, but for damages for violation of the Act or any regulation provided by Order in Council: Mattei v. Gillies, 11 O. W. R. 1083, 16 O. L. R. 558. The chauffeur is regarded as the *alter ego* of the owner, and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own: Mattei v. Gillies, 16 O. L. R. 558. Liability of owner for chauffeur's acts: Bernstein v. Lynch, 4 O. W. N. 1005, 28 O. L. R. 435. Responsibility attaching to use of automobiles considered: Campbell v. Pugsley, 7 D. L. R. 177, 180. Comment on Campbell v. Pugsley, 7 D. L. R. 177, see 49 C. L. J. 34. Owner refusing to give information as to driver of car by whom offence committed: Ex p. Beecham, 1913, 3 K. B. 45.

23. "By reason of a motor vehicle." Construction of section as amended and consideration of statutory presumption, and respective functions of Judge and jury: Maitland v. Mackenzie, 4 O. W. N. 1059, 28 O. L. R. 506. Onus—section considered: Marshall v. Gowans, 24 O. L. R. 522; Verral v. Dominion Auto. Co., 24 O. L. R. 551; Ashick v. Hale, 3 O. W. N. 372, 20 O. W. R. 606; Fisher v. Murphy, 20 O. W. R. 201, 3 O. W. N. 150; Mattei v. Gillies, 11 O. W. R. 1083, 16 O. L. R. 558; McIntyre v. Coate, 13 O. W. R. 1098, 19 O. L. R. 9. Bearing of sec. 23 on sec. 19: see Lowry v. Thompson, 5 O. W. N. 240. Pleading; particulars: Lum Yet v. Hugill, 20 O. W. R. 877, 3 O. W. N. 521.

CHAPTER 208.

The Snow Roads Act.

CHAPTER 209.

THE TOLLS EXEMPTION ACT.

CHAPTER 210.

THE TOLL ROADS ACT.

19. A township might have title to a portion of road beyond its territorial limits so as to enable their lessee to collect tolls: Township of Ancaster v. Durrand, 32 C. P. 563. But see as to transfer by a township of road beyond its limits: Smith v. Ancaster, 27 O. R. 276, 23 A. R. 596.

21. History of section; duties and obligations passing to purchaser: S. Dumfries v. Clark, 14 O. W. R. 158. Under sec. 26 of 16 Vic., ch. 190, a municipal corporation to which under 12 Vic., ch. 5, sec. 12, a toll road has been transferred by the Governor in Council, has power to sell the road to an individual who may exact tolls for the use thereof. The right to purchase is not limited to toll road companies. Tolls can be increased not to exceed the statutory maximum, and the transferee can exact the increased rate and is not limited to sufficient to keep the road in repair: Payne v. Caughell, 24 A. R. 556. Duty of an individual acquiring a company's road: S. Dumfries v. Clark, 14 O. W. R. 158.

31. Abandonment of road; right to abandon: Ottawa and Gloucester Road Co. v. Ottawa, 4 O. W. N. 1015, 24 O. W. R. 344, 984, 5 O. W. N. 57. Devolution of liability for bridge where road abandoned: Ottawa, etc., Road Co. v. Ottawa, 5 O. W. N. 57, 24 O. W. N. 984.

35. This section applies not only to toll roads owned or held by private companies or municipal councils,

but also to toll roads purchased from the late Province of Canada, and where such roads intersect, a mandamus will be granted to compel the issue of tickets referred to: Smith v. Wentworth, 26 O. R. 209.

38. Toll was charged at a check gate and a ticket given for the principal gate through which the traveller intended to pass. This was held proper: Vanderlip v. Smyth, 32 C. P. 60.

42. A road company constructed a culvert across their road which by this section they were required to keep in repair. The culvert was constructed so improperly that the plaintiff was injured. The construction of the culvert was a thing "done in pursuance of the Act and that therefore the time for bringing the action was six months after the fact committed:" (see sec. 66 *post*); Webb v. Barton, 26 O. R. 343. Road acquired by an individual: S. Dumfries v. Clark, 14 O. W. R. 158. Responsibility for maintenance and repair discussed in action for damages: Pow v. West Oxford, 11 O. W. R. 115 at 118.

43. History and analysis of legislation affecting the forfeiture of toll roads: S. Dumfries v. Clark: 14 O. W. R. 158, pp. 166, *et seq.*

44. The Court cannot substitute its opinion for the report of the proper public officer. Section considered and construed: S. Dumfries v. Clark, 14 O. W. R. 158, at p. 162. History of section, *Ib.*

47. Provisions as to tolls apply to a road company incorporated under special Act so far as to prevent the company from demanding tolls after engineer appointed under statute in that behalf has reported the road out of repair, until he further reports that the road has been put in good and efficient repair, and an action will lie at the suit of the Attorney-General to restrain such collection: Atty. Gen. v. Vaughan Road, 21 O. R. 507, 19 A. R. 234, 21 S. C. R. 631.

49. History and analysis of legislation affecting the forfeiture of toll roads: S. Dumfries v. Clark, 14

O. W. R. 158, pp. 166, *et seq.* Toll road running through two counties and several minor municipalities; procedure: S. Dumfries v. Clark, 14 O. W. R. 158. Duty to maintain as a public highway: *Ib.* History of sections, *Ib.*

57. Although a statutory remedy is provided for passing through gates without paying toll, the Court granted an injunction pending the trial on consideration of balance of convenience in favour of the road company: Hamilton v. Raspberry, 13 O. R. 466. Demand and refusal of toll at the gate must be pleaded: Enrick v. Yarmouth, 9 O. R. 162.

66. See Webb v. Barton, 26 O. R. 343, note to sec. 42 *ante.*

75.—(1) Road owned by an individual: Expropriation: South Dumfries v. Clark, 14 O. W. R. 158.

76. Consideration of these sections and method of expropriation provided. Costs of and parties to arbitration incident to expropriation of toll road: Brockville, etc., Road Co. v. Leeds and Grenville, 5 O. W. N. 362.

79. Action to recover costs incurred in arbitration under Toll Road Expropriation Act (1901): Northumberland v. Hamilton, 10 O. L. R. 680. Costs of expropriation: see Brockville, etc., Road Co. v. Leeds and Grenville, 5 O. W. N. 362.

CHAPTER 211.

The Snow Fences Act.

2. Where an owner, pursuant to a township by-law designed to prevent drifts, removed his existing fence and substituted wire, which under the by-law was to be paid for by the municipality, it was held that the by-law was a conditional offer and that the owner had fulfilled the required conditions.

The owner was not precluded from suing by sec. 2 which only applies where the parties are unable to agree—but here the council repudiated all liability: Brohm v. Somerville, 11 O. L. R. 588. The provisions of this Act shew the mind of the legislature to be favourable to the maintenance of open highways in a condition to be readily and safely travelled upon in the winter. Municipalities cannot neglect the measures they are thus entitled to take and ask to be excused from liability for damages sustained by reason of their default: per Moss, C.J.O., Hogg v. Brooke, 7 O. L. R. 273, at pp. 281-2, see also p. 285.

CHAPTER 212.

The Traction Engines Act.

4. See R. S. O. 1914, ch. 192, sec. 400 (49) as to powers of cities and towns to prohibit the use of traction engines on certain streets. See R. S. O. 1914, ch. 206, sec. 5, (The Highway Travel Act), as to portable and traction engines meeting or overtaking vehicles.

5. An engine used for the purpose of operating a thresher or grain separator was not a "traction engine," and a municipality was bound to keep its bridges in such a condition that they would bear the weight of such an engine: Pattison v. Wainfleet, 22 Occ. N. 364, 1 O. W. R. 407; (but see sub-secs. (3) (4), amendments of 1903-4). The effect of the whole legislation is that traction engines, including now those used for threshing purposes, if over 8 (now 10) tons weight, can only use the highway subject to the conditions of this Act; but, if less than 8 (now 10) tons weight, a threshing engine may use the highway free from the obligations of the Act, but subject to the new obligation of laying planks; while other traction engines, even of less than 8 (10) tons weight, are subject to the provisions of secs. 10 (1) and (2) of the original Act: Goodison v. McNab, 12 O. W. R. 775, 14 O. W. R. 25, 19 O. L. R.

188. The duty imposed on a municipality by R. S. O. 1914, ch. 192, sec. 460, is subject to the requirements of this section as amended in 1903 and 1904: Goodison Thresher Co. v. McNabb, 19 O. L. R. 188, 44 S. C. R. 187. Consideration and construction of section, *Ib.*

CHAPTER 213.

Tree Planting Act.

2. Apart from statute, an owner has no title to trees growing in the street sufficient to enable him to complain of the cutting of them: Hodgins v. Toronto, 19 A. R. 537; see R. S. O. 1914, ch. 192, sec. 487. The proceedings under sec. 487 must be by by-law, not by resolution: Re Allen and Napanee, 4 O. L. R. 582. The statute gives such a special property in trees as to enable an owner to maintain an action against a wrongdoer, to recover damages for cutting down or destroying the trees. The Act covers both planted trees and those of natural growth: Douglas v. Fox, 31 C. P. 140; see O'Connor v. Nova Scotia Telephone Co., 22 S. C. R. 276; see also for construction of Act: Connor v. Middagh, 16 A. R. 356. When branches of trees growing in private grounds overhang the street and are not a nuisance: see Hodgins v. Toronto, 19 A. R. 537. As to right of Park Commissioner to lop overhanging branches: see R. S. O. 1914, ch. 192, sec. 487, sub-sec. 4.

CHAPTER 214.

The Travelling Shows Act.

CHAPTER 215.

The Liquor License Act.

Refer to Saint-Cyr, Liquor License Law (Can.); Sinclair, Liquor License Act; Jelf, Ontario Liquor License Act.

2.—(*h*) R. v. Lamphier, 12 O. W. R. 685, 17 O. L. R. 244.

2.—(*i*) Liquors; medicines: Rex v. Ing Kon, 10 O. W. R. 544. Action to recover damages for breach of warranty that ale was non-intoxicating: Stephenson v. Sanataris Ltd., 5 O. W. N. 483.

2.—(*n*) The Magistrate has jurisdiction to determine as a matter of fact whether liquor has been sold in less quantity than three half pints, and if *certiorari* were granted, the Court would have no power on a motion to quash the conviction, to review the Magistrate's decision: Regina v. Cunerty, 26 O. R. 51.

2.—(*p*) What amounts to two sales: R. v. Trainor, 2 O. W. N. 398, 18 O. W. R. 474. Sale of a quart at a time to fill a three gallon keg, amounts to a sale of three gallons: R. v. Lamphier and Orr, 17 O. L. R. 244.

5. A Board of License Commissioners is not a body against whom a writ of prohibition will be granted prohibiting them from issuing licenses: Re M. A. Thomas, 26 O. R. 448. The License Commissioners have a wide discretion but it must be exercised judicially, and the Court has no power to compel them so to exercise it. Where a board passed a resolution granting a license and afterwards rescinded it in order to grant the license to a subsequent applicant, they were not acting judicially: Haslem v. Schnarr, 30 O. R. 89. Action for mandamus and damages: *Ib.*

6.—(1) The License Commissioners have no power to pass a resolution restricting the right to sell liquors by providing that none shall be sold to persons who have the habit of drinking to excess, and providing for the suspension of licenses for breach of the resolution: Roberts v. Climie, 46 U. C. R. 264. A resolution of License Commissioners fixing hours of sale of liquor was upheld. *Quære,* whether there is power on notice of motion to quash a resolution of this kind: McGill v. License Commissioners of Brantford, 21 O. R. 665. A regulation of commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable: Regina v. Martin, 21 A. R. 145. A resolution of commissioners prohibiting games of chance on licensed premises is within their powers. Under such a resolution, a hotelkeeper was fined where persons had played euchre on the premises for amusement, the cards being the property of one player: Rex v. Laird, 6 O. L. R. 180.

6.—(4) Constitutionality of regulations of police and local character for the good government of taverns; power to enact regulations, thereby to create offences and attach penalties: see Hodge v. the Queen, 9 App. Cas. 117. Where a Board of License Commissioners by resolution prohibited gambling or any game of chance on licensed premises, it was held that the provisions of this section should be read into their resolution: R. v. Laird, 6 O. L. R. 180. Where an information charged that the defendant had his bar room open after 10 p.m., contrary to a resolution of the Board of License Commissioners, the defendant signed an admission that the resolution was read over to him and he desired to plead guilty and was convicted, this did not preclude him from objecting to the power of the Commissioners to pass the resolution, but following McGill v. License Commissioners of Brantford, 21 O. R. 655, the objection was overruled: R. v. Farrell, 23 O. R. 422. By the conviction, a fine and costs were imposed, and in default of payment, distress, and in default of sufficient distress, imprisonment. Held under the combined effect of this Act and the Municipal Act, costs and imprisonment could be properly imposed: R. v. Farrell, 23 O. R. 422; see R. S. O. 1914, ch. 90, sec. 7.

9. See Re Hassard and Toronto, 11 O. W. R. 684, 1088, 12 O. W. R. 49, 16 O. L. R. 500.

11. The province of Ontario extends to the middle line of the Great Lakes, as defined by the treaties of Paris and Ghent. The B. N. A. Act recognizes the territorial divisions of the province into counties and townships. Those bordering on the lakes extend to the boundary of the province. Within their territorial limitations, the provinces have plenary jurisdiction in regard to the traffic in intoxicating liquor and therefore the province had authority to enact this section: Rex. v. Miekleham, 11 O. L. R. 366.

11.—(2) Master of vessel as "occupant:" R. v. Miekleham, 11 O. L. R. 366.

12.—(7) A petition against the granting of "any license" within the polling subdivision for reasons specified in this section (not otherwise specifying any grounds) is insufficient. The petition must be against the granting of a particular license, and some one or more of the reasons given in sub-sec. 7 or all of them, must be specifically alleged: Pizer v. Fraser, 17 O. R. 635.

12.—(12) Where a license has been granted but not issued by a retiring Board of Commissioners, a mandamus will not be issued to compel their successors in office to issue the license where they have revoked their predecessors' decision: Leeson v. License Commissioners of Dufferin, 19 O. R. 67.

12.—(13) It is imperative that the petition which is to be filed with the inspector be accompanied by a properly signed certificate of the majority of the electors. The Act does not authorize the granting of such a license contrary to the provisions of the section: Re Hunter, 24 O. R. 522; see East v. O'Connor, 2 O. L. R. 355; Bannerman v. Lawyer, 2 O. L. R. 355. Signature of certificate: Bannerman v. Lawyer, 2 O. L. R. 355, 45 C. L. J. 484; Re Keeling and Brant, 25 O. L. R. 181.

13.—(1) License Board under English Acts has no power to renew licenses with a condition: R. v. Dodds, (1905) 2 K. B. 40.

13.—(5) Want of *bona fides* in amount fixed as license fee, in effect amounting to total prohibition: Re Rowland and Collingwood, 11 O. W. R. 804, 16 O. L. R. 272.

14. The granting of a license to one who has no interest in the business and is not an occupant of the premises on which it is carried on, in trust for the true owner and occupant is not a thing permissible under the Act: Boucher v. Capital Brewing Co., 9 O. L. R. 266; see notes to secs. 21, 48, *infra*. The person receiving a license is assumed to have satisfied the License Commissioners that he is the true owner, but notwithstanding, it can be shewn that the licensee was merely agent for another, who was the real owner of the business: Auffman v. Walterhouse, 19 O. R. 186.

15. See Re L'Abbe and Blind River, 7 O. L. R. 230.

17.—(2) An application for an additional tavern license in a locality largely resorted to by summer visitors may be made at any time so long as the license does not extend beyond the prescribed period of six months from the first of May: Re M. A. Thomas, 26 O. R. 448.

21. The right to sell liquor at a particular place under license, is not assignable by the holder except under the conditions mentioned in this section. A license cannot be seized under *fi. fa.* goods: Walsh v. Walper, 3 O. L. R. 158. A covenant in a lease of an hotel that the lessee will apply for licenses, and at the expiry of his term, assign to the lessor the license held by him is not a covenant binding on the assignee of the term: Walsh v. Walper, 3 O. L. R. 158. Where the holder of a license enters into partnership and assigns an interest in his tavern to his partner, this is not an assignment of his business within the meaning of this section and does not require a transfer of license: Westbrook v. Wheeler, 25 O. R. 559. The duly licensed tenant of a public house gave up possession. For the next nine days no Sessions sat at which application could be made for a temporary transfer of license and the incoming tenant carried on business. This was held to be

a serious offence and not one of a trifling nature: Barnard v. Barton, 75 L. J. K. B. 326, 1906, 1 K. B. 357. License Commissioners have no power to say to an applicant for a transfer of a license that if he will put certain premises in a suitable state of repair for compliance with the law in the future, they will transfer a license to such premises. They are entitled to act only on the existing facts and not to make promises as to the future: East v. O'Connor, 2 O. L. R. 355; Bannerman v. Lawyer, 2 O. L. R. 355 (note).

27. Meaning of "any municipality:" Re McCracken and Sherborne, 23 O. L. R. 81.

28. Omission of local limits of operation not fatal defect. The fact that the by-law was passed by the Council of a city shewed that it must, by reasonable intendment be held operative there. Such a by-law is not unreasonable nor in restraint of trade, since it is passed pursuant to power expressly given by the Legislature: Re Boylan and Toronto, 15 O. R. 13. The by-law need not state the number of inhabitants so as to shew on its face that the number of licenses fixed is within the statutory limit. Provisions that the by-law should remain in force until altered or repealed, and that every person receiving a shop license should confine the business of his shop exclusively to the selling of liquor are unobjectionable. The by-law need not shew on its face that it was passed pursuant to Provincial Legislative authority. It will be judicially regarded as emanating from the power which would authorize its passage: Re Croome, 6 O. R. 188. A member of a Municipal Council is disqualified from voting in the Council upon any subject in which he has a personal or pecuniary interest distinct from that which he has as a ratepayer in common with other ratepayers, *e.g.*, where a member was a mortgagee of a property likely to be affected by a by-law reducing licenses: Re L'Abbe v. Blind River, 7 O. L. R. 230. The statute provides no form for the by-law. Omitting the words "beginning on the first day of May" after the words "ensuing license year" is not a fatal defect; scope of section considered: Re Caldwell and Galt, 10 O. L. R. 618. The words "in any

year " mean " calendar year," not " license year." The by-law must be passed in the months of January or February: Re Golden and Ottawa, 28 O. R. 387. " Any future license year:" Bourgon v. Cumberland, 1 O. W. N. 1012, 2 O. W. N. 244, 16 O. W. R. 582, 17 O. W. R. 438, 22 O. L. R. 256. Powers of Council under this section; meaning of " license year:" Re Hassard and Toronto, 11 O. W. R. 684, 1088, 12 O. W. R. 49, 16 O. L. R. 500. Effect of by-law limiting number of licenses where town annexed to city: Re Brewer and Toronto, 13 O. W. R. 954, 1087, 19 O. L. R. 411. Impropriety of Council pulling through license reduction by-law when their election is attacked: Martin v. St. Catharines, 13 O. W. R. 559. Although passed in good faith, a by-law limiting the number of licenses in a municipality to one is bad: McCracken v. Sherborne, 16 O. W. R. 732, 18 O. W. R. 24, 1 O. W. N. 1091, 2 O. W. N. 601, 23 O. L. R. 81.

30. The provisions as to time of presenting petition certificate, etc., are peremptory: Re Hunter, 24 O. R. 153, 522.

33. " Premises to be made suitable:" see East v. O'Connor, 2 O. L. R. 355; Bannerman v. Lawyer, 2 O. L. R. 355 (note), see note to sec. 21, *ante*.

34. Saloon licenses: see Re Hassard and Toronto, 16 O. L. R. 500.

40.—(2) See (under former provisions) R. v. Howard, 45 U. C. R. 346; R. v. Campbell, 8 P. R. 55.

42. Resolutions fixing hours of sale valid: McGill v. License Commissioners of Brantford, 21 O. R. 665. Shop licenses: Bourgon v. Cumberland, 1 O. W. N. 1012, 2 O. W. N. 244, 16 O. W. R. 582, 17 O. W. R. 438, 22 O. L. R. 256. Re Croome, 6 O. R. 188, and notes to sec. 28, *ante*.

43. A grocer carried on business at two places, at one of which only he was licensed to sell liquor by retail. At the unlicensed premises he solicited business which he executed at the other premises. He was held rightly convicted: Elias v. Dunlop, 1906, 1 K. B. 266, 75 L. J. K. B. 168.

44. "Club:" R. v. Cahoon, 17 O. W. R. 467. As to sale of liquor by unincorporated societies: see R. v. Austin, 17 O. R. 743.

45. The steward of a club, incorporated but having no license, supplied at his own discretion intoxicating liquors to members and others in exchange for tickets purchaseable by members from the club secretary. The liquors belonged to the club whose charter expressly forbade it to sell liquor. Conviction held good: R. v. Hughes, 29 O. R. 179. The section was held not to justify the conviction of the manager of an incorporated club who has charge or control of the liquor merely in the capacity of manager, the act of keeping being that of the club: R. v. Slattery, 26 O. R. 148. Where a club was incorporated and authorized to maintain a club house for social purposes, the charter not authorizing the company to have a club house at any other place than that named in the charter, the club secretary, found in possession of and selling liquor at another place, although claimed to be a club constituted under the charter, was rightfully convicted: R. v. Charles, 24 O. R. 432.

48. "Authorizing" him to sell, means to sell in the particular manner and quantities in which he has sold: R. v. Lamphier, 12 O. W. R. 685. Sale under cover of agency: Bowie v. Gilmour, 24 A. R. 254. Holding license as trustee: Boucher v. Capital Brewing Co., 9 O. L. R. 266; see also R. v. Miekleham, 11 O. L. R. 366.

49. Owner not being "occupant," "permit," *mens rea*: R. v. Irish, 13 O. W. R. 769, 18 O. L. R. 351.

50. Treating or giving liquor to friends by a landlord in a private room in his licensed premises on a Sunday is an offence, and is covered by the words "other disposal:" Reg. v. Walsh, 29 O. R. 36. These sections do not authorize the sale of liquor to a lodger in the licensee's house during prohibited hours. The most that can be said is that the sale does not make him an offender: Reg. v. Southwick, 21 O. R. 670. Only the holder of the license could under R. S. O. 1877, ch. 181, be prosecuted for selling on prohibited days: Reg. v. Duquette, 9 P. R. 29.

For a conviction for selling liquor on Sunday under this section it must have been shewn that the defendant had a license or that the place was one where liquors might be sold by wholesale or retail: Reg. v. Rodwell, 5 O. R. 186. Commissioners' resolutions regulating hours of sale: see McGill v. Commissioners of Brantford, 21 O. R. 665. What amounts to a sufficient appropriation on Saturday of beer to be delivered on Sunday under English Acts: Noblett v. Hopkinson, 1905, 2 K. B. 211. "Disposal" of intoxicating liquor on Sunday: R. v. Clark, 4 O. W. N. 529, 27 O. L. R. 525. "Disposal" of liquor: R. v. Montgomery, 14 O. W. R. 625, 1 O. W. N. 30. Sale of liquor under English Acts to *bona fide* traveller: Jones v. Jones, 1910, 2 K. B. 262. Necessity for negativing the exception as to medical purposes, and when proceedings can be amended in that regard: R. v. Boomer, 10 O. W. R. 978, 15 O. L. R. 321; R. v. White, 21 C. P. 354; but see Form 6, Nos. 5, 6, and R. S. O. 1914, ch. 90, sec. 5.

52. "Keeping open" within the meaning of the English Licensing Acts: see Metropolitan Police Commissioner v. Roberts, 1904, 1 K. B. 369.

55. Reg. v. Southwick, 21 O. R. 670; see *ante*, note to sec. 50.

59. Where a brewing company obtained possession of a liquor business, took a lease of the premises where it was carried on and sold the same to A., taking the license in the name of their manager as security for the purchase money, it was held a contravention of this section: Boucher v. Capital Brewing Co., 9 O. L. R. 266. What constitutes reason for belief that purchaser is not buying to re-sell: R. v. Calcutt Brewing Co., 12 O. W. R. 1045, 17 O. W. R. 363.

65. Keeping for sale; Chinese wines: R. v. Sam Lee Hing, 1 O. W. N. 806. Sale of liquor without a license; executory contract: R. v. Lawless, 3 O. W. N. 669, 21 O. W. R. 247. Sale in unlicensed place; sale by servant; scope of employment: see Boyle v. Smith, 75 L. J. K. B. 282, 1906, 1 K. B. 432. A messenger for the person who buys liquor is not "selling" liquor: R. v. Davis, 4 O. W. N. 358, 23 O. W.

R. 412. Sale by subterfuge: R. v. Richardson, 20 O. R. 514; R. v. Young, 8 O. R. 476. Evidence on charge of keeping liquor for sale without a license: R. v. Reedy, 13 O. W. R. 265, and see sec. 100, *infra*. Effect on second conviction of change in penalty for the first conviction: R. v. Teasdale, 15 O. W. R. 242, 397, 1 O. W. N. 398, 486, 20 O. L. R. 382. Proof of prior conviction: see provisions of sec. 88-9; see R. v. Farrell, 10 O. W. R. 790. Conviction; distress; imprisonment: R. v. Degan, 12 O. W. R. 1029, 17 O. L. R. 366. The omission to ascertain the costs and insert the amount in the conviction is only an irregularity and may be afterwards rectified: R. v. Irwin, R. v. Pettit, 11 O. W. R. 728, 730, 16 O. L. R. 454. The Court has no power on the return of *habeas corpus* to amend a conviction for second offence by substituting the maximum penalty prescribed by this section for a first offence: R. v. Simmons, 12 O. W. R. 776, 17 O. L. R. 239. Application of section 739 of the Criminal Code, R. S. C., 1906, ch. 146, as to award of distress; cases before and since 1892 considered: R. v. Reid, 12 O. W. R. 819, 14 O. W. R. 71; see also R. S. O. 1914, ch. 90. Imprisonment under several warrants and running of terms of imprisonment: R. v. Degan, 17 O. L. R. 366; and see sec. 80, *post*.

70. Permitting drunkenness on licensed premises; the hour of closing has nothing to do with this offence: Lawson v. Edminson, 1908, 2 K. B. 952. Permitting drunkenness on the premises: Thompson v. McKenzie, 1908, 1 K. B. 905. A conviction for delivering liquor to a person while intoxicated directed imprisonment without provision for distress. The Court on *certiorari* amended the conviction under the provisions of the Summary Convictions Act: Regina v. Flynn, 20 O. R. 638. Covenant to "keep and conduct" public house in a proper manner; lessee liable for act of under-lessee permitting drunkenness and thereby forfeiting the license: Palethorpe v. Home Brewery, 1906, 2 K. B. 5.

72. Proof of age of minor: R. v. Farrell, 1 O. W. N. 1045, 16 O. W. R. 630, 21 O. L. R. 540. See also Rex. v. Smith, 11 O. L. R. 279. Power of magistrates to amend information by describing persons to whom

liquor furnished as apparently or to the knowledge of the defendant under age specified. Effect of sections 92, 84: R. v. Ayer, 12 O. W. R. 1223, 17 O. L. R. 509.

74. Premises covered by license: R. v. Palmer, 46 U. C. R. 262.

75. The powers of a Board of License Commissioners to pass resolutions forbidding gambling, etc., on licensed premises under section 6 are not restricted by this section: Rex. v. Laird, 6 O. L. R. 180.

77. This provision is constitutional under B. N. A. Act, sec. 92, sub-secs. 9, 16 and 15, and is not opposed to sec. 91, sub-sec. 27: R. Boardman, 30 U. C. R. 553.

79. "Thirty days," one month: R. v. Rudolph, 1 O. W. N. 1057, 16 O. W. N. 723. A conviction for a first offence properly awards imprisonment in default of payment of fine and not in default of sufficient distress: Reg. v. Hazen, 20 O. R. 633. Imprisonment in B. N. A. Act, sec. 92, sub-sec. 15, means with or without hard labour: Hodge v. The Queen, 9 App. Cas. 117, 3 Cart. 144; see also R. v. Frawley, 7 A. R. 246, 2 Cart. 576; R. v. Allbright, 9 P. R. 25. Costs: see R. S. O. 1914, ch. 90, sec. 7, notes.

80. See R. v. Degan, 17 O. L. R. 366.

81. Jurisdiction of the County Judge: Re Hunter, 24 O. R. 153, 522. The provisions of the section are penal and to be construed strictly. The section extends to a "license issued" contrary to the provisions of the Act but not to a license so transferred, and to the licensee and not to the transferee: Re Dunlop, 22 O. R. 22.

82.—(2) "Any person:" R. v. Dunkley, 16 O. W. R. 263, 1 O. W. N. 861.

84. This must be read with sec. 92: R. v. O'Connor, 3 O. W. N. 840, 21 O. W. R. 691. Adjournments made by Justice before whom information laid prior to trial before Police Magistrate: R. v. Miller, 19 O. L. R. 125. Where information laid within the 30

days and summons not issued for some months, effect of the words " this day " in the form of summons in the schedule: R. v. Hudgins, 14 O. L. R. 139.

85. At a trial, a License Commissioner sat at the counsel's table and afterwards in the constable's chair, a few feet distant from the Magistrate. The evidence did not shew that he interfered improperly with the trial. The provisions of the section were not thereby contravened: R. v. Southwick, 21 O. R. 670.

86. The reeves of municipalities in unorganized districts are *ex officio* Justices of the Peace in their respective municipalities with power to try alone and convict for offences under the Act: R. v. McGowan, 22 O. R. 497. The defendant was charged with a breach of the Act in the township of Barton, Wentworth County, and was tried and convicted before the Police Magistrate at Hamilton in the same county. The Police Magistrates' Act gives jurisdiction for this: R. v. Gully, 21 O. R. 219. Jurisdiction of Police Magistrate over offences in another town: see R. v. Holmes, 14 O. L. R. 124, 9 O. W. R. 750; R. v. Farrell, 10 O. W. R. 790; see R. S. O. 1914, chs. 87 and 88, and cases there cited; see also R. v. Irwin; R. v. Pettit, 11 O. W. R. 728, 730, 16 O. L. R. 454.

87. The license inspector who lays the information is a competent witness. An objection that it was not shewn that the evidence was read over to the witness overruled, the maxim *omnia presumuntur rite esse acta* applying: R. v. Excell, 20 O. R. 633; R. v. Scott, 26 O. R. 646. The direction as to witnesses signing their evidence is not imperative but directory merely: R. v. Scott, 26 O. R. 646. Where there were three informations against one defendant for selling liquor to different persons the evidence must be taken separately: R. v. Lapointe, 3 O. W. N. 1469. No writing necessary where defendant personally admits his guilt in Court: R. v. Dagenais, 2 O. W. N. 1091, 19 O. W. R. 252, 23 O. L. R. 667. Depositions taken in shorthand and not read over or signed; consent of counsel; cases reviewed: R. v. Leach, 12 O. W. R. 1016; R. v. Fogarty, 12 O. W. R. 1026; R. v. Warilow, 12 O. W. R. 789, 17 O. L. R.

643. Power of counsel to accept shorthand reporter's notes as final: R. v. Degan, 12 O. W. R. 1047, 17 O. L. R. 366. Where the depositions returned failed to shew any proof of a previous conviction, the Magistrate's affidavit that such proof had been duly given could not be received: R. v. Farrell, 15 O. L. R. 100. Taking down evidence is for the protection of the Magistrate and as a record of the material on which the conviction is founded, the Court being bound by such evidence and without power to remit the case back to the Magistrates to take further evidence: R. v. Brisbois, 10 O. W. R. 869, 15 O. L. R. 264. See also R. v. Irwin, 11 O. W. R. 728.

87.—(1) Compare R. S. O. 1914, ch. 90 and Criminal Code sections which apply.

88.—(1) The effect of the amendment of 1909 striking out the words "and not before" is to make the provision directory: R. v. Graves, 21 O. L. R. 329, 16 O. W. R. 372, 1 O. W. N. 787. "And not before." Effect of striking these words out: R. v. Coote, 22 O. L. R. 269. There is nothing to forbid the Magistrates who heard and convicted on the first charge to try the second: R. v. Reid, 12 O. W. R. 819, 17 O. L. R. 578; R. v. Willman, 12 O. W. R. 822, 17 O. L. R. 583. A conviction of the defendant for a third offence was quashed on the ground that the convicting Magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt on the charge against him of the third offence. The jurisdiction of the Magistrate was gone when he admitted the improper evidence and his competence not restored by its deletion: Rex. v. Nurse, 7 O. L. R. 418; see also R. v. Edgar, 15 O. R. 142. In a conviction for a second offence the prior conviction was referred to as if being then adjudicated on instead of being stated as a fact found on enquiry after the finding on the charge then before the Magistrates, but which fact (as the evidence shewed) had been so found, the Court refused to interfere, intimating that, if necessary the conviction could be amended: R. v. Whitesides, 8 O. L. R. 622. Application to department in

mitigation of penalty where suggestion of prior conviction: R. v. Gilmour, 5 O. W. N. 14. Section construed: R. v. Coote, 22 O. L. R. 269. Where a previous offence is charged, the Magistrate exceeds his powers in taking evidence of any offence but the subsequent offence before he finds the defendant guilty of the subsequent offence: R. v. Vanzyl, 13 O. W. R. 485. Jurisdiction of Magistrate to convict in absence of defendant: R. v. Coote, 16 O. W. R. 903, 2 O. W. N. 6, 17 O. W. R. 470, 2 O. W. N. 229, 22 O. L. R. 269. Where change in penalty for first offence; effect on second offence: R. v. Teasdale, 20 O. L. R. 382, 15 O. W. R. 242, 397, 1 O. W. N. 398, 486. Necessity for reciting prior conviction in warrant of commitment: R. v. Nelson, 18 O. L. R. 484. Procedure in inquiring as to previous conviction not followed: R. v. Teasdale, 20 O. L. R. 382.

88.—(2) It is not necessary that the proof of the prior conviction should be by production of the formal conviction or a certificate thereof, other satisfactory evidence being by the Statute declared sufficient: R. v. McGarry, 31 O. R. 486. Right of Court to examine proceedings anterior to conviction valid on its face; discussion of procedure on second conviction; certainty of previous conviction and sufficiency of endorsement: R. v. Simmons, 12 O. W. R. 776, 17 O. L. R. 239. Proof of prior conviction: see R. v. Farrell, 10 O. W. R. 790, 15 O. L. R. 100. Proof of previous conviction; certificate of Magistrate; identity of defendant with person previously convicted: R. v. Leach, 12 O. W. R. 1016. Evidence of previous conviction; certificate put in in absence of accused: R. v. Warilow, 12 O. W. R. 1026.

88.—(3) Two offences on same day: R. v. Dunkley, 16 O. W. R. 263, 1 O. W. N. 861.

88.—(4) Where previous conviction not set aside: see R. v. Graves, 21 O. L. R. 329, 16 O. W. R. 372, 1 O. W. N. 787.

88.—(5) The subsequent offence and the previous offence shall each be an offence in contravention of one of

the sections mentioned: R. v. Simmons, 17 O. L. R. 239.

92. This must be read with sec. 84: R. v. O'Connor, 21 O. W. R. 691, 3 O. W. N. 840. Power of amendment to bring information within wording of sec. 72; effect of section 84: R. v. Ayer, 12 O. W. R. 1223, 17 O. L. R. 484. Amendment: R. v. Rudolph, 16 O. W. R. 723, 1 O. W. N. 1057. Amending information so as to negative the exception as to medical purposes in sec. 50: R. v. Boomer, 15 O. L. R. 321. And see note to R. S. O. 1914, ch. 90, sec. 5.

93. Costs; distress; commitment in default: R. v. Graves, 16 O. W. R. 372, 1 O. W. N. 787, 21 O. L. R. 329. This section makes more clear the power to issue distress on non-payment of penalty: R. v. Reid, 14 O. W. R. 153; see R. S. O. 1914, ch. 90, secs. 4 and 7, and notes.

94.—(1) Application of section 739 of the Criminal Code; award of distress on non-payment of fine. Cases before and after the enactment of this clause of the code (1892) considered: R. v. Reid, 14 O. W. R. 71. Power to amend information by describing persons to whom liquor furnished as apparently or to the knowledge of the defendant under the age specified; effect of secs. 72, 84 and 92: R. v. Ayer, 12 O. W. R. 1223, 17 O. L. R. 509. "Unlawfully" omitted in warrant of commitment: R. v. Graves, 16 O. W. R. 372, 1 O. W. N. 787, 21 O. L. R. 329. Amendment of conviction: R. v. Ackers, 16 O. W. R. 105, 1 O. W. N. 780, 21 O. L. R. 187. Warrant of commitment for third offence failing to recite prior conviction cannot be cured under the Criminal Code, sec. 1124, nor under this section: R. v. Nelson, 12 O. W. R. 1063, 18 O. L. R. 484. Amendment after motion launched to quash: R. v. Leonard, 1 O. W. N. 415. Form and amendment of information, and procedure under code sections: see R. v. Hazen, 20 O. R. 633; R. v. Alward, 25 A. R. 519. Where the minute of conviction not in accordance with the formal conviction: see R. v. Hartley, 20 O. R. 481; R. v. Richardson, 20 O. R. 514; Regina v. Southwick, 21 O. R. 670. It is not a valid objection that the conviction does not state the amount of costs

imposed: Regina v. Clark, 20 O. R. 642; Reg. v. Flynn, 20 O. R. 638. The omission to ascertain the costs and insert the amount in the conviction is only an irregularity and may be afterwards rectified: R. v. Irwin, R. v. Pettit, 11 O. W. R. 728, 730, 16 O. L. R. 454; see R. S. O. 1914, ch. 90, sec. 7. Power to amend conviction by striking out reference to costs of conveying to prison: R. v. Degan, 17 O. L. R. 366, and see R. S. O. 1914, ch. 90, sec. 7 (3). As to code provisions applicable: see R. S. O. 1914, ch. 90, sec. 4, and see R. v. Graves, 16 O. W. R. 372, at p. 382, 21 O. L. R. 329.

94.—(2) The Court has no power on the return of *habeas corpus,* to amend a conviction for a second offence by substituting the maximum penalty prescribed for a first offence under sec. 65: R. v. Simmons, 12 O. W. R. 776, 17 O. L. R. 239. In order to quash a conviction there must be no legal evidence of an offence. It is not sufficient that the weight of evidence is against the conviction: R. v. McElroy, 5 O. W. N. 284, 25 O. W. R. 279. A conviction for delivering liquor to a person while intoxicated directed imprisonment without provision for distress. The Court amended the conviction: R. v. Flynn, 20 O. R. 638. Though a conviction be good on its face, yet where there is no appeal, the Court will not refuse to go into the evidence on a motion to quash: Regina v. Hughes, 29 O. R. 179. Application to quash: see R. S. O. 1914, ch. 56, sec. 63 and notes. Compare this section as enacted by 6 Edw., ch. 47, sec. 30, with R. S. O. 1897, ch. 92, sec. 13. Powers of review: R. v. Cook, 12 O. W. R. 829.

94.—(3) Only applies where evidence has been rejected: R. v. Graves, 16 O. W. R. 372, 1 O. W. N. 787, 21 O. L. R. 329.

102.—(1) Simulating a licensed house: R. v. Bevan, 4 O. W. N. 400. Effect of plea of guilty: R. v. Dorr, 4 O. W. N. 419, 23 O. W. R. 663.

102.—(2) This enactment does not relate to liquor which *is* on the premises, but to liquor which the person *has* on the premises: R. v. Borin, 5 O. W. N. 412.

103. Question, whether this section is limited to offences connected with barter, sale and traffic, or if it extends to the refusal of a servant to admit an officer claiming right of search under section 130; R. v. Potter, 20 O. R. 516. "Occupant" now extends to owner, master, captain or other person in charge of a vessel: see R. v. Miekleham, 11 O. L. R. 366, *ante*, note to sec. 11. Illegal sale by club servant: see R. v. Hodgins, 24 O. R. 433, note; see also R. v. Slattery, 26 O. R. 148. The defendant was a married woman and the sale of liquor took place in the presence of her husband, but the evidence shewed that she was the more active party and she was the occupant of the premises on which the sale took place. It was held, having regard to this section, that even if the presumption that the sale was made under compulsion had not been removed by the Criminal Code, it would have been rebutted by the circumstances: R. v. McGregor, 26 O. R. 115. Convictions of two persons for same offence: see R. v. Boomer, 15 O. L. R. 321. Analysis of this section as amended in 1907 and 1908: R. v. Bradley, 13 O. W. R. 39. "Principal offender:" Rex. v. Pfister, 20 O. W. R. 778, 3 O. W. N. 440. "Conclusively guilty:" R. v. Bradley, 20 O. W. R. 33, 3 O. W. N. 58.

106. Right to analysis: R. v. Stephenson, 4 O. W. N. 272, 23 O. W. R. 269.

107. The "refusal" to answer any question touching the case means any question which may be lawfully put and which the witness is bound to answer. Any other witness except the defendant, his wife or husband (as the case may be), can avail himself of the protection afforded by R. S. O. 1914, ch. 76, sec. 6, and if the answer to the question would tend to subject the witness to criminal proceedings or to prosecution for a penalty, he can decline to answer: R. v. Nurse, 2 Can. Cr. Cas., 57; Re Askwith, 31 O. R. 150; R. v. Fee, 13 O. R. 590.

109. Where a sum is allowed the inspector under this section as costs, if wrong in amount, it is severable and cannot affect the conviction: Rex. v. Laird, 6 O. L. R. 180.

110. When right to move under Judicature Act, sec. 63, R. S. O. 1914, ch. 56, and when defendant is deprived of this right or right of *certiorari* under former practice: R. v. Cook, 12 O. W. R. 829, 18 O. L. R. 415. Remedy by appeal: see as to summary motions and *certiorari* taken away under new procedure: R. v. Major, 1 O. W. N. 223.

110.—(6) Formerly an appeal lay only from a dismissal by a Justice or Justices: R. v. Smith, 11 O. L. R. 279.

110.—(8) An appeal under this section is in effect a trial on the merits; the burden of proof is not on the appellant: R. v. Farrell, 21 O. L. R. 540, 1 O. W. N. 1045.

110.—(9) See R. S. O. 1914, ch. 90, secs. 4 and 10.

112. See Judicature Act, R. S. O. 1914, ch. 56, sec. 12, 26 (2*g*).

113. The Attorney-General having refused a certificate *quaere*, whether an appeal lay: R. v. Miller, 19 O. L. R. 125. Appeal; certificate: R. v. Leach, 21 O. W. R. 919. Right of appeal to Divisional Court: R. v. Teasdale, 20 O. L. R. 382, 15 O. W. R. 397, 1 O. W. N. 398, 486; R. v. Graves, 21 O. L. R. 329. When appeal given under this section: R. v. Ing Kon, 12 O. W. R. 544. A special right of appeal is given by the plain words of this section: R. v. Reid, 12 O. W. R. 819, 17 O. L. R. 578. Does this section or R. S. O. 1914, ch. 84, sec. 8, prevail so as to give an absolute right of appeal: R. v. Robinson, 10 O. W. R. 338.

114. The provision is remedial and should receive a liberal construction: Trice v. Robinson, 16 O. R. 433. Where a person comes to his death while intoxicated, and the intoxicating liquor has been supplied at two taverns so that an action might have been brought successfully against either tavern keeper, they cannot be sued jointly: Crane v. Hunt, 26 O. R. 641. What is an accident caused by intoxication: see Bobier v. Clay, 27 U. C. R. 438. Where

felony has been committed: see McCurdy v. Swift, 17 C. P. 126. Liability of hotelkeeper for sale by bartender: De Struve v. McGuire, 20 O. W. R. 347, 21 O. W. R. 138, 3 O. W. N. 251, 685, 25 O. L. R. 87, 491. "Caused by such intoxication:" De Struve v. McGuire, 25 O. L. R. 87, 491.

116. When the defendant's manager had the license issued to himself to secure payment of the purchase price of the licensed premises sold to the plaintiff, the arrangement was illegal and the plaintiff held entitled to recover moneys paid by him to the defendant for liquor supplied as furnished in contravention of the Act: Boucher v. Capital Brewing Co., 9 O. L. R. 266. Sale under subterfuge of agency: Bowie v. Gilmour, 24 A. R. 254.

117. Judgment obtained by default for liquor drunk in an ale house is null and void. An execution sale of lands to satisfy the judgment is void, the deed and mortgage of no effect and the registration of them should be vacated: Drew v. Rexford, 14 O. W. R. 505.

118. What amounts to an "order forbidding," under this section. If a proper order were made, and brought to the knowledge of the defendant, there would, it seems, be a violation of the law in making a sale to an inebriate though the liquor was given to and actually drunk by other persons on the licensed premises: R. v. Mount, 30 O. R. 303.

119. Action for damages by a married woman for supplying liquor to her husband after notice: see Northcote v. Bunker, 14 A. R. 364. Where the defendant's barkeeper served the plaintiff's husband after notice contrary to the defendant's instructions, the defendant was liable: Austin v. Davis, 7 A. R. 478. Form of notice considered: Thornley v. Reilly, 17 A. R. 204. See also Austin v. Davis, 7 A. R. 478; Gleason v. Williams, 27 C. P. 93. No proof of actual damage necessary: Gleason v. Williams, 27 C. P. 93. Notice not to sell liquor to "brother-in-law:" Piggott v. French, 1 O. W. N. 715, 15 O. W. R. 852, 21 O. L. R. 87. The effect of an unauthorized notice is to promulgate a libel:

Piggott v. French, 1 O. W. N. 715, 15 O. W. R. 852, 21 O. L. R. 87.

120.—(*d*) In line 8, before "upon," insert "in addition:" 4 Geo. V. ch. 2, sched. (35).

130. This section only applies to the persons named therein. Where an inspector proceeding under it without a warrant, took a person other than those named, his act was illegal and the defendant was justified in resisting it: R. v. Ireland, 31 O. R. 267. Is an hotel-keeper liable for the act of his servant in refusing to admit an officer claiming right of search under this section: R. v. Potter, 20 A. R. 516. The right of search may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient: R. v. Sloan, 18 A. R. 482. "Person in charge:" Pacaud v. Perkins, 20 O. W. R. 893.

131. It is only by proceeding under this section and procuring a warrant that an inspector is enabled to take with him a person other than those named in sec. 130: R. v. Ireland, 31 O. R. 267. Where peace officers acting on a search warrant hereunder are obstructed, as the section provides no punishment, the proceedings against the defendant must be by indictment for a misdemeanour under the Criminal Code: R. v. Hodge, 23 O. R. 450. Sufficiency of definition of place to be searched: R. v. McGarry, 24 O. R. 52.

132. Declaration of forfeiture and order for destruction; verbal direction; proprietary medicines: Ing Kon v. Archibald, 12 O. W. R. 592, 17 O. L. R. 484.

137.—(1) The Act of the Provincial Legislature allowing under certain conditions municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires*, but the prohibition can only extend to a sale by retail: Re Local Option Act, 18 A. R. 572; Huson v. South Norwich, 24 S. C. R. 145; but see Re Provincial Jurisdiction, 24 S. C. R. 170. As to Dominion and Provincial Legislation: see Atty. Gen. for Ont. v. Atty. Gen. for

Can., 1896, A. C. 348, which also decides that local liquor prohibitions are within the powers of the Provincial Legislature, but inoperative in any locality which adopts the provisions of the Dominion of Canada Temperance Act, of 1886. The by-law may be for shops and taverns or for shops only or for taverns only: Re Frawley and Orillia, 14 O. L. R. 99; Re Hickey and Orillia, 12 O. W. R. 433. House of public entertainment: Re Duncan and Midland, 10 O. W. R. 345, 551, 16 O. L. R. 132. Creation of village after passing of L. O. by-law of township of which village formed part: Re Denison and Wright, 13 O. W. R. 1056; see Re Swan River Local Option By-law, 3 W. L. R. 546. Local option by-laws in Ontario: 44 Can. Law Journal, 753.

137.—(2) As to the preparation of list of voters, its revision and what is the proper list: see R. S. O. 1914, ch. 192, secs. 265 to 269, also secs. 51 and 91, and notes; see also notes to R. S. O. 1914, ch. 6, sec. 24. Who are the persons entitled to vote?: see Re Croft and Peterboro, 17 A. R. 1; Re Sinclair and Owen Sound, 12 O. L. R. 488, 13 O. L. R. 447, 39 S. C. R. 239; Re McGrath and Durham, 12 O. W. R. 149. The proper voters' list in local option contest: Carr v. North Bay, 28 O. L. R. 623; R. ex rel. Black v. Campbell, 18 O. L. R. 269; and see notes to R. S. O. 1914, ch. 192, sec. 265. Effect of the present provision on Re Saltfleet, 16 O. L. R. 293, and on Re West Lorne, 26 O. L. R. 339: see Re Aurora Scrutiny, 4 O. W. N. 1069, 28 O. L. R. 475. Multiple voting: see R. S. O. 1914, ch. 192, sec. 269, and notes, also secs. 99 and 138 (g). As to the propriety of the clerk voting in local option contests: see R. S. O. 1914, ch. 192, sec 270, and notes. Poll Clerks: see ch. 192, sec. 100. Deputy Returning Officers: see ch. 192, secs. 274, 100 and notes: Re Armour and Onondaga, 14 O. L. R. 606; Re Saltfleet, 16 O. L. R. 293; Re Joyce and Pittsburg, 16 O. L. R. 380. As to powers of Judge on a scrutiny to enquire into legality of votes cast: see R. S. O. 1914, ch. 192, sec. 279, and notes.

137.—(3) Method of taking the votes of the electors is fixed by the Municipal Act, 1914, ch. 192, Part X.,

sec. 260, *et seq.* By sec. 274, Part III., of the Municipal Act also applies (secs 56 *et seq*). Mode of voting: see Duncan v. Midland, 16 O. L. R. 132. The day fixed for taking the votes of the electors: see R. S. O. 1914, ch. 192, secs. 71, 73, 74. As to fixing polling places, appointing D. R. O.'s: see R. S. O. 1914, ch. 192, sec. 263 (1), and notes. Appointment of persons to attend at polls and at summing up: see R. S. O. 1914, ch. 192, sec. 264, and notes. Proceedings for publication of by-law: see R. S. O. 1914, ch. 192, sec. 263 (5), and notes. Fixing time and place for summing up: see R. S. O. 1914, ch. 192, sec. 263 (4), and notes. Review of objections to by-law: see Re Sturmer and Beaverton, 24 O. L. R. 65. As to irregularities which are or are not covered by R. S. O. 1914, ch. 192, sec. 150, see notes to that section.

137.—(4) Where a petition praying for submission to the electorate of a local option by-law is filed in due time and accepted by the council, it operates as a statutory command to council whose ordinary discretion is suspended: Re Williams and Brampton, 12 O. W. R. 1235, 17 O. L. R. 398, 408; Carr v. North Bay, 4 O. W. N. 1284, 28 O. L. R. 623. Insufficiency of petition: Re Carter and Clapp, 12 O. W. R. 1275. Right of petitioners to withdraw their names: Re Keeling and Brant, 20 O. L. R. 551, 25 O. L. R. 181; Casson v. Stratford, 20 O. W. R. 766, 3 O. W. N. 443.

137.—(5) Scrutiny: see R. S. O. 1914, ch. 192, sec. 279 (1). Proceedings on scrutiny and ascertainment of three-fifths majority: see sec. 279 (3), and notes. Review of decisions as to scrutiny in local option contests and deduction of votes disallowed: Re West Lorne Scrutiny, 26 O. L. R. 339, 47 S. C. R. 451; Re Aurora Scrutiny, 28 O. L. R. 475; and see Re McGrath and Durham, 17 O. L. R. 514; Re Duncan and Midland, 16 O. L. R. 132; Re Weston Local Option, 9 O. W. R. 250; Re Swan River L. O., 3 W. L. R. 546; Re L. O. in Saltfleet, 16 O. L. R. 293; Re Orangeville L. O., 20 O. L. R. 476; Re Strathroy L. O., 1 O. W. N. 465; Re Mitchell and Campbellford, 11 O. W. N. 941. Summing up result of contest: see R. S. O. 1914, ch. 192,

secs. 275 and 279 (3), and notes. Computing three-fifths majority: see Re Cleary and Nepean, 9 O. W. R. 406, 14 O. L. R. 393; Re Sturmer and Beaverton, 2 O. W. N. 1116, 19 O. W. R. 255; Re Ellis and Renfrew, 15 O. W. R. 880, 1 O. W. N. 710; Re Prangley and Strathroy, 15 O. W. R. 890, 1 O. W. R. 706; Re Begg and Dunwich, 21 O. L. R. 94, 15 O. W. R. 908; Re Weston, 9 O. W. R. 250; Re Brown and E. Flamborough, 2 O. W. N. 1000, 19 O. W. R. 35, 23 O. L. R. 533. Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law: Re West Lorne Scrutiny, 23 O. L. R. 598, 25 O. L. R. 267, 26 O. L. R. 339, 47 S. C. R. 451.

Passing the by-law: see R. S. O. 1914, ch. 192, sec. 280, and notes. Where a by-law was attacked on the ground that no formal motion for its second reading was made, motion refused: Re Kelly and Toronto Junction, 8 O. L. R. 162. Formerly the provision for passing after approval of electors was not compulsory: Re Dewar and East Williams, 10 O. L. R. 463. The plain duty of the council is to pass the by-law: Re Schumacher and Chesley, 1 O. W. N. 1041. Third reading: Re Copeman and Dundalk, 1 O. W. N. 805. The duty of the council is purely ministerial if three-fifths of the electors approve: Re Duncan and Midland, 10 O. W. R. 345, 551, 16 O. L. R. 132.

137.—(6) What constitutes a majority against a local option by-law; basis of Judge's certificate: Re Aurora Scrutiny, 28 O. L. R. 475. Reduction of majority below statutory minimum: Re Dillon and Cardinal, 10 O. L. R. 371; Re Cleary and Nepean, 14 O. L. R. 392; Re Saltfleet, 16 O. L. R. 293; Re Mitchell and Campbellford, 16 O. L. R. 578; Re McGrath and Durham, 17 O. L. R. 514; Re Orangeville, 20 O. L. R. 476; Re Ellis and Renfrew, 21 O. L. R. 74, 23 O. L. R. 427; Re Schumacher and Chesley, 21 O. L. R. 522. "Submission to electors:" Stoddart v. Owen Sound, 4 O. W. N. 83, 27 O. L. R. 221.

137.—(7) Application of this section where ineffective proceedings taken in respect of repealing by-law:

Re Vandyke and Grimsby, 14 O. W. R. 538, 19 O. L. R. 402. Local option contest—repealing by-law: Stoddart v. Owen Sound, 27 O. L. R. 221.

137.—(11) Misleading form of ballot paper: Re Milne and Thorold, 19 O. W. R. 29, 461, 20 O. W. R. 983, 3 O. W. N. 536, 25 O. L. R. 420. Prescribed form of ballot not followed; defect cured: Re Giles and Almonte, 1 O. W. N. 920, 16 O. W. R. 530, 21 O. L. R. 362. Form of ballot: Ward v. Owen Sound, 1 O. W. N. 512.

138. "No tavern or shop license," these words are read distributively: Re Frawley and Orillia, 9 O. W. R. 365. "Penalty" and "punishment," distinguished and defined: R. v. Leach, 12 O. W. R. 1016, 17 O. L. R. 643. Where an offence is committed in territory subject to local option, the offence is under the Liquor License Act and not under the By-law: R. v. Leach, 21 O. W. R. 919.

139. Meaning and effect of this legislation; case stated: Re Liquor License Act, 5 O. W. N. 225. Effect of section; declaration of clerk: Re Ellis and Renfrew, 15 O. W. R. 880, 16 O. W. R. 952, 18 O. W. R. 703, 1 O. W. N. 710, 2 O. W. N. 27, 837, 21 O. L. R. 74, 23 O. L. R. 427. Order of minister that no license issue; needless appeal: Re Hickey and Orillia, 12 O. W. R. 650. Where the consent of the Provincial Secretary is necessary to the issue of a license, until such consent is obtained there is a "prohibition of the sale of intoxicating liquors" within the meaning of a covenant in a lease calling for a reduction in rent in such event: Hessey v. Quinn, 18 O. L. R. 487, 13 O. W. R. 907.

151. The defendants were constructing the C. P. R. near a collection of houses known as Michipicoten River and had their headquarters there. The plaintiffs brought to the village in a sailing vessel a quantity of intoxicating liquor. The defendants, who were J.P.'s for Algoma, assumed to act under the provisions of the statute then in force respecting the sale of liquor near public works, and caused the liquor to be destroyed. Held that this was a village under the Act R. S. O. 1877, ch. 32, sec. 1, and that

the Justices had no jurisdiction: Bond v. Conmee, 15 O. R. 716, 16 A. R. 398, Cas. Dig. 511. Destruction of liquor pursuant to order under R. S. O. 1897, ch. 39: Ing Kon v. Archibald, 17 O. L. R. 484. One who sold liquor without license in the area where R. S. O. 1897, ch. 39 was in force was liable to be punished in two ways, either under that Act or under the Liquor License Act for selling liquor illegally, with the proviso that the offender should not be punished twice for the same illegal sale: R. v. Irwin, R. v. Petit, 11 O. W. R. 728, 730, 16 O. L. R. 454.

152. Regina v. Guittard, 30 O. R. 283.

153. The Ontario Act requiring every brewer and distiller to obtain a license thereunder to sell wholesale within the province is *intra vires* as being direct taxation within B. N. A. Act, sec. 92, subsec. 2, and as comprised within the term "other licenses" in sub-sec. 9 of the same section. Severn v. The Queen, 2 S. C. R. 70, is in effect overruled: Reg. v. Halliday, 21 A. R. 42; Brewers, etc., Association v. Atty. Gen. for Ontario, 1897, A. C. 231.

155.—(1) A brewery company gave orders to draymen not to deliver beer unless an order for it had been received at the company's office. The beer was sold C. O. D. and the draymen authorized to receive payment and to bring back all beer undelivered. There was no appropriation of the bottles or crates of beer on the waggons to any particular customer. Held that sales made by a drayman on his rounds, of beer to persons on the streets were not within the scope of the drayman's employment and the company were not guilty of having sold liquor at an unauthorized place: Boyne v. Smith, 75 L. J. K. B. 282, 1906, 1 K. B. 432. The defendants, duly licensed brewers, became possessed of the goodwill, etc., of a liquor business and put the plaintiff in charge, the license being taken out in the name of the defendant's manager to be controlled by him for the purpose of securing the purchase money. Liquors sold under this arrangement were illegally sold. Granting a license in trust

for another is not permissible: Boucher v. Capital Brewing Co., 9 O. L. R. 266. See also as to wholesale licenses: Regina v. Guittard, 30 O. R. 283; Molson v. Lambe, 15 S. C. R. 253. Sale by wholesaler under cover of agency: Bowie v. Gilmour, 24 A. R. 254.

155.—(2) Purview of amendment of 1909; sale in local option district: R. v. Montgomery, 14 O. W. R. 625, 1 O. W. N. 30.

168. The expressions "license by wholesale," "wholesale license," "license to sell by wholesale," may be treated as interchangeable expressions: Reg. v. Guittard, 30 O. R. 283; see *ante* secs. 152-155, and notes.

171. A cellar in a brewery where beer is stored is a "warehouse" within the section: Reg. v. Halliday, 21 A. R. 42.

175. It is an offence for a chemist or druggist to allow liquor sold by him or in his possession to be consumed within his shop by the purchaser. It is not essential that the druggist should be registered: Reg. v. McKay, 23 O. R. 442. Offence of not recording sales: Reg v. Elborne, 21 O. R. 504, 19 A. R. 439.

175.—(5) Form of conviction considered: Reg. v. Scott, 20 O. R. 646; Reg. v. Villeneuve, 17 C. L. T. Occ. N. 374, and see now Form 6 No. 12.

R. S. O. 1914, VOL. II., P. 2962.

PUBLIC MORALS; THE LORD'S DAY ACT.

This statute, formerly R. S. O. 1897, ch. 246, is omitted from the present revision but is printed at p. 2962. The Act was formerly C. S. U. C. ch. 104. See Atty. Gen. Ont. v. Hamilton St. Ry., 1903, A. C. 524, the effect of which decision appears to be to leave the old C. S. U. C. ch. 104 still in force,

the Ontario amendments to it being *ultra vires*. The Act treated as a whole is *ultra vires* the Ontario legislature, and an infraction of the Act is an offence against criminal law: See Dominion Lord's Day Act, R. S. C. 1906, ch. 27. Differences from English Act, 29 Car. II., ch. 7, considered: R. v. Wells, 24 O. L. R. 77. C. S. U. C. ch. 104, is in force in Ontario: R. v. Yaldon, 17 O. L. R. 179, 12 O. W. R. 384. Exclusive jurisdiction of Dominion Parliament: R. v. Weatheral, 11 O. W. R. 946. Constitutionality of R. S. O. 1914, ch. 185, sec. 234, and Dominion legislation affecting it, regarding the operation of provincial railways on Sunday: Kerley v. London and Lake Erie, 26 O. L. R. 588, 28 O. L. R. 606. Sunday law respecting provincial railways: see Article 48 C. L. J. 677.

As affecting contracts, etc., where payment falls due on Sunday, it must be made Saturday (except as altered by statute): Whittier v. McLennan, 13 U. C. R. 638.

Tender not to be made on Sunday: Cudney v. Gives, 20 O. R. 500. Pleading illegality of contract made on Sunday: Crosson v. Bigley, 12 A. R. 94. An unmeritorious defence: Vail v. Duggan, 7 U. C. R. 568. A note made on Sunday in payment of goods, void as between the parties, but good in the hands of an indorsee for value without notice: Houliston v. Parsons, 9 U. C. R. 681; Crombie v. Overholtzer, 11 U. C. R. 55. Sales and mortgages: Lai v. Stall, 6 U. C. R. 506. Giving or taking security not void: Wilt v. Lai, 7 U. C. R. 535. Affidavits and Court process void: Hall v. Brush T. T. 3 and 4 Vic. Coroner's inquest: Re Cooper, 5 P. R. 256. Contract dated on Sunday: Bailey v. Dawson, 20 O. W. R. 908, 3 O. W. N. 560.

The Act does not apply to railways and therefore not to their employees: R. v. Reid, 30 O. R. 732. A cab driver is not within any of the enumerated classes of persons: R. v. Somers, 24 O. R. 244; R. v. Budway, 8 C. L. T. Occ. N. 269. The Act does not apply to persons in the public service of His Majesty, e.g., a government lock tender: R. v.

Berriman, 4 O. R. 282. "Ordinary calling," barber: R. v. Taylor, 19 C. L. J. 362; In re Lambert, 7 B. C. R. 396. Farmer: Hespeler v. Shaw, 16 U. C. R. 104; Hamren v. Mott, 5 Terr. L. R. 400. Conveying Travellers; Steamboat: R. v. Tinning, 11 U. C. R. 636; R. v. Daggett, 1 O. R. 537 (and see sec. 7 (1)). Taking persons on street cars from point to point within a city is not "conveying travellers:" Atty. Gen. v. Hamilton St. Ry., 27 O. R. 49, 24 A. R. 170, 1903, A. C. 524; Atty. Gen. v. Wesley Park, etc., Tramway, 18 A. R. 453. Sunday amusements: R. v. Barnes, 45 U. C. R. 276. Band playing on Sunday: R. v. Powell, 19 O. W. R. 459. The words "or other persons whatsoever" are to be construed *ejusdem generis* and do not include farmers: Hamren v. Mott, 5 Terr. L. R. 400. Ice cream is a food and the sale of it on Sunday by a restaurant keeper is not an offence under sec. 1: Reg. v. Albertie, 3 Can. Crim. Cas. 356, 20 C. L. T. Occ. N. 123. See also R. v. Myers, (unrep.) where it was held by Morgan, J., that candies were a food. Where such a sale is made not by a restaurant keeper but in a candy shop, there is an offence: R. v. Sabine (Winchester, J.), The same rule applies to a sale of oranges: Rex v. Devins, 10 O. W. R. 11; see also R. v. Howarth, 33 U. C. R. 537. Sale of cigars, candies and soft drinks on Sunday by hotels, restaurants and druggists: R. v. Wells, 2 O. W. N. 1232, 19 O. W. R. 452, 24 O. L. R. 77.

CHAPTER 216.

The Minors' Protection Act.

CHAPTER 217.

The Gaming Act.

Refer to: Coldridge and Hawksford on Gambling; Schwabe and Branson on the Stock Exchange.

2. Cheque given in payment of part of share of winnings on joint betting account: Beeston v. Beeston, 1 Ex. D. 13. Cheque payable in London issued in a foreign country as security for a gambling debt incurred abroad, not valid though the consideration for the cheque was sufficient according to the law of the place where it was issued: Monlis v. Owen, 1907, 1 K. B. 746. What are and what are not gaming transactions: Ex parte Philips, re Morgan, 3 L. T. Rep. 516; Ex parte Marnham, re Morgan, 3 L. T. Rep. 517. The terms on which the risk in an insurance policy is undertaken: Sibbald v. Hill, 2 Dow. H. L. 263. Contracts *uberrimæ fidei*: Bates v. Hewitt, L. R. 2, O. B. 595. Certainty of time essential: Isaacs v. Royal Ins. Co., L. R. 5 Ex. 296. Agreement with tipster for share of winnings: see Higginson v. Simpson, 2 C. P. D. 76. No penalty can be enforced under Stamp Act for not affixing a stamp to a note given for money lost at play, for such note is utterly void: Taylor v. Goulding, 28 U. C. R. 198. Even in the hands of a *bona fide* holder for value: Re Summerfeldt v. Worts, 12 O. R. 48. Immoral *quasi* contracts: see Paine, Canadian Law of Contracts, pp. 134-5. Defence of illegal or immoral contract: Pearson v. Carpenter, 35 S. C. R. 380.

5. Where a contract was made in Ontario and was legal therein, to advance money for speculative purposes in Illinois, it is no defence that the purpose for which the money advanced was to be used was illegal by the laws of a foreign country: Bank of Toronto v. McDougall, 28 C. P. 345. Position of stakeholder in case of wager: Hampden v. Walsh, 1 Q. B. D. 189. Deposit of money with stakeholder not illegal; no action against the winner of

the bet who has received the money from the stakeholder after the decision of the event: Seeley v. Dalton, 36 N. B. R. 442. A plaintiff cannot recover in Ontario on a claim for the amount of a bet won on the result of a parliamentary election in the Dominion: Harris v. Elliote, 28 O. L. R. 349.

6. Cheque for money won on bets held over at request of loser; new consideration: Hyams v. Stuart King, 1908, 2 K. B. 696.

CHAPTER 218.

The Public Health Act.

Refer to: Glen, Public Health; Lumley, Public Health Act (Eng.).

2.—(*f*) Dismissal of officer not appointed under the Act: Warren v. Whitby, 4 O. W. N. 1029, 24 O. W. R. 317.

2.—(*k*) "Owner or his agent" in a by-law under this Act was held to mean the owner as here defined, or a person acting for him as trustee or in some such capacity, and not including a plumber employed by the owner: R. v. Watson, 16 O. R. 646.

15. Formerly the Board of Health was not a corporation and could only be proceeded against by mandamus in the High Court: Rich v. Melancthon, 3 O. W. N. 826, 21 O. W. R. 517. Local boards of health as constituted under secs. 48 and 49 of R. S. O. 1897, ch. 248, were not corporations and could not be sued by any corporate name: Sellars v. Dutton, 7 O. L. R. 288. But in Ross v. London, 15 O. W. R. 685, 18 O. W. R. 82, 1 O. W. N. 612, 2 O. W. N. 583, 20 O. L. R. 578, 23 O. L. R. 74, such boards were held to be "*quasi* corporations."

26. Impropriety of holding individual members of board liable: Ross v. London, 20 O. L. R. 578, 23 O. L. R. 74; and see *ante* sec. 15, notes.

29. Private disinfection no sufficient reason for refusing to allow a public officer to disinfect: Bonsquet v. Gagnon, Q. R. 23 S. C. 35; see also R. v. Playter, 1 O. L. R. 360.

32. Property destroyed to prevent spread of infectious disease; compensation; liability of municipality: see Petipas v. Pictou, 36 N. S. Rep. 460.

37. Dismissal of officer: Warren v. Whitby, 4 O. W. N. 1029, 24 O. W. R. 317. Action by physician for damages for wrongful dismissal: McKay v. Cape Breton, 18 S. C. R. 639.

38. A medical health officer is not a servant of the corporation so as to make the corporation liable for his Acts done in pursuance of his statutory duties: Forsyth v. Canniff, 20 O. R. 478; see also Macfie v. Hutchinson, 12 P. R. 167.

39. Remuneration of physician employed by local board of health; mandamus: Rich v. Melancthon Board of Health, 26 O. L. R. 48. Action to recover remuneration for services as physician; Medical Health Officer; mandamus; costs: Bibby v. Davis, 1 O. W. R. 189; and see *post* sec. 52, notes.

43.—(1) Action to restrain a municipality from using land acquired under the Public Parks Act for the purpose of erecting a contagious disease hospital: Ottawa Board of Park Management v. Ottawa, 21 Occ. N. 378. See as to by-law providing for establishment of hospital, and resolution of council instructing board of health to purchase a site. Legality of delegation and resolution: Reed v. City of Ottawa, 21 Occ. N. 470. "*Quia timet*" action to restrain the use of a building as a smallpox hospital; evidence: Atty. Gen. v. Nottingham, 1904, 1 Ch. 673.

43.—(6) Consent of outside municipality to erection of hospital: Verner v. Toronto, 3 O. W. N. 586, 21 O. W. R. 170.

48. Medical superintendent of hospital is a public officer: Pye v. Toronto and Tweedie, 9 O. W. R. 632. Liability of municipality for negligence of officers

and servants employed in Isolation Hospital: Butler v. Toronto, 10 O. W. R. 876. If by the negligence of a competent and duly qualified medical man appointed by the corporation as physician to a city hospital, a patient is prematurely discharged and contagion is caused to other persons, the corporation is not liable: Evans v. Liverpool (1906), 1 K. B. 160.

49. Prevention of spread of contagious disease; conversion of hotel into hospital; malice: see Ward v. Lothian, 3 O. W. R. 362, 4 O. W. R. 502.

50. The consent of the owner or occupier is not a legal answer to an action (by one who can shew special damage) to restrain the corporation from erecting hospital: Reed v. Ottawa, 21 Occ. N. 470.

52. Application by physician for mandamus to compel the board to sign an order on the treasurer of the municipality: : Re Derby and South Plantaganet, 19 O. R. 51. Employment of physician to attend smallpox patients; remuneration: Ross v. London, 20 O. L. R. 578, 15 O. W. R. 685, 1 O. W. N. 612, 23 O. L. R. 74; and see notes to sec. 39.

56. Under this section health officers are justified in detaining a person who has been exposed to infection from a person suspected of having smallpox, but who really had measles: Mills v. Vancouver, 10 B. C. R. 99.

58. The directions of this section are imperative. Where instead of following them, the members of a local board send a person suffering from an infectious disease into an adjoining municipality, they are liable to repay that municipality the moneys reasonably expended in caring for him and preventing the spread of the disease: : Logan v. Hurlburt, 23 A. R. 628. Action brought in Division Court claiming payment by defendant as mother of person infected for whom expenses had been incurred; jurisdiction; interpretation of statute: Ameliasburg v. Pitcher, 8 O. W. R. 915. Remuneration of physician employed to attend smallpox patients: Ross v. London, 20 O. L. R. 578, 23 O. L. R. 74. See as to employment of physician and nurses:

Cameron v. Dauphin, 24 Occ. N. 99, 14 Man. L. R. 573. Liability of municipality for extraordinary expenses of quarantine: South Whitton v. Giroux, Q. R. 24 S. C. 361.

84. This section does not apply to a house or hospital for consumptive patients. Infectious diseases and hospitals are dealt with elsewhere: R. v. Playter, 1 O. L. R. 360. As to conviction and costs under this section: see R. v. Rowlin, 19 O. R. 199. "Such as may become offensive," construction of sentence and effect of these words: R. v. Barber Asphalt Co., 2 O. W. N. 819, 18 O. W. R. 778, 23 O. L. R. 372.

100. A meat salesman could be indicted at common law for knowingly selling or exposing meat for sale as fit for human food which in fact was not so: R. v. Stevenson, 3 F. & F. 106; R. v. Jarvis, 3 F. & F. 108. What amounts to exposure for sale: Daly v. Webb, Ir. R. 4 C. L. 309; Barlow v. Terrett, 1891, 2 Q. B. 107. Intent to sell: Shillito v. Thompson, 1 Q. B. D. 12; Mallinson v. Carr, 1891 1 Q. B. 48. *Scienter*: actual personal knowledge on the part of the owner not necessary to conviction: Blaker v. Tillstone, 1894, 1 Q. B. 345. Evidence that meat was wrongly condemned: Waye v. Thompson, 15 Q. B. D. 342. Where an offence is charged of selling meat unfit for food, and proceedings are taken on the charge under the Criminal Code, there is no power to change the charge to one under the Public Health Act: Rex v. Dungey, 2 O. L. R. 233.

115. See R. v. Dungey, 2 O. L. R. 223, note to sec. 100 *ante*. Unsanitary condition of rented house: Gordon v. Goodwin, 20 O. L. R. 327.

116. R. S. O. 1914, ch. 192, secs. 71, 72.

125. Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a Justice of the Peace upon a conviction regular on its face, and which was within the jurisdiction of the Justice making it: R. v. Coursey, 26 A. R. 685, 27 O. R. 181. Conviction for unloading a car of manure on railway premises: not essential to shew that it might endanger public health: R. v. Redmond, 24 O. R. 331.

CHAPTER 219.

The Vaccination Act.

Refer to: Fry on Vaccination; Shaw on Vaccination.

8. Compulsory vaccination: see R. v. Ritchie, Ex p. Jack, 35 N. B. Reps. 581. Unreasonable by-law: Montreal v. Garon, Q. R. 23, S. C. 363.

CHAPTER 220.

The Housing Accommodation Act.

CHAPTER 221.

The Milk Act.

3. Sale of milk: Re Foster & Hamilton, 31 O. R. 292.

CHAPTER 222.

The Milk, Cheese and Butter Act.

Refer to: Bartley on Adulteration of Food.

5. See R. v. Wason, 17 A. R. 221; R. v. Dowling, 17 O. R. 698.

CHAPTER 223.

The Dairy Products Act.

CHAPTER 224.

THE BREAD SALES ACT.

3. Formerly the regulation of the sale of bread was a matter for by-law under the Municipal Act: see 3 Edw. VII., ch. 19, sec. 583 (1), (11); see R. v. Chisholm, 9 O. W. R. 914, 14 O. L. R. 178.

4. Is this *ultra vires* Provincial Legislature as being a matter of "weights and measures" or "trade and commerce?:" see Re Bread Sales Act, 23 O. L. R. 238. "Small bread:" R. v. Nasmith Baking Co., 17 O. W. R. 116, 2 O. W. N. 116; Re Bread Sales Act, 2 O. W. N. 736, 18 O. W. R. 251, 23 O. L. R. 238.

CHAPTER 225.

THE FRUIT SALES ACT.

CHAPTER 226.

THE ENTRY OF HORSES AT EXHIBITIONS ACT.

2. This Act *intra vires*; conviction affirmed: see R. v. Horning, 8 O. L. R. 215.

CHAPTER 227.

THE DEBT COLLECTORS' ACT.

CHAPTER 228.

The Building Trades Protection Act.

6. Construction and application: see Hunt v. Webb, 4 O. W. N. 1225, 28 O. L. R. 589. Hoist not operated so as to afford reasonable safety to those using it: Schofield v. Blome, 5 O. W. N. 328, 25 O. W. R. 282.

CHAPTER 229.

The Factory, Shop and Office Building Act.

2.—(*b*) It is not enough that the employer take the statement of a child as to his age. The employer must satisfy himself by reasonable means that the applicant for work is of the requisite age, and it is for the jury to say whether reasonable precautions have been taken: McIntosh v. Firstbrook Box Co., 8 O. L. R. 419, 10 O. L. R. 526. Where employer had no knowledge that child under age of 14, defendants were liable under Employer's Liability Policy although employment was contrary to the Act: Morton v. Ontario Accident, 11 O. W. R. 828, 12 O. W. R. 269, 14 O. L. R. 1010, 1 O. W. N. 199. An action for injury received in an elevator may fail at common law and under R. S. O. 1914, ch. 146, but the plaintiff being under 14, a *prima facie* case is made out simply by proof of age, the employment, and the injury: Jones v. Morton Co., 14 O. L. R. 402. Children: see Roberts v. Taylor, 31 O. R. 10; Fahey v. Jephcott, 2 O. L. R. 449; O'Brien v. Sanford, 22 O. R. 136; and see *post* secs. 10, 26, 54, and notes.

2.—(*e*) A store occupied by merchant tailors, the rear part being used as a tailoring department and the front as a retail sale department, 14 persons being employed in the former, is a "factory:" R. ex rel. Burke v. Ferguson, 13 O. L. R. 479.

2.—(*k*) "Owner" means the owner of the building who may or may not be the employer: R. ex rel. Ferguson v. Burke, 13 O. L. R. 479, 8 O. W. R. 957; see Toller v. Spiers and Pond, 19 T. L. R. 119.

2.—(*q*) The employer has to exercise more than ordinary precautions for the well being and safe guarding of minors who have been put into factory work contrary to the prohibition of the legislature: O'Brien v. Sanford, 22 O. R. 136. As to young persons and duty to caution: Lawson v. Packard Electric, 10 O. W. R. 525, 11 O. W. R. 72; see also Cribbs v. Kynoch, 1907, 2 K. B. 548; Smith v. Baker, 1891, A. C. 354.

9. No cause of action is given to an infant plaintiff who was injured when trespassing, the machine not being operated in dangerous proximity to the highway nor situated so as to allure children: Smith v. Hayes, 29 O. R. 283.

10. See Jones v. Morton Co., 14 O. L. R. 402, note to sec. 2 (b); see also Prior v. Slaithwaite Spinning Co., 1898, 1 Q. B. 881; and see notes to secs. 32, 54 *post*.

32. Where a young person does work in a factory during meal times, the occupier of the factory is liable to conviction though he may not have employed the young person to do the work: Prior v. Slaithwaite Spinning Co., 1898, 1 Q. B. 881.

43.—(3) In proceedings where owners of a factory are called upon to use a fan or other mechanical means to prevent the inhalation of dust generated to a dangerous extent, it is unnecessary to prove by evidence that any worker has sustained actual injury. It is enough to shew that dust was generated to such an extent that its tendency was necessarily to injure workers in course of time: Hoare v. Ritchie, 1901, K. B. 434.

54. It was held that the employment of a child under 14 in a factory, at work other than that specified as proper, although it subjects the employer to a penalty, does not give rise to an action for damages

unless there is evidence to connect the violation of the Act with the accident: (Roberts v. Taylor, 31 O. R. 10); but in a later case it was held that employing a girl under 14 to work between the fixed and traversing parts of a machine in breach of the provisions of this section, is in itself sufficient to render the master *prima facie* liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducting to the accident need not be shewn: Fahey v. Jephcott, 1 O. L. R. 18, 2 O. L. R. 449, (overruling Roberts v. Taylor, 31 O. R. 10); see also Jones v. Morton Co., 9 O. W. R. 500 and notes to sec. 2 (b) *ante*. Child cleaning machine in motion: Taylor v. Dawson, 1911, 1 K. B. 145.

55. The doctrine of common employment affords no defence where injury has been caused to a servant by a breach of a statutory duty imposed on the master: David v. Britannic Merthyr Coal Co., 1909, 2 K. B. 146; and see 26 T. L. R. 164. The maxim *volenti non fit injuria* does not apply where the accident is caused by a breach of statutory duty: Baddeley v. Earl Granville, 19 Q. B. D. 423; McClemont v. Kilgour Mfg. Co., 27 O. L. R. 305. Failure to obey the directions of the Factories Act as to guarding dangerous machinery, which results in injury being caused an employee, gives a cause of action: Groves v. Lord Wimborne, 1898, 2 Q. B. 402; Billing v. Semmens, 7 O. L. R. 340, 8 O. L. R. 540; Meyers v. Sault Ste. Marie Pulp Co., 3 O. L. R. 600, 33 S. C. R. 23; Pomfret v. Lancashire and Yorkshire Ry., 1903, 2 K. B. 718; Blenkinsopp v. Ogden, 1898, 1 Q. B. 783; Godwin v. Newcombe, 1 O. L. R. 525; Carnahan v. Robert Simpson Co., 32 O. R. 328; Moore v. Moore, 4 O. L. R. 167; McIntosh v. Firstbrook, 8 O. L. R. 419, 10 O. L. R. 526; McBain v. Waterloo Mfg. Co., 8 O. L. R. 333. See R. S. O. 1914, ch. 146, sec. 3 (*a*), notes, especially notes on common law and statutory liability, defective system, defects in the ways, etc., and common employment; also sec. 3 (*b*), notes.

It was held that the onus was on the plaintiff to shew that the mechanical device has not been approved. If it has neither been approved or disapproved, the question still is whether the device

used is of a character and make as to render the use of it unreasonable: Black v. Ontario Wheel Co., 19 O. R. 578. But in a more recent case it was held that the onus was on the defendants, but that it was not necessary for them to shew that the device in concrete form as applied to the elevator had been approved, but only that the kind of device used had been approved: Carnahan v. Robert Simpson Co., 32 O. R. 328. There is no cause of action where the circumstances make it impossible reasonably to draw the inference that the negligence or omission with which the defendants are charged was the cause of the injury complained of: Corcoran v. Montreal Rolling Mills, 26 S. C. R. 595; Kerwin v. Canadian Coloured Cotton Mills, 29 S. C. R. 478; Wakeline v. London S. W. Ry., 12 App. Cas. 41, 1896, 1 Q. B. 196; Bergeron v. Tooke, 27 S. C. R. 567. The defendants may be liable where there is a breach of the Act and no direct evidence of how the deceased was injured: Wilson v. Lincoln Paper Mills, 9 O. L. R. 119. The guarding is for the protection not only of those operating the machinery, but also of those whose business brings them in proximity to such machinery: Moore v. Moore, 4 O. L. R. 167; see also Lawson v. Packard Electric, 16 O. L. R. 1. Guarding machinery may be impracticable: Allard v. Cleveland Saw Mills, 12 O. W. R. 729. Dangerous machinery not securely guarded: Doherty v. Macdonell, 15 O. W. R. 176, 1 O. W. N. 368; Gower v. Glen Woolen Mills, 4 O. W. N. 467, 23 O. W. R. 553, 28 O. L. R. 193; McClemont v. Kilgour, 20 O. W. R. 770, 21 O. W. R. 856, 3 O. W. N. 446, 999, 4 O. W. N. 313, 27 O. L. R. 305; Billing v. Semmens, 7 O. L. R. 340, 8 O. L. R. 540; Birtwistle v. Hindle, 1897, 1 Q. B. 192; Godwin v. Newcombe, 1 O. L. R. 525; Choate v. Ontario Rolling Mill, 27 A. R. 155; O'Connor v. Hamilton Bridge Co., 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598; Rodgers v. Hamilton Cotton Co, 23 O. R. 425; Moore v. The J. D. Moore Co., 4 O. L. R. 167; Wilson v. Lincoln Paper Mills, 9 O. L. R. 119; Lawson v. Packard Electric Co., 10 O. W. R. 525, 11 O. W. R. 72; Deeley v. Canadian Westinghouse, 9 O. W. R. 736; Race v. Harrison, 10 T. L. R. 92; Blamires v. Lancashire & Yorkshire Ry., L. R. 8 Ex. 283; Sharp v. Pathhead Spinning Co., 12 Rettie 574.

Hamilton v. Groesbeck, 19 O. R. 76, 18 A. R. 437, is no longer law, having been decided under a former wording of the Act: Wilson v. Owen Sound Portland Cement, 27 A. R. 328. And see also as to enforcement of the Act by penalty only: Finlay v. Miscampbell, 20 O. R. 29. Employer's liability for breach of statutory liability; assumption of risk: see Annotation, 5 D. L. R. 328. See R. S. O. 1914, ch. 146, notes to sec. 3 (*a*), especially notes on defective system, dangerous machines and evidence of cause of death.

58. Where an elevator was not part of the employer's premises but was used as an adjunct, it was sufficient actual occupation for the plaintiff's purposes in a damage action: Jones v. Morton Co., 9 O. W. R. 500; see Bacon v. Dawes, 3 T. L. R. 557.

63. Right of tenant to recover from landlord of factory premises, expenses for structural alterations to which the tenant was put by reason of refusal of authorities to certify the demised premises as suitable for a bakehouse: Stukey v. Hooke, 1906, 2 K. B. 20.

81. Penalty: see Finlay v. Miscampbell, 20 O. R. 29.

82. See R. S. O. 1914, ch. 90. The present procedure under that Act and under the Code is apparently intended to obviate the difficulty raised in R. v. Simpson, 28 O. R. 231: see R. v. Ferguson, 8 O. W. R. 306.

84. Application to quash early closing by-law affecting grocers in Ottawa: see Re Halliday and Ottawa, 10 O. W. R. 46, 14 O. L. R. 458, and see 15 O. L. R. 65. On such an application it may be shewn that persons who signed the by-law as presumedly of the trade or business whose shops the by-law was designed to close, were not, in fact, of such trade or business. The time specified for the final passing of the by-law, viz., one month after presentation of the petition, is directory. Petitioners have the right of withdrawal before the final passing of the by-law: *Ib.*, 10 O. W. R. 46, 14 O. L. R. 458. The council cannot delegate to the clerk the duty of ascertaining whether the petition for the by-law is properly

signed: Re Halliday and Ottawa, 15 O. L. R. 65. As to right of withdrawal of name from petition: see also Gibson v. North Easthope, 21 A. R. 504, 24 S. C. R. 707; Keeling v. Brant, 20 O. W. R. 551. A by-law provided that all shops should be closed at 7 p.m., but that it should not be considered an infraction of the by-law for any shopkeeper to supply articles after 7 p.m. to mariners, etc., from vessels calling at the port of the town. Held bad as discriminating between classes of buyers and classes of tradesmen: R. v. Flory, 17 O. R. 715. Councils can pass early closing by-laws without petition: Simpson v. Caledonia, 20 O. W. R. 874, 3 O. W. N. 503. Method of computing number of barbers in city: wording of statute: validity: McCoubrey v. Toronto, 4 O. W. N. 573, 23 O. W. R. 653, 24 O. W. R. 904. Where a motion to quash is refused by the Judge who hears it, see as to application for leave for a further appeal: Re Reddock and Toronto, 19 P. R. 247.

84.—(4) For "2" in last line, read "3:" 4 Geo. V. ch. 2, sched. (36).

CHAPTER 230.

THE MATERNITY BOARDING HOUSE ACT.

CHAPTER 231.

THE CHILDREN'S PROTECTION ACT.

1. Cf. Imperial Act of 1871, 34 Vic. ch. 3.

2. Section considered: Re Maher, 28 O. L. R. 419. Power given to two Justices does not introduce provisions of R. S. O. 1914, ch. 90: Re Grainger, 28 O. R. 255.

9. See Re Faulds, 12 O. L. R. 245.

11. Appeal: see Re Grainger, 28 O. R. 255.

27. Effect of this Statute on the jurisdiction of the Supreme Court as inheritor of the powers of the Court of Chancery; sections considered: Re Maher, 28 O. L. R. 419. A writ of habeas corpus is a proper method of obtaining production of the child; practice considered: Re Kenna, 5 O. W. N. 393. Power of Supreme Court to deal with custody of infant whose case has been dealt with by Commissioner: Re Maher, 4 O. W. N. 1009, 28 O. L. R. 419. Leaving a child with those who had contracted to take proper care of it is not abandonment or desertion. Giving up all claim on child is not abandonment. These words involve such disregard of the welfare of the child as would shew the parent to be unfit to again receive it in his charge: Re Davis, 13 O. W. R. 939, 18 O. L. R. 384. Abandonment or abdication of parental right; when Act applies: Re Faulds, 12 O. L. R. 245. Abandonment of right of parent: Re Longaker, 14 O. W. R. 321. The putative father of an illegitimate child has no rights in respect of its custody: Re Maher, 28 O. L. R. 419. When the legal guardian's custody may be displaced in favour of the parent: Re Kenna, 4 O. W. N. 1395, 5 O. W. N. 393.

28. Construction and application of section and power of Court. Right of father to insist on his religion for child: Re Kenna, 4 O. W. N. 1395, 24 O. W. R. 690; 5 O. W. N. 393.

CHAPTER 232.

THE FEMALE PATIENTS' AND PRISONERS' PROTECTION ACT.

CHAPTER 233.

THE JUVENILE COURTS ACT.

CHAPTER 234.

THE MINORS' TOBACCO SALES ACT.

CHAPTER 235.

THE EGRESS FROM PUBLIC BUILDINGS ACT.

CHAPTER 236.

THE THEATRES AND CINEMATOGRAPHS ACT.

10. Age of children: R. v. Bruce Paton, 20 O. W. R. 533.

CHAPTER 237.

THE PREVENTION OF ACCIDENTS BY FIRES IN HOTELS.

6. Neglect to provide fire escape in bedroom: Hagle v. Laplante, 20 O. L. R. 339, 15 O. W. R. 289, 1 O. W. N. 413.

9. Cause of action arising by breach of statutory duty to provide fire escape not taken away by this provision: Hagle v. Laplante, 20 O. L. R. 339, 15 O. W. R. 289, 1 O. W. N. 413.

CHAPTER 238.

THE THRESHING MACHINES ACT.

CHAPTER 239.

THE OFFENSIVE WEAPONS ACT.

CHAPTER 240.

THE COUNTIES REFORESTATION ACT.

CHAPTER 241.

THE FOREST FIRES PREVENTION ACT.

CHAPTER 242.

THE FIRE GUARDIANS ACT.

CHAPTER 243.

THE FIRES EXTINGUISHMENT ACT.

CHAPTER 244.

THE BEACH PROTECTION ACT.

CHAPTER 245.

THE BEACHES AND RIVER BEDS ACT.

CHAPTER 246.

The Dog Tax and Sheep Protection Act.

11. Apprehended danger to sheep: McNair v. Collins, 3 O. W. N. 1639, 22 O. W. R. 891, 27 O. L. R. 44.

12. The offence under this section is having in possession a dog which, wherever the act is done, has worried, killed or injured sheep. Therefore the offence is committed where the defendant lives and this bears on the magistrate's jurisdiction: R. v. Duering, 2 O. L. R. 593.

14. The right of action given to the owner of sheep killed by dogs is to be prosecuted with the usual procedure of the appropriate forum, and the usual rules as to juries and the apportionment of damages by them apply: Fox v. Williamson, 20 A. R. 610. The owner of sheep killed or injured by a dog can recover damages under this Act without proving that the dog had a propensity to kill or injure sheep, and the Act applies to a case where the dog has been set on the sheep: R. v. Perrin, 16 O. R. 446. The Act applies to towns which have withdrawn from the county municipalities: Williams v. Port Hope, 27 C. P. 548. A proceeding under this section is independent of the proceeding under sec. 12 and the magistrate has no power to award damages for the injury to the sheep without a separate complaint: R. v. Duering, 2 O. L. R. 593. Damage by animals: see Underhill on Torts, art. 90.

17. See R. S. O. 1914, ch. 192, sec. 398 (29) and notes.

18. Discretion of Council in respect of amount paid: Craig v. Malahide, 13 O. W. R. 686.

CHAPTER 247.

THE POUNDS ACT.

2. A by-law enacting that certain animals shall not run at large does not impliedly allow other animals not named to do so contrary to common law: Jack v. Ontario S. & H. Ry., 14 U. C. R. 328.

3. By the common law, it is trespass if cattle are found depasturing on a highway (Dovaston v. Payne, 2 H. Black 527; Stevens v. Whistler, 11 East 51), but by the law of Ontario such a use of the highway may be legalized by the municipal authorities, in whom the highway is vested: see R. S. O. 1914, ch. 192, secs. 399 (52)-(55), 434. This involves the right to let cattle graze and make a charge therefor: Ross v. East Nissouri, 1 O. L. R. 353. The effect of this Act is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass. Cattle feeding in the owner's enclosure or shut up in his stable cannot be held to be running at large when they happen to escape from such stable or enclosure into the neighbouring grounds: McSloy v. Smith, 26 O. R. 509. Running at large: see Ibottson v. Henry, 8 O. R. 625. Cattle running at large going on Crown lands and thence on railway: see Fensom v. C. P. R., 7 O. L. R. 254, and see R. S. O. 1914, ch. 185, sec. 281, *et seq.*, and notes.

4. Cattle running at large on Crown lands: by-laws: power of townships in unorganized districts to prevent cattle running at large: Fensom v. C. P. R. 7 O. L. R. 254.

7. A pound-keeper is a public officer and is not liable for detaining a distress unless he has done some act beyond his duty whereby the owner has suffered particular damage not recoverable against the party impounding, or unless he makes himself a party to

an illegal act of the distrainor: Waddell v. Chisholm, 9 C. P. 125; see also Denison v. Cunningham, 35 U. C. R. 383; Davis v. Williams, 13 C. P. 365. A pound-keeper cannot detain and sell an animal seized by him for damage done to his own close, but only such as shall be brought to him by some other person: Brown v. Williams, 6 O. S. 656.

10. Selling after security given: see Sargeant v. Allen, 29 U. C. R. 384. Wrongful detention: Barber v. Armstrong, 5 P. R. 153.

19. See McSloy v. Smith, 26 O. R. 509, note to sec. 3, *ante*. As to setting aside award of fence viewers: see Re Cameron, 25 U. C. R. 533. Award conclusive as to legality of fence: Short v. Palmer, 24 U. C. R. 633; Stedman v. Wasley, E. T. 4 Vic.

CHAPTER 248.

The Injured Animals Act.

CHAPTER 249.

The Ontario Stallion Act.

CHAPTER 250.

The Natural Gas and Oil Wells Act.

CHAPTER 251.

The Steam Threshing Engines Act.

CHAPTER 252.

THE STEAM BOILER ACT.

CHAPTER 253.

THE NOXIOUS WEEDS ACT.

3. An occupier of land is at common law under no obligation to cut thistles naturally growing on his land so as to prevent them seeding. If he neglects to cut them and they seed and blow on his neighbour's land and do damage, he is not liable: Giles v. Walker. 24 Q. B. D. 656; see also Ponting v. Noakes, 1894, 2 Q. B. 281. Municipal corporations are not "owners" or "occupants" of highways in their municipalities under this Act, nor does the word "land" therein include street or highway: Osborne v. Kingston, 23 O. R. 382. The statute does not change the character of the inaction imputed as waste. A tenant for life is not thereby made liable to the remainderman though there may be a direct remedy against the occupant or owner under the statute: Patterson v. Central Canada Loan, 29 O. L. R. 134. For a railway company to permit grass and weeds to grow on a side track is not such negligence as to make it liable to compensate an employee who is injured in consequence, in the course of his employment: Wood v. C. P. R., 6 B. C. R. 561, 30 S. C. R. 110. (See R. S. C. 1906, ch. 37, sec. 296.)

6. The appointment of an inspector is discretionary with the council unless petitioned as provided. The appointment of an overseer is quite discretionary. In the absence of such appointments no duty is cast on the council to cut down noxious weeds growing in the streets: Osborne v. Kingston, 23 O. R. 382.

CHAPTER 254.

THE FRUIT PEST ACT.

CHAPTER 255.

THE BARBERRY SHRUB ACT.

CHAPTER 256.

THE GINSENG ACT.

CHAPTER 257.

THE BEE PROTECTION ACT.

CHAPTER 258.

THE FOUL BROOD ACT.

6. Liability for contravention of the statute. Consideration of application of statute passed for the benefit of a class: McKay v. Davey, 28 O. L. R. 322.

CHAPTER 259.

The Line Fences Act.

3. A boundary fence should be so placed that when completed the vertical centre of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land: Cook v. Tate, 26 O. R. 403. Adjoining landowners made an agreement to build a line fence less than 5 feet high between their lots, each assuming to build and repair a definite portion. The defendant allowed his portion to fall into disrepair and his cattle got on the plaintiff's land and did damage. A township by-law provided that no fence should be less than 5 feet high. The defendant was held liable and such liability was not displaced by the by-law: Barber v. Cleave, 2 O. L. R. 213. Consideration of these sections and proceedings of fence viewers: Delamatter v. Brown, 13 O. W. R. 58, 862.

7. Duties of fence-viewers in making award: Miller v. Mackenzie, 14 O. W. R. 542. It is manifest that the fence-viewers call in a surveyor merely to aid them to do what they have authority to do without him: Delamatter v. Brown, 13 O. W. R. 862. As to awards, see R. S. O. 1914, ch. 67, and notes.

8. As to reception of copy of fence-viewers' award as evidence: see Warren v. Deslippes, 33 U. C. R. 59.

12. Right of appeal: see Re McDonald and Cattenach, 5 P. R. 288, 30 U. C. R. 432. See Bicknell and Seager, p. 253. The provisions of this Act apply to the Snow Fences Act: see R. S. O. 1914, ch. 211, sec. 3 (6).

CHAPTER 260.

The Ditches and Watercourses Act.

2. See R. S. O. 1914, ch. 42 and ch. 198, and notes.

3.—(*j*) If the initiating party is not really an owner, the filing of a declaration of ownership under the Act will not give jurisdiction: Logan v. McKillop, 25 A. R. 498, 29 S. C. R. 702. Prior to amendment of 62 Vic. see as to "owner:" Logan v. McKillop, 25 A. R. 498, 29 S. C. R. 702; McLellan v. Chinguacousy, 27 A. R. 355; York v. Osgoode, 24 O. R. 12, 21 A. R. 168, 24 S. C. R. 282.

5. A municipal council could not appoint B. engineer, pursuant to the former wording of this section, when they had already appointed A. under a previous by-law without notice to A. or revoking his appointment: Turtle v. Euphemia, 31 O. R. 404. See Cuddahee v. Mara, 12 O. L. R. 522, noted *post*.

6. Sufficient outlet: cf. R. S. O. 1914, ch. 198, secs. 2 (*m*), and 63 notes. "A sufficient outlet" is one that enables the water to be discharged without injuriously affecting the lands of another, and if the outlet chosen by the engineer is not a proper outlet, his award is no protection to those acting under it as against one not a party to it: McGillivray v. Lochiel, 8 O. L. R. 446. As to damages and proportion attributable to each: *Ib.*

8. Municipality: see McLellan v. Chinguacousy, 27 A. R. 355. Initiating party not owner: see Logan v. McKillop, 25 A. R. 498, 29 S. C. R. 702. Initiating party not owner; are the proceedings valid if there is a majority without him: York v. Osgoode, 24 O. R. 12, 21 A. R. 168, 24 S. C. R. 282. The provisions of this section, the filing of the declaration and the calling of the meeting are directory provisions only and are not essential to the jurisdiction of the engineer and may be cured by sec. 23: Maisonneuve v. Roxborough, 30 O. R. 127. See also Mandley v. Monck, 14 O. W. R. 65.

9. A township municipality within the limits of which a ditch is constructed under this Act, in accordance with the engineer's award made in assumed compliance with a requisition of ratepayers, is not liable for damages caused by the construction though the requisition be in fact defective: Seymour v. Maidstone, 24 A. R. 370.

16. Mandamus will not lie against municipality to compel their engineer to act: Dagenais v. Trenton, 24 O. R. 343.

19. Award by engineer invalidly appointed: Turtle v. Euphemia, 31 O. R. 404. No action lies to recover damages because of a failure to comply with an award made under this Act. The remedy, if any, is under the Act itself: Dalton v. Ashfield, 26 A. R. 363. The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award: *Ib.* The only remedy for non-completion of the work is that provided by the Act itself: Hepburn v. Orford, 19 O. R. 585; see sec. 28, *post*. Where a municipality has, pursuant to an award in proceedings initiated by it, constructed without negligence a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining owner in case his land has been injuriously affected by the drain: Re McLellan and Chinguacousy, 27 A. R. 355; see R. S. O. 1914, ch. 192, sec. 325.

21.—(1) Application of Act to railways: see Miller v. G. T. R., 45 U. C. R. 222; McCrimmon v. Yarmouth, 27 A. R. 636.

21.—(8) The provisions of this section are directory merely: Re McFarlane and Miller, 26 O. R. 516. Appeal: see Re McDonald and Cattenach, 30 U. C. R. 432.

23. The validating power of this section will not cover an award or proceedings where the party initiating is not an owner: Logan v. McKillop, 25 A. R. 498, 29 S. C. R. 702. Nor when there is a fundamental

invalidity in the appointment of the engineer: Turtle v. Euphemia, 31 O. R. 404. It will cover non-compliance with the exact terms of sec. 8: Maisonneuve v. Roxborough, 30 O. R. 127.

25. Appeals and procedure: see Bicknell and Seager, pp. 253, 278, 559, 561.

26. Moneys paid by a municipality under this Act for the construction of a ditch when placed on the collector's roll become a charge on the lands traversed by the ditch in the hands of the respective owners for the time being: Wicke v. Ellice, 11 O. L. R. 422. Authorization of reeve for amounts being placed on collector's roll: Rose v. Morrisburg, 28 O. R. 245.

28. See Hepburn v. Orford, 19 O. R. 585; Dalton v. Ashfield, 26 A. R. 363; also Kelly v. O'Grady, 34 U. C. R. 562, note to sec. 19, *ante*; see also Kelly v. O'Grady, 34 U. C. R. 562. Time for engineer to take action: see Rose v. Morrisburg, 28 O. R. 245. Duty of engineer to inspect: O'Byrne v. Campbell, 15 O. R. 339. Work under an award not performed as contracted for may be relet: Cuddahee v. Mara, 12 O. L. R. 522.

29. Where a council fixed the engineer's charges at $5.00 per day, his certificate to the clerk under this section that he was entitled to $45, constitutes a *prima facie* valid claim for that amount: Cuddahee v. Mara, 12 O. L. R. 522.

33. Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair, cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shewn that even if the drain had been in repair the same injury would have resulted: Mackenzie v. West Flamborough, 26 A. R. 198. Damages; remedy: Mandley v. Monck, 14 O. W. R. 65, 1 O. W. N. 271. See R. S. O. 1912, ch. 198, secs. 80, 98, notes.

35. The township engineer, on the reconsideration of an award, may make any award which might have been

made in the first instance: Cuddahee v. Mara, 12 O. L. R. 522.

37. Mandatory injunction requiring townships to open up and maintain culvert: Vanderberg v. Markham, 15 O. W. R. 321, 1 O. W. N. 441.

CHAPTER 261.

The Cemetery Act.

2. Interment of the dead. As to cremation, see Gilbert v. Buzzard and Boyer, 2 Hag. Consist. Rep. 333; R. v. Stephenson, 13 Q. B. D. 331. To burn a dead body is not in itself a misdemeanour: R. v. Price, 12 Q. B. D. 247.

25. Common law right to burial: R. v. Coleridge, 2 B. & Ald. 806; Andrews v. Cawthorne, Willes 536; R. v. Taylor, Willes 538, n.

29. As to manner of burial required by law: Gilbert v. Buzzard and Boyer, 2 Hag. Consist. Rep. 333. Vaults: see Bryan v. Whistler, 8 B. & C. 293; Rooker v. Vicar of Northfleet, 3 Add. 14.

44. Rights of plot-owners and trustees: Serson v. Willson, 13 O. W. R. 180.

CHAPTER 262.

The Ontario Game and Fisheries Act.

8. Ownership of wild animals: Re Long Point and Anderson, 19 O. R. 487, 18 A. R. 401.

13. Deer hounds at large: R. v. Crandall, 27 O. R. 63.

23 Trespass in pursuit of game: R. v. Lansing, 14 O. W. R. 1007, 1 O. W. N. 186. *Bona fide* assertion of right; jurisdiction of Justice of the Peace: R. v. Harran, 3 O. W. N. 1107, 21 O. W. R. 951. As to ownership of game followed on to the lands of another, see Deane v. Clayton, 7 Taunt. 489; Churchyard v. Studdy, 14 East 249. Game started and killed wrongfully on the lands of another becomes the property of the owner of the land: Blades v. Higgs, 11 H. L. Cas. 621.

CHAPTER 263.

THE PROTECTION OF BIRDS ACT.

CHAPTER 264.

THE WOLF BOUNTY ACT.

CHAPTER 265.

THE DEPARTMENT OF EDUCATION.

4. Contribution to County Model School by a town in a county and municipality separated from it: Toronto Junction P. S. Board v. York, 3 O. L. R. 416.

5. Regulation as to hours of study: Shaver v. Cambridge, 18 O. W. R. 501, 2 O. W. N. 686.

CHAPTER 266.

THE PUBLIC SCHOOLS ACT.

Refer to McMurrich and Roberts, School Law of Ontario; Maclean, Law Concerning Secondary and Preparatory Schools (Eng.).

2.—(*i*) "Ratepayer:" see McFarlan v. Greenock School Trustees, 8 O. W. R. 672, 9 O. W. R. 183, 13 O. L. R. 220.

8. Religious instruction: Shaver v. Cambridge, 18 O. W. R. 501, 2 O. W. N. 686.

11.—(1) Meeting of "ratepayers;" cf. see 2 (*i*), 59, 54 (4). When the word "ratepayers" in the Act is used in relation to those who have a right to vote, it includes farmers' sons: McFarlan v. Greenock School Trustees, 8 O. W. R. 672, 13 O. L. R. 220, 9 O. W. R. 183. Sufficient consent of meeting: see Re McCormack and Colchester, 46 U. C. R. 65. What is a sufficient meeting: see Re Taber and Scarboro', 20 U. C. R. 549. The school trustees cannot, without reference to the ratepayers, select and purchase the school site: Orr v. Ranney, 12 U. C. R. 377. Dissent of school trustees from a decision of ratepayers as to school site must be intimated promptly: Coupland v. School Trustees of Nottawasaga, 15 Gr. 339. Site selected at one meeting changed at a subsequent meeting: see Wallace v. School Trustees of Lobo, 11 O. R. 648. The vital matter to be voted on must be laid before the meeting so that a fair vote can be had unequivocally indicating the mind of the majority on the particular point: McGugan v. School Trustees of Southwold, 17 O. R. 428. The words "selection of a site for a new school house" refer to a selection of a site in a newly established school section, and probably also to the selection of a site for an additional school house, while the words "change of site for an existing school house" refer to the case where a site has been chosen and a school house provided, but which it is deemed desirable to abandon and to choose a new

site. The section does not apply to the case of a new school house to be built on an existing site: Re P. S. Trustees of Cartwright, 4 O. L. R. 272, 5 O. L. R. 699. As to purchase of school sites: see R. S. O. 1914, ch. 277.

11.—(2) It is only in case of a difference between the trustees on the one hand and a majority of the meeting of ratepayers on the other as to a school site *selected* by the trustees that an arbitration is to be had. Where the majority voted at the meeting in favour of a change of site without any selection of site having been made by the trustees, there was no foundation for an arbitration and an award was absolutely void: Re P. S. Trustees of Cartwright, 4 O. L. R. 272, 5 O. L. R. 699. Before arbitration proceedings can be taken and an award made the trustees must first come to a decision, which the ratepayers decline to approve of on the matter being submitted to them. An award made without such pre-requisites is nugatory, and the fact that it is valid on its face is no answer to an application for a mandamus to compel a township municipality to pass a by-law to raise the amount required for the purchase of a site and the erection of a school house where it appears to have been made without jurisdiction: Re P. S. Trustees of Cartwright, 4 O. L. R. 272, 5 O. L. R. 699. Difference of opinion authorizing an arbitration: Township of Toronto v. McBride, 29 U. C. R. 13. Appointment of arbitrator at subsequent meeting: Malcolm v. Malcolm, 15 Gr. 13. Sufficiency of reference and award: Vance v. King, 21 U. C. R. 187; Ryland v. King, 12 C. P. 198. Under the law as it stood prior to 1904, the arbitrators appointed in pursuance of this section could determine only whether or not the site selected by the trustees was a suitable one. They had no power to select another site: Re Sombra P. S., Sec. No. 26, 6 O. L. R. 585. As to effect of amendments of 1904: see Re McLeod and Tay, 10 O. W. R. 649,

11.—(3) Reconsideration: Williams v. Plympton, 7 C. P. 559.

15.—(1) In by-laws altering existing school sections or adding territory to them, the lots and parts of lots

dealt with must be accurately and exactly described: Re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49. Indefiniteness in description of boundaries: Re Simmons and Chatham, 21 U. C. R. 75. Uncertainty: Haake v. Markham, 17 U. C. R. 562. Sufficiency of description; map as evidence: Re Shorey and Thrasher, 30 U. C. R. 504. A motion to quash a by-law of a municipality altering the boundaries of a school section on the ground that it is invalid, must since 1906, be made to the Judge of the county or district in which the section is situate and not to the Supreme Court, which has jurisdiction only on an appeal: Re Almonte Board of Education and Ramsay, 12 O. L. R. 486. By-law informal but not substantially defective: Re Leddingham and Bentinck, 29 U. C. R. 206. Necessity for notice: Griffiths v. Grantham, 6 C. P. 274; Re Shaw and Manvers, 19 U. C. R. 288; Re Isaac and Euphrasia, 17 U. C. R. 205. Proof of notice: Re Taylor and West Williams, 30 U. C. R. 337. Sufficiency of notice; "parties affected:" Re Patterson and Hope, 30 U. C. R. 484. If sufficient notice given, township Council not bound to await any request before passing by-law: Re Ley and Clarke, 13 U. C. R. 433. The by-law establishing a township board may be attacked with a view to its repeal again and again so long as the agitation against it subsists: Re Tuckersmith P. S. Board, 16 O. R. 604. Union of sections in different townships: see sec. 21, *infra*.

15.—(2) Time of taking effect: Cotter v. Darlington, 11 C. P. 265; Re McIntyre and Elderslie, 27 C. P. 58; Re Patterson and Hope, 31 U. C. R. 360; Re Isaac and Euphrasia, 17 U. C. R. 205; Re McAlpine and Euphemia, 45 U. C. R. 199. Five years' limit: see Re Amaranth and Dufferin, 30 O. R. 43. Where a by-law has been regularly passed creating a new rural school section from parts of existing school sections, it is *ultra vires* a township council to repeal or alter the by-law until the expiration of five years, even where the repealing by-law is passed before that creating the new section is to take effect. The only remedy is to appeal to the County Council under sec. 17: Re Powers and Chatham, 29 O. R. 571, 26 A. R. 483. "Year" means calendar year commencing 1st January and ending 31st December: Re Asphodel and Humphries, 24 O. R. 682.

15.—(4) Incorporation into city: see Carleton v. Ottawa P. S. Board, 25 C. P. 137.

17.—(1) Appeal: see Re Powers and Chatham, 29 O. R. 571, 26 A. R. 483, see note to sec. 15 (2), *ante*. There is no appeal from the refusal of a township council to "divide" a school section: Re Hamilton School Section, 29 O. R. 390. A county council has no jurisdiction to entertain appeal or appoint arbitrators unless a notice of appeal has been duly given: Re Martin and Simcoe, 25 O. R. 411. Appeal against by-law uniting school sections: see Re Proper and Oakland, 34 U. C. R. 266. Parties to action to set aside by-law as invalid: Holt v. Medonte, 22 O. R. 302.

17.—(3) There is no right to appoint arbitrators unless notice of appeal is duly given under sub-sec. 1 or satisfactory evidence of waiver of objection by all persons interested: Re Martin and Simcoe, 25 O. R. 411. Provision for appointment of arbitrators is permissive and not imperative: Re Wooliver and Kent, 31 O. R. 606. Arbitrators have no power to unite two school sections on an appeal against a refusal to comply with an application to alter boundaries: Re Southwold School Sections, 3 O. L. R. 81. There is power to remit the matters or any of them for reconsideration by the arbitrators: see R. S. O. 1914, ch. 65, sec. 12; Re Churchill and Hullett, 11 O. L. R. 284. The arbitrators appointed on appeal from a refusal of the township council to alter school sections have power only to grant or refuse what is asked for in the petition: Re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49. But there is no reason for limiting the arbitrators' jurisdiction to an exact conformity with the prayer of the ratepayer's petition or a rejection of their request: Re Churchill and Hallett, 11 O. L. R. 284. The arbitrators appointed under sec. 17 have much less extensive powers than those appointed under secs. 21 and 22: Re Mersea, 12 O. W. R. 88, 16 O. L. R. 617. Procedure on appeal from school award: Re Mersea, 12 O. W. R. 417, 16 O. L. R. 617.

19. See sec. 28 note. As to purchase of school sites, see R. S. O. 1914, ch. 277.

20.—(1) Existence *de facto*: see Nichol School Trustees v. Maitland, 26 A. R. 506.

20.—(3) A motion to quash a by-law of a municipality altering the boundaries of a school section on the ground that the by-law is invalid must since 1906 (6 Edw. VII. ch. 53, sec. 29 (4) be made to the Judge of the County Court of the county in which the section is situate and not to the High Court: Re Almonte and Ramsay, 12 O. L. R. 486, 8 O. W. R. 147. Appeal to the High Court by leave: Re Mersea, 12 O. W. R. 88, 16 O. L. R. 617.

21.—(1) Right to question in action validity of formation of union school section: Askew v. Manning, 38 U. C. R. 345. Union of sections in different townships: see Halpin v. Calder, 26 C. P. 501; Re Ley and Clarke, 13 U. C. R. 433; Re Hart and Vespra, 16 U. C. R. 32; Re Petition of Minister of Education, 28 C. P. 325; Boyd v. Bobcaygeon P. S. Board, 43 U. C. R. 35; Askew v. Manning, 38 U. C. R. 345. "Request:" see Re Ness and Saltfleet, 13 U. C. R. 408.

21.—(2) See Re Wawanosh and Hullett v. Lockhart, 27 O. R. 345.

21.—(9) Power of arbitrators to dissolve union; not justified in taking a portion of territory outside village municipality and attaching it to the village: Re Chesterville P. S. Board, 29 O. R. 321. Power of arbitrators: see Re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49; Re Churchill and Hallett, 11 O. L. R. 284; Southwold School Sections, 3 O. L. R. 81. For distinction regarding powers of arbitrators under sections 21 and 22 and under sec. 17; see Re Mersea, 12 O. W. R. 88, 16 O. L. R. 617. As to procedure on appeal: see Re Mersea, 12 O. W. R. 417, 16 O. L. R. 617; see note to sec. 17, *ante*.

21.—(17) As to whether an award of arbitrators is conclusive for five years, though the award be that no change be made in the boundaries: see Re Wawanosh, 26 O. R. 463; Re Wawanosh and Hullett v. Lockhart, 26 O. R. 662, 27 O. R. 345. Five years' limit: see also Re Amaranth and Dufferin, 30 O. R. 43, and notes to sec. 15 (2), *ante*.

22. As to powers of arbitrators: see notes to secs. 17 (3) and 21 (9).

27. See Re Rockland P. S. Board and Rockland H. S. Board, 10 O. W. R. 1002.

28. School board making title on sale of lands: Re Hamilton B. of E. and McNichol, 12 O. W. R. 1015.

30 Necessity for notice: see Re Martin and Simcoe, 25 O. R. 411, note to sec. 17 (3); see also notes to sec. 15 *ante*.

31. Two schools in one section. The trustees may do what the minister has power to compel them to do under this section: Re Medora S. S., 18 O. W. R. 279, 992, 2 O. W. N. 594, 985, 23 O. L. R. 523.

39. An Act of the legislature providing for the validation of a by-law giving a manufacturing company exemption from taxation, must be construed as limited to such taxes as the municipality had the power of exemption, and so not extending to exemption from school taxes: Pringle v. Stratford, 14 O. W. R. 437, 15 O. W. R. 38, 20 O. L. R. 246; see also Whyte Packing Co. v. Stratford, 42 S. C. R. 691. As to bonus by-laws by way of tax exemption, see R. S. O. 1914, ch. 192, secs. 395 (f), 396 (e), and notes.

43.—(1) "Application" to the council; validity of loan by-law: Re McGloghlon and Dresden, 14 O. W. R. 734, 1 O. W. N. 74. Employment of architect: see Erb v. Dresden P. S. Board, 12 O. W. R. 864, 13 O. W. R. 503, 18 O. L. R. 295; note to sec. 73 (e). Public school trustees should not undertake for building purposes, an outlay in excess of the funds provided by the council: Smith v. Fort William P. S. Board, 24 O. R. 366. They are not however restricted to the debentures voted by the council, but may also use other moneys of which they have control: Forbes v. Grimsby P. S. Board, 6 O. L. R. 539. Duty of Council in regard to money to be raised: Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468; and see *post*, secs. 47, 73 (d), (o), and notes. See also R. S. O. 1914, ch. 268, sec. 24 (h), notes.

43.—(3) Assent of electors: see Re McCormick and Colchester, 46 U. C. R. 65. For form of affidavit on application to the Ontario Railway and Municipal Board to confirm By-law under this section, see R. S. O. 1914, ch. 192, sec. 295, notes.

44. See remarks as to duty of municipal council in regard to money to be raised under this section: Re Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468; Re McLeod and Tay, 10 O. W. R. 649. Submission to general meeting and sanction: see Re McCormack and Colchester, 46 U. C. R. 65. Payment of money to secretary-treasurer who absconds: Hamilton School Trustees v. Neil, 28 Gr. 408. By-law authorizing school trustees to sign instead of the reeve, held fatally defective although the reeve actually signed the debentures: Re McIntyre and Elderslie, 27 C. P. 58. Requisites of by-law: Hart v. Vespra, 16 U. C. R. 32. For form of affidavit on application to the Ontario Railway and Municipal Board to confirm by-law under this section, see R. S. O. 1914, ch. 192, sec. 295, notes.

45. See Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468.

47. General policy to govern trustees in preparing requisition and municipality in scrutinizing it: see Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468; London Board of Education v. London, 1 O. L. R. 284 (see p. 287); and other cases noted at sec. 73. School rates; collection; distress: Coleman v. Kerr, 27 U. C. R. 5; Harling v. Mayville, 21 C. P. 499; Spry v. McKenzie, 18 U. C. R. 161. Collector's warrant: Gillies v. Woods, 13 U. C. R. 357. Excessive amount collected: Nottawasaga School Trustees v. Nottawasaga, 15 A. R. 310, and see Dig. Ont. Case Law, cols. 6264-6266. Imposition of rates; building schoolhouse: Re Taber and Scarborough, 20 U. C. R. 549. Costs: Re Turnan and Nepean, 15 U. C. R. 87; Re Johnson and Harwich, 30 U. C. R. 264; Scott v. Burgess, 21 C. P. 398. Travelling expenses: Stark v. Montague, 14 U. C. R. 473. Salary of Teacher: Stark v. Montague, 14 U. C. R. 473; Munson v. Collingwood, 9 C. P. 497; and see Dig.

Ont. Case Law, cols. 6266-6267. How imposition of rates effected: by-law: De la Haye v. Gore of Toronto, 2 C. P. 317, 3 C. P. 23; Re Dunlop and Druro, 18 U. C. R. 227. Resolution of trustees: Coleman v. Kerr, 27 U. C. R. 5. Inequality: Re Scott and Ottawa, 13 U. C. R. 346; Harling v. Mayville, 21 C. P. 499. Voluntary subscription: McMillan v. Rankin, 19 U. C. R. 356; Craig v. Rankin, 10 C. P. 186; (and see Dig. Ont. Case Law, cols. 6267-6270). Mandamus to municipal corporations to levy rates: Kennedy v. Sandwich, 9 U. C. R. 326; (Dig. Ont. Case Law, cols. 6270-6273). Mandamus to school trustees to levy rates: Re Johnson and Harwich, 30 U. C. R. 264; Scott v. Burgess, 21 C. P. 398; (Dig. Ont. Case Law, cols. 6273-6274. As to submission of "estimates" by board of education: see *infra* sec. 73 (n), note. The municipal council has the right, and it is its duty to take some care that it is not made the instrument by which any excess of the powers of the board of education is given effect to by levying for them any sum which the law does not authorize them to exact: London Board of Education v. London, 1 O. L. R. 284.

48.—(3) Under this section it would seem that public schools are for children between the ages of 5 and 21 years. Only those between 8 and 14 years are subject to the Truancy Act, R. S. O. 1914, ch. 274, sec. 3. Only those under 17 and actually attending school are entitled, under the Railway Act, R. S. O. 1914, ch. 185, sec. 210 (1*b*), to the benefit of reduced fares: Re Sandwich East and the W. and T. Electric Ry., 12 O. W. R. 370, 16 O. L. R. 641.

48.—(4) Presumption of regularity of map: see Burford School Trustees v. Burford, 18 O. R. 546; Re Shorey and Thrasher, 30 U. C. R. 504; Nichol School Trustees v. Maitland, 26 A. R. 506; (see history of section at pp. 510, 511).

49.—(1) Liability of school board in contract; corporate seal: Quin v. Seymour School Trustees, 7 U. C. R. 130; see note to sec. 87 (1). Purchase of land: Smith v. Belleville School Trustees, 16 Gr. 130. Liability of trustees on contract: see Anderson v. Van Sittart,

5 U. C. R. 335; Sheriff v. Patterson, 5 U. C. R. 620. Promissory note: see Township of Toronto v. McBride, 29 U. C. R. 13. School trustee sued for acts done in his corporate capacity: see Spry v. Mumby, 11 C. P. 285. A school board has an action for money had and received against their secretary-treasurer for money in his hands not expended or accounted for: Stephen School Trustees v. Mitchell, 29 U. C. R. 382. It is the school board and not the schoolmaster who can sue for trespass to the schoolhouse: Monaghan v. Ferguson, 3 U. C. R. 484.

49.—(3) "Residents," what amounts to qualification within this term: see R. ex rel. Horan v. Evans, 31 O. R. 448.

54.—(10) Validity of election; acquiescence of board in proceedings looking to new election: Foster v. Stokes, 2 O. R. 590.

54.—(11) The provision for investigation as to the election by the inspector, does not prevent the issue of *quo warranto*: R. ex rel. Horan v. Evans, 31 O. R. 448.

55.—(1) Powers usually possessed by corporations; authority for expenditure of money: Re Toronto School Board and Toronto, 2 O. L. R. 727, 4 O. L. R. 468.

55.—(2) "Resident;" *Quo warranto*: see R. ex rel. Horan v. Evans, 31 O. R. 448.

59. Ratepayer: see McFarlan v. Greenock School Trustees, 8 O. W. R. 672. See further as to qualified electors: R. ex rel. McNamara v. Christie, 9 U. C. R. 682.

64. Election; acquiescence of trustees elect in proceedings for new election: Foster v. Stokes, 2 O. R. 590. This section presupposes an election. Where there is a tie, there is no election until the proper officer gives his casting vote, and the County Court Judge has no jurisdiction to hear the complaint: Re Ireland, 22 Occ. N. 151.

73.—(*c*) "Improvements:" see London Board of Education v. London, 1 O. L. R. 284, at p. 287.

73.—(*d*) Majority of trustees signing contract under seal for building school, held sufficient: Forbes v. Plympton School Trustees, 8 C. P. 74. Selection of site: see Re Sombra P. S. Section No. 26, 6 O. L. R. 585. No authority is given to expend money for a teachers' residence, common room for studies, dormitory, parlor, kitchen or garden: Grattan v. Ottawa, 8 O. L. R. 135. Adequate accommodation; under what circumstances mandamus granted: see Dunn v. Windsor, 6 O. R. 125. Adequate accommodation; rent of school rooms for children taken care of by charitable institution: see Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468; see also Re Hutchinson and St Catharines School Trustees, 31 U. C. R. 274. "Resident:" see Hall v. Stisted School Trustees, 28 O. R. 127, 24 A. R. 476. The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality: Forbes v. Grimsby P. S. Board, 6 O. L. R. 539. Duty of Board of Education to expend money for repairs, and particulars required in estimate: see London Board of Education v. London, 1 O. L. R. 284. A school trustee cannot even with the consent of his co-trustees, be a contractor for the building of a school house: Lamont v. Aldborough Trustees, 5 C. L. J. 93. Acquisition of school sites: see R. S. O. 1914, ch. 277. Sale of lands: see sec. 19 *ante*.

73.—(*e*) It is within the power of trustees to employ an architect for hire to prepare plans for a proposed schoolhouse: Erb v. Dresden P. S. Board, 12 O. W. R. 864, 13 O. W. R. 503, 18 O. L. R. 295. Negligence of school board: Shaw v. Board of Education of St. Thomas, 2 O. W. N. 510, 1467, 3 O. W. N. 32, 18 O. W. R. 165, 19 O. W. R. 846, 957.

73.—(*g*) "The number of schools:" Re Medora, 2 O. W. N. 594, 985, 18 O. W. R. 279, 992, 23 O. L. R. 523.

73.—(*o*) A school board in preparing their estimates may include everything that in their judgment is

needed to meet legitimate expenditure. They must disclose generally the several objects of expenditure and what is required for each. The duty of the municipal council is to scrutinize each item to ascertain if it is *intra vires*. When an item is *intra vires* the municipal council cannot reduce or moderate it: Toronto P. S. Board v. Toronto, 2 O. L. R. 727, 4 O. L. R. 468; Nottawasaga P. S. Trustees v. Nottawasaga, 15 A. R. 310. The annual estimate should be of the same character as the estimates of municipal councils for striking rates and contain the like details and not merely state a certain sum as required: London Board of Education v. London, 1 O. L. R. 284.

73.—(*r*) "Acquired for public school purposes" includes acquisition by a board of education of a city of school property in a district annexed: Re Hamilton B. of E. and McNichol, 12 O. W. R. 1015.

74. Rent of school rooms to be used for children taken care of by charitable organizations: see Re Toronto P. S. Board and Toronto, 2 O. L. R. 727, 4 O. L. R. 468; and see *ante*, sec. 73 (*d*), notes.

77. Secretary-treasurer; appointment: Hamilton School Trustees v. Neil, 28 Gr. 408. Sureties: Waterford School Trustees v. Clarkson, 23 A. R. 213; see cases collected Dig. Ont. Case Law, col. 6255.

84.—(*i*) Action against trustees and teacher. What amounts to suspension and to expulsion; when malice must be shewn; whether remedy by action or mandamus: see McIntyre v. Blanchard School Trustees, 11 O. R. 439. Court will not lightly interfere with the discretion of the master and trustees in the exercise of disciplinary powers: Re McCallum and Brant Trustees, 17 O. R. 451.

87.—(1) Contracts for more than one year: see Grattan v. Ottawa Separate School Trustees, 8 O. L. R. 135. Where trustees enter into an agreement with a teacher and direct the officer having the custody of the seal to affix it, and both parties act on the agreement for two years, it seems that the fact

that the seal has not been actually affixed will not invalidate the agreement: McPherson v. Usborne School Trustees, 1 O. L. R. 261; see also Acheson v. Bastard School Trustees, 2 O. W. R. 451. Seal and signature: see Lambière v. South Cayuga School Trustees, 7 A. R. 506; Quin v. Seymour School Trustees, 7 U. C. R. 130. Absence of writing and seal in engagement of teacher: McMurray v. East Nissouri P. S. B., 21 O. L. R. 46. Right of dismissal for good cause necessarily exists as a result of the relation of the parties: Raymond v. Cardinal School Trustees, 14 A. R. 562. Proper exercise of option to terminate agreement: Greenless v. Picton P. S. Board, 2 O. L. R. 387. Verbal contract with teacher no basis for action of wrongful dismissal: McMurray v. East Nissouri S. S., 15 O. W. R. 806. Where an agreement is entered into between teacher and trustees with the intention that it shall supersede a prior agreement between them, and is acted on for several years, and is valid on its face, the onus of shewing its invalidity by reason of the requirements of this section rests on the trustees: McPherson v. Usborne School Trustees, 1 O. L. R. 261. The trustees have no power to make an agreement for providing the teacher with board and lodging: Quin v. Seymour School Trustees, 7 U. C. R. 130.

87.—(2) A teacher not legally qualified cannot recover either on agreement under seal or upon the common count for work and labour: Wright v. Stephen School Trustees, 32 U. C. R. 541.

87.—(3) "Three months or over" in former corresponding provision: Gliddon v. Yarmouth P. S. Trustees, 12 O. W. R. 1001, 17 O. L. R. 343.

87.—(5) Expiration of agreement—by notice or resignation: Gliddon v. Yarmouth P. S. Trustees, 12 O. W. R. 1001, 17 O. L. R. 343.

87.—(6) A teacher cannot maintain an action against a municipality for refusal to levy a rate for his salary upon an estimate furnished by the Trustees: Smith v. Collingwood, 19 U. C. R. 259. Nor upon an order

made upon and accepted by the Municipal Treasurer: Smith v. Collingwood, 19 U. C. R. 259; Munson v. Collingwood, 9 C. P. 497. Action against Trustees: Anderson v. Vansittant, 5 U. C. R. 335; Quin v. Seymour, 7 U. C. R. 130. The teachers might be entitled against the Trustees to a mandamus: Wright v. Stephen School Trustees, 32 U. C. R. 541; Quin v. Seymour School Trustees, 7 U. C. R. 130; Welsh v. Leahey, 18 C. P. 48. Arbitration: Tiernan v. Nepean School Trustees, 14 U. C. R. 15; Re Milne and Sylvester, 18 U. C. R. 538. There is no right to arbitrate unless the agreement is made by the Trustees under seal. Without this, the person discharging the duties of teacher has no legal status as such: Birmingham v. Hungerford, 19 C. P. 411. See also for decisions under former arbitration clauses between teacher and Trustees; cases collected: Dig. Ont. Case Law, col. 6296. The Master and Servant Act does not apply to the relation of Trustees and teacher: Re Joice, 19 U. C. R. 197. Jurisdiction of Division Court: see Greenlees v. Picton P. S. Board, 2 O. L. R. 387. The action is authorized to be brought in the Division Court and the ordinary right of appeal is the appeal authorized by the Division Courts Act: Norton v. Bertie P. S. Trustees, 12 O. W. R. 1249, 17 O. L. R. 413. See the special provisions of sec. 105, *post*.

88. Christian Brothers as such are not entitled to teach in Separate schools in Ontario: see R. S. O. 1914, ch. 270, sec. 50 note; Grattan v. Ottawa Separate School Trustees, 8 O. L. R. 135, 9 O. L. R. 433, (1907) A. C. 69.

105. Right of appeal: see Norton v. Bertie P. S. Trustees, 12 O. W. R. 1249, 17 O. L. R. 413; note to sec. 87 (6), *ante*.

116. Refusing to exercise corporate powers: see Ranney v. Macklem, 9 C. P. 192; Van Buren v. Bull, 19 U. C. R. 633; Graham v. Hungerford, 29 U. C. R. 239. Appeal from conviction under this section: see R. v. Tucker, 10 O. L. R. 56, and see R. S. O. 1914, ch. 90, sec. 10.

119. Disqualification of Trustees: see Lee v. Toronto P. S. Board, 32 C. P. 78; R. ex rel. Stewart v. Standish, 6 O. R. 408; Chaplin v. Woodstock, 16 O. R. 728; Lamont v. Aldborough School Trustees, 5 U. C. L. J. 93; and generally see cases noted R. S. O. 1914, ch. 192, sec. 53.

121. See Re Medora, S. S. 4, 18 O. W. R. 279, 992, 2 O. W. N. 594, 985, 23 O. L. R. 523.

123. See R. S. O. 1914, ch. 192, sec. 302.

124. Withholding books and money: Ferris v. Chesterfield, 10 C. P. 272, 6 U. C. L. J. 163.

CHAPTER 267.

The Continuation Schools Act.

3. Establishment of continuation schools: see Re West Nissouri, 3 O. W. N. 478, 726, 1623, 20 O. W. R. 841, 21 O. W. R. 533, 22 O. W. R. 842, 25 O. L. R. 550. Continuation school: Henderson v. West Nissouri, 17 O. W. R. 210, 18 O. W. R. 1, 19 O. W. R. 292, 20 O. W. R. 50, 2 O. W. N. 152, 529, 1131, 23 O. L. R. 21, 24 O. L. R. 517, 46 S. C. R. 627. Guarantee of debts of School Board in connection with continuation school litigation illegal: McFarlane v. Fitzgerald, 4 O. W. N. 869, 24 O. W. R. 230.

6. See Henderson v. West Nissouri, 23 O. L. R. 21, 24 O. L. R. 517, 46 S. C. R. 627.

CHAPTER 268.

The High Schools Act.

4. Position of the Board as regards continuation schools and application to quash by-law establishing same: Re Henderson and West Nissouri, 23 O. L. R. 21, 24 O. L. R. 517, 46 S. C. R. 627; and see R. S. O. 1914, ch. 267 and notes.

5. Alteration of districts: Re Wilson and Elgin, 21 A. R. 585, 24 S. C. R. 706; Re Tyrell and York, 35 U. C. R. 247. Repeal of by-law: Re Chamberlain and Stormont, 45 U. C. R. 26; Re Morrisburg and Winchester, 8 A. R. 169.

13. Although honorary trustees of the property held for public education, the relation of the Trustees to the staff of teachers is in no sense fiduciary: Dunn v. B. of E. for Toronto, 7 O. L. R. 451.

14.—(1) Appointment of High School Boards and Trustees: Dawson v. Sault Ste. Marie, 18 O. R. 556; Port Arthur v. Fort William, 25 A. R. 522. Appointment to fill vacancy: R. ex rel. Moore v. Nagle, 26 O. R. 249.

14.—(2) Re Rockland P. S. Board and Rockland H. S. Board, 10 O. W. R. 1002.

16. Propriety of High School teacher being member of Council: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929, at 933.

21. Appointment to fill vacancy: Reg. ex rel. Moore v. Nagle, 26 O. R. 249.

24.—(*h*) A mandamus may be granted requiring a township corporation to levy and collect its proportion of the amount required by a High School Board for maintenance of the High School pursuant to a requisition, including a deficit from the last school year, there being no suspicion of *mala fides*: Re Athens High School Board and Yonge and Escott,

5 O. W. N. 100, 29 O. L. R. 360. See also Re Toronto P. S. Board and Toronto, 2 O. L. R. 727, 4 O. L. R. 468; A. G. v. Lichfield, 17 L. J. Ch. 472; Jones v. Johnson, 5 Ex. 862; Haynes v. Copeland, 18 C. P. 150. The Municipal Council has the right and duty to see that the annual estimate is not made the instrument by which any excess of the powers of a board are given effect to by levying for them any sum which the law does not authorize them to exact: B. of E. of London v. London, 1 O. L. R. 284. The application must be the corporate act of the board: Re Oakwood and Mariposa, 16 A. R. 87; B. of E. of London v. London, 1 O. L. R. 284. See note to R. S. O. 1914, ch. 266, secs. 43, 44, 47, 73 (*o*). Applications to Municipal Council for funds: see notes to sec. 33, *infra*.

24.—(*j*) Members of the board are the sole judges of what they may deem expedient in each particular case in the matter of the removal or dismissal of a teacher on the grounds of unsuitability for the position: Dunn v. B. of E. for Toronto, 7 O. L. R. 451.

33. Applications to Municipal Council for funds: Re Morrisburg B. of E. and Winchester, 8 A. R. 169; Re Perth B. of E. and Perth, 39 U. C. R. 34; Re Port Rowan H. S. Trustees and Walsingham, 23 C. P. 11, and see *supra*, sec. 24 (*h*) and notes. The school must be really in existence and not merely in contemplation: Sharp v. Peel, 40 U. C. R. 71.

34. Proportion of liability: Re Port Arthur and Fort William, 25 A. R. 522. The agreement, sub-sec. (3), deals merely with the settlement of the amount. Limits of jurisdiction considered: see B. of E. for Windsor v. Essex, 10 O. L. R. 60.

37. Mandamus to compel money to be raised to carry on continuation schools: Re West Nissouri, 3 O. W. N. 478, 726, 1623, 25 O. L. R. 550 (and see R. S. O. 1914, ch. 267, notes). Sufficiency of demand and refusal: *Ib.* Forcing contribution to cost of erection as well as maintenance: Re Niagara H. S. Board and Niagara, 1 A. R. 288. See also B. of E. of London v. London, 1 O. L. R. 284, note to sec. 24 (*h*), *ante*.

38. The application must be the corporate act of the board: Re Oakwood and Mariposa, 16 A. R. 87. Buildings: Re Morrisburg B. of E. and Winchester, 8 A. R. 169. Right of Council to review action of School Board: Re West Nissouri Continuation School, 3 O. W. N. 478, 726, 1623, 25 O. L. R. 550.

CHAPTER 269.

The Boards of Education Act.

13. Joint board; powers; buildings: see Re Morrisburg Board of Education and Township of Winchester, 8 A. R. 169. Purchase of new site: Moffatt v. Carleton Place Board of Education, 5 A. R. 197.

21. Powers of Boards of Education: Re B. of E. and Corporation of Perth, 39 U. C. R. 34; B. of E. of London v. London, 1 O. L. R. 184.

CHAPTER 270.

The Separate Schools Act.

2. Residents of a section in which a Separate School has been established for the class to which they belong are not entitled to send their children to the general common school of such section: Re Hill and Camden and Zone, 11 U. C. R. 573. The erection of a Separate School does not annul the rights of those for whom it was established in common schools when the Separate School is no longer kept up these rights revive: Re Stewart and Sandwich East, 23 U. C. R. 634.

3 A mandamus to admit a child to a common school may be refused on the ground of want of accommodation but not on the ground, *e.g.*, of the child's colour, where no Separate School for his class was legally established: Re Hutchison and St. Catharines.

7. See Free v. McHugh, 24 C. P. 13.

10. Effect of appointment of a Protestant public school teacher before December 25th is to enable the municipality to repeal the by-law but does not of itself put an end to the Separate School: Free v. McHugh, 24 C. P. 13. The boundary of a Protestant Separate School Section cannot be extended into or over an adjoining public school section where the teacher in the latter is not a Roman Catholic: Banks v. Anderdon, 20 O. R. 296.

11. See Free v. McHugh, 24 C. P. 13. Correction of roll: Re Ridsdale and Brush, 22 U. C. R. 122.

12. See Free v. McHugh, 24 C. P. 13; Harling v. Mayville, 21 C. P. 499.

16. See Free v. McHugh, 24 C. P. 13.

19. No valid incorporation of the Trustees takes place unless the formalities are complied with, *e.g.* as to the number of resident heads of families present: Arthur R. C. Separate School Trustees v. Arthur, 21 O. R. 60.

45.—(*d*) School children: see Re Sandwich East and W. & T. Electric Ry., 16 O. L. R. 641, 12 O. W. R. 370.

50. " Persons qualified by law as teachers " means those individuals so qualified at Confederation: Brothers of the Christian Schools v. Minister of Education for Ontario, 1907, A. C. 69. See same case *sub nom*: Grattan v. Ottawa, 8 O. L. R. 135, 9 O. L. R. 433.

55. Property which was owned by a Separate School supporter and so assessed for rates under by-laws passed before the time of the withdrawal of his support, does not remain liable for such rates in the future unless the property is still owned by him at the time of each asssessment and he resides in the section. But a ratepayer who was such when a loan was effected remains liable for future assessments to the extent of the rateable property he possesses so long as he is resident within the school district: Re Separate Schools Act, 1 O. L. R. 584. Supporters

of a Separate School resident in a town, may by proper notice become supporters of the nearest Separate School in an adjoining rural municipality within three miles distance; and the High Court has power in an action brought by the Trustees of the rural public school section against the town corporation to adjudge that taxes levied and collected from ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice, shall be paid over to the plaintiffs: Sandwich East R. C. Separate School Section v. Walkerville, 10 O. L. R. 214. A rate having been imposed to build a new school house, certain Protestants signed a notice to the clerk, he being one of them, that as R. C. Separate School supporters, they claimed exemption, and the clerk thereupon omitted the names. Held that the clerk having been notified that it would be illegal to exempt these persons, could be punished, but the Court could not in the following year interfere by mandamus to compel him to correct the roll: Re Risdale and Brush, 22 U. C. R. 122. Landlord being a Separate School supporter leased to tenant who, being a public school supporter and having agreed to pay taxes, paid public school taxes. The landlord was held liable for the Separate School taxes. The action should be brought in the name of the Trustees as a corporation: Healey v. Carey, 13 C. L. J. 91. Consideration of sub-sec. (5), in view of sec. 188 of the Assessment Act, 4 Edw., ch. 23, R. S. O. 1914, ch. 195, sec. 195; Re Therriault and Cochrane, 5 O. W. N. 26, 24 O. W. R. 964.

56. See Sandwich East R. C. Separate School Section v. Walkerville, 10 O. L. R. 214.

61. See Re Separate Schools Act, 1 O. L. R. 584, and notes to sec. 55, *ante*.

62. Duty of assessor in regard to statements made by ratepayer that he is a Roman Catholic; proceeding with and without notice; jurisdiction of Court of Revision. Duty of assessor when he is made aware or ascertains that ratepayer not a Roman Catholic or has not given notice; omission to give notice through inadvertence: see Re Roman Catholic Separate Schools, 18 O. R. 606.

75.—(6) In line 6, for "void," read "valid:" 4 Geo. V. ch. 2, sched. (37).

76. What a Separate School is entitled to share in: see Belleville R. C. School Trustees v. Belleville, 10 U. C. R. 469.

CHAPTER 271.

THE INDUSTRIAL SCHOOLS ACT.

26. Bond to secure the cost of maintaining a boy at an industrial school: see St. Thomas v. Yearsley, 22 A. R. 340.

CHAPTER 272.

THE SPECIAL CLASSES ACT.

CHAPTER 273.

THE SCHOOLS FOR THE DEAF AND BLIND ACT.

CHAPTER 274.

THE TRUANCY ACT.

3. "School children:" see Re Sandwich East and W. & T. Electric Ry., 16 O. L. R. 641, 12 O. W. R. 370.

CHAPTER 275.

THE ADOLESCENT SCHOOL ATTENDANCE ACT.

CHAPTER 276.

THE INDUSTRIAL EDUCATION ACT.

CHAPTER 277.

THE SCHOOL SITES ACT.

5. Purchase of school site; contract: see Smith v. School Trustees of Belleville, 16 Gr. 130. As to authority to purchase site: see R. S. O. 1914, ch. 266, sec. 11, notes.

6. Lands of infants can be expropriated for school purposes: McDonald v. Ottawa P. S. Board, 12 O. W. R. 572. An agreement for purchase and possession of a new site made by a School Board is one that controls the remainderman: Forbes v. Grimsby P. S. Board, 6 O. L. R. 539.

8. Expropriation: see Johnson v. Howard School Trustees, 26 Gr. 204.

16. Land conveyed to school trustees cannot be sold under execution against them for money due for building the school-house: Scott v. Burgess, 19 U. C. R. 28.

20. Section considered: Sandwich L. I. Co. v. Windsor Board of Education, 3 O. W. N. 1150, 4 O. W. N. 112, 23 O. W. R. 142.

CHAPTER 278.

THE SCHOOL TRUST CONVEYANCES ACT.

CHAPTER 279.

THE UNIVERSITY ACT.

13. Principle upon which price to be paid by landowner for access to highway is to be fixed: Re Toronto Conservatory of Music and University of Toronto, 14 O. W. R. 408.

18. The Governors of the University of Toronto are a corporate body and liable to be sued as such: Scott v. Governors of University of Toronto, 4 O. W. N. 994, 24 O. W. R. 325.

CHAPTER 280.

THE UPPER CANADA COLLEGE ACT.

CHAPTER 281.

THE AGRICULTURAL COLLEGE ACT.

CHAPTER 282.

THE VETERINARY COLLEGE ACT.

CHAPTER 283.

THE MINING SCHOOLS ACT.

CHAPTER 284.

THE COLLEGE OF ART ACT.

CHAPTER 285.

THE ROYAL ONTARIO MUSEUM ACT.

CHAPTER 286.

THE RELIGIOUS INSTITUTIONS ACT.

2. Where land is conveyed to persons in trust for a religious body, the trustees and their successors must be treated as being trustees for the true body who are entitled to enforce the trust and have possession of the church: Brewster v. Hendershot, 27 A. R. 232. Trustees under this Act should sue in their corporate capacity: Trustees of Ainleyville v. Grewer, 23 C. P. 533; Humphreys v. Hunter, 20 C. P. 456; Trustees of Berkeley Street Church v. Stevens, 37 U. C. R. 9; Trustees of Franklin Church v. Maguire, 23 Gr. 102. Variance from corporate name: Rintz v. R. C. Episcopal Corporation of Sandwich, 30 U. C. R. 269. The Salvation Army is an unincorporated religious body and an action cannot be maintained against it for torts committed by its officers. There is grave doubt whether they are within the meaning of this Act: Kingston v. The Salvation Army, 5 O. L. R. 585, 6 O. L. R. 406. Change in church government: A. G. v. Christie, 13 Gr. 495; Doe d. Methodist Episcopal Trustees v. Brass, 6 O. S. 437. Change in doctrine: Dorland v. Jones, 12 A. R. 543, 14 S. C. R. 39; Itter v. Howe, 23 A. R. 256. Congregation ceasing to exist: A. G. v. Jeffrey, 10 Gr. 273; Re Wansley and Brown, 21 O. R. 34. Change in tenets; dispute as to ownership

of land and building: Zacklynski v. Kerchinski, 1 W. L. R. 32.

8. The duly appointed trustees of a religious congregation, to whom by that description the site of a church has been conveyed, and who by that description give a mortgage to secure a balance of purchase money with the ordinary covenant, are a corporation and are not personally liable on the mortgage though it is signed by them individually: Beaty v. Gregory, 28 O. R. 60, 24 A. R. 325.

11. The trustees are a corporation, and even where the congregation has dispersed and ceased to exist, continue to hold the fee and can sell: Re Wansley and Brown, 21 O. R. 34. A contract for the sale of church lands held by trustees, made in compliance with a resolution of the congregation, by a member of a committee appointed for the purpose, is invalid: Irving v. McLachlan, 5 Gr. 625. Power to sell unnecessary land: Huegli v. Pauli, 3 O. W. N. 915, 26 O. L. R. 94. An advertisement on the same day of the week in four successive issues of a daily paper is not a sufficient compliance with a direction to publish in a weekly paper: Re East Presbyterian Church and McKay, 16 O. R. 30. (The present wording is "daily or weekly paper.") The statutory requirements must be complied with. The public notice must state the terms of the intended sale: Re Second Congregational Church, 1 Ch. Ch. 349; Re Baptist Church of Stratford, 2 Ch. Ch. 288. For cases on advertisement under somewhat similar provision of Municipal Act: see R. S. O. 1914, ch. 192, sec. 263 (5) and notes.

15. The sanction of the sale and the approval of the deed by the County Judge is sufficient in lieu of the provisions of sub-sections (1) and (2): Re Wansley and Brown, 21 O. R. 34. Change of site; resolution of congregation: Kopman v. Simonsky, 2 O. W. R. 617. Resolution authorizing new building: Heine v. Schaffer, 2 W. L. R. 310.

16. Vesting of property in successors to trustees: see Hambly v. Fuller, 22 C. P. 141. Removal of trustee;

expulsion from church; appointment of new trustees: Smallwood v. Abbott, 18 U. C. R. 564. Removal of trustees: see also Lage v. Mackenson, 40 U. C. R. 388.

20. Power to sell unnecessary land; special trusts: Huegli v. Pauli, 3 O. W. N. 915, 21 O. W. R. 776, 26 O. L. R. 94.

Former section, R. S. O. 307, sec. 24, is omitted from this revision: see Article 48 C. L. J. 406. That section, R. S. O. 1897, ch. 307, sec. 24, enabled trustees to take a devise for land for a minister's residence, if actually used as such, although the land could not be held for rental purposes merely. An intention not to use was not presumed from a short period of non-user. In any event the trustees could sell within seven years: Sills v. Warner, 27 O. R. 266. The seven years during which land might be held after its " acquisition " did not commence to run, in the case of a devise of a remainder dependent upon a life estate, until the expiry of the life estate: Re Naylor, 5 O. L. R. 153. Where a testator directed land to be sold and out of the proceeds and some personalty directed $2,000 to be paid to A. for the use of a church to be applied in A.'s discretion and A. assigned the whole fund to the trustees of the church, this was held a valid exercise of the discretion given him by the will: Re Johnson Chambers v. Johnson, 5 O. L. R. 459. See similar power in missionary societies to receive gifts: 50 Vic. ch. 91, and see Re Barrett, 10 O. L. R. 337. The six months' limitation in former sec. 24 and in 50 Vic. ch. 91, must be regarded as having been repealed by the later Mortmain and Charitable Uses Act: R. S. O. 112 (14 Ap. 1892): Re Barrett, 10 O. L. R. 337. See also Madill v. McConnell, 16 O. L. R. 314, 17 O. L. R. 209, and the provisions of R. S. O. 1914, ch 103 and notes.

CHAPTER 287.

The Ontario Reformatory Act.

CHAPTER 288.

THE ANDREW MERCER REFORMATORY ACT.

CHAPTER 289.

THE FEMALE REFUGES ACT.

CHAPTER 290.

THE HOUSES OF REFUGE ACT.

2. Purchase of land for an industrial farm; attempted rescission: see McCartney v. Haldimand, 10 O. L. R. 668. Joint action of municipalities: see Re Lister and Belle River, 13 O. W. R. 778.

12. Moneys of intestate inmate of County House of Refuge: Re Garrison, 12 O. W. R. 282.

CHAPTER 291.

THE DISTRICT HOUSES OF REFUGE ACT.

CHAPTER 292.

THE INDUSTRIAL FARMS ACT.

2. Purchase of land for an industrial farm: see McCartney v. Haldimand, 10 O. L. R. 668.

4. Joint action of municipalities: see Re Lister and Belle River, 13 O. W. R. 778.

CHAPTER 293.

THE GAOLS ACT.

CHAPTER 294.

THE DISTRICT COURT HOUSES ACT.

CHAPTER 295.

THE HOSPITALS FOR THE INSANE ACT.

2.—(*e*) See R. S. O. 1914, ch. 68, sec. 2 (*e*), (*f*).

8. Where the discharge of a person, detained in a lunatic asylum as a lunatic, was moved for under a writ of habeas corpus by reason of alleged informalities in the certificates, and it appeared that it would be dangerous to allow him to be at large, the Court directed a trial of an issue as to his sanity, and the application was directed to stand over pending the result of the issue: Re Gibson, 15 O. L. R. 245, 10 O. W. R. 542.

13. The enquiry before the Justice is a judicial proceeding, and in an action for malicious prosecution it is essential that the plaintiff show that the proceedings terminated in his favour, and this although the Statute did not provide for setting aside the adjudication of the Justice by appeal or otherwise: Bush v. Park, 12 O. L. R. 180. A husband twice procured the release of his wife from an asylum where he had obtained her admission, and she having grown worse, and being refused admission again, took proceedings under this section and had her committed. The wife later on the application of her

relatives was released. It was held that she was not entitled to alimony: Hill v. Hill, 2 O. L. R. 289, 541, 3 O. L. R. 202.

35. Property of lunatic: Inspector of Prisons v. Macdonald, 2 O. W. N. 289, 17 O. W. R. 630.

36. The provisions allowing the inspector to take possession of the property of a lunatic to pay for maintenance do not apply to money in Court: see sec. 48, *infra*: Re McKenzie, 14 P. R. 421; see also Mein v. Mein, 3 Ch. Ch. 62. Moneys belonging to a lunatic on deposit in a bank were attached by a creditor. On application of the committee the moneys were ordered paid into Court for maintenance of the lunatic in priority to the creditor's claim: Re Vernon, 20 C. L. T. Occ. N. 309. As to practice under the Registry Act regarding conveyances by the Inspector, see R. S. O. 1914, ch. 124, sec. 42, notes.

40. Jurisdiction of Court over lunatics not so found: Re Montgomery, 4 O. W. N. 308, 23 O. W. R. 342. As to discharges of mortgage by the inspector, it is not necessary for him to file any document shewing his right to execute the discharge under the Registry Act: Guthrie Report, 1899, p. 28. See Con. Rules 157, 220, as to service of process; H. & L. notes, pp. 290, 411, and see 1913 Rule 21. As to suits by and against insane persons: see Con. Rule 217; H. & L. notes, pp. 406-408, 1913 Rules 94, 97. Appearance in such cases: Con. Rule 218; H. & L. notes, pp. 408-409, 1913 Rule 95. When added parties after judgment: Con. Rule 219, 1913 Rule 96.

43. Where a lunatic not so found recovers during a suit instituted on his behalf, all further proceedings in the suit are irregular: McCabe v. Boyle, 2 O. W. N. 695, 18 O. W. R. 551.

48. Where the property of a lunatic is money in Court, the inspector is not to proceed under section 36, but under this section, and must shew clearly that the person to whom the fund belongs is a lunatic and that the object for which the money is sought is to pay maintenance in a public lunatic asylum, but it is not necessary that the person shall have been or

shall be declared a lunatic: Re McKenzie, 14 P. R. 421; Re Hinds, 11 P. R. 5; Mein v. Mein, 3 Ch. Ch. 62; Re Thompson, 19 P. R. 304.

CHAPTER 296.

THE PRIVATE SANITARIUM ACT.

59. Formerly this section contained a special provision as to venue: see Rule 529, H. & L. notes, p. 735, 1913, Rule 245.

CHAPTER 297.

THE HOSPITAL FOR EPILEPTICS ACT.

4. In line 1, for "Asylums for the Insane," read "Prisons and Public Charities:" 4 Geo. V. ch. 2, sched. (38).

CHAPTER 298.

THE SANATORIA FOR CONSUMPTIVES ACT.

CHAPTER 299.

THE TORONTO GENERAL HOSPITAL ACT.

CHAPTER 300.

THE HOSPITALS AND CHARITABLE INSTITUTIONS ACT.

CHAPTER 301.

THE PRISONS AND PUBLIC CHARITIES INSPECTION ACT.

6. As to practice under the Registry Act regarding conveyances by the Inspector: see R. S. O. 1914, ch. 124, sec. 42, notes.

10. Where a rule was made at a gaol that "no fine will be received or bail allowed after 5 p.m.," it was held that there was no authority to pass regulations preventing a prisoner transacting business through his solicitor or agent, at any reasonable time, with anyone, nor was there any such power at common law: Rex. v. Colahan, 9 O. W. R. 661.

21. This section formerly contained a special provision as to venue: R. S. O. 1897, ch. 321, sec. 28; see Rule 529, H. & L. notes, p. 735, 1913, Rule 245.